

SOUTH AFRICA / JUDGMENT

Tekete and Others v Minister of Safety and Security (8042/2007) [2024] ZAWCHC 143 (7 May 2024)

[2024] ZAWCHC 143

COURT

Western Cape High Court, Cape Town

BEFORE

Andrews AJ

CASE / FILE NUMBER

8042/2007

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case Number: 8042/2007

In

the matter between:

NOSISANA
MERCY TEKETE
First
Plaintiff
NTOMBIZODWA
JENNETE VAROYI
Second
Plaintiff
TSHEPHISO
JAMES TEKETE
Third
Plaintiff
and
MINISTER
OF SAFETY AND SECURITY
Defendant

JUDGMENT

Andrews AJ

Introduction

- [1] The Plaintiffs instituted action against the Defendant for damages arising out of a shooting incident which occurred on 2 October 2005 in Khayelitsha, Cape Town, Western Cape when Mr Johannes Tekete (“the deceased”), was shot by a member of the South African Police Service and who later died on 31 December 2005 as a consequence of his injuries. The deceased, at the date of his death, was married in community of property to the First Plaintiff and was the father of the Second and Third Plaintiffs.
- [2] The parties previously agreed that the issues of liability and quantum were to be separated, which was accordingly directed in terms of Rule 33(4) of the Uniform Rules of Court at the outset of the trial. Judgment on liability was handed down on 12 December 2019 where Samela J found the Defendant to be liable to the Plaintiffs for loss of support as a consequence of the shooting of the deceased, by a member of the South African Police Service at Site C, Khayelitsha on 2 October 2005.
- [3] The matter proceeded before this Court for the determination of quantum.

The Plaintiffs’ Claims

- [4] It is alleged that the deceased was legally obliged to maintain and did maintain the Plaintiffs as at the time of his death. In terms of the amended particulars of claim, the Plaintiffs claim damages against the Defendant as a result of the death of the deceased as set out below together with interest on the said amounts a tempore more:

First Plaintiff

- [5] It is alleged that First Plaintiff suffered damages as follows:

- (a) Funeral expenses

R10 270.00

- (b) Estimated past loss of support

R383 411.00

(calculated from date of incident / date of demise of
the deceased to date of summons)

- (c) Estimated future loss of support:

R622 007.00

(calculated from date of issue of summons until the age
at which the deceased would have retired)

Subtotal

R1 015 688.00

[6] It is further alleged that the First Plaintiff, in her capacity as Master's representative, suffered damages in the sum of R1895.00 for medical and hospital expenses incurred prior to the death of the deceased.

Second Plaintiff

[7] It is alleged that Second Plaintiff suffered damages in her personal capacity as follows:

(a) Estimated loss of support

R137 792.00

(Calculated from date of the incident /
date of demise to date of summons).

Subtotal

R137 792.00

Third Plaintiff

[8] At the time when the action was instituted, the Third Plaintiff was a minor. The First Plaintiff instituted action against the Defendant in her representative capacity as mother and natural legal guardian of the minor. The Third Plaintiff has since turned 18 years. The pleadings were duly amended prior to the commencement of the proceedings to reflect the changed status of Third Plaintiff.

[9] According to the particulars of claim damages suffered by the Third Plaintiff is set out as follows:

(a) Estimated past loss of support

R344 028.00

(Calculated from the date of the incident /

(b) Estimated future loss of support

R23 331.00

(Calculated from date of summons until the
age at which the minor reaches the age of 18 years).

Subtotal

R367 359.00

Issues

for determination

[10] The crisp issue for determination is the amount of damages, more particularly in relation to loss of support, the Defendant is liable to pay to the Plaintiffs. There is no dispute regarding the actual loss in respect of the claim for funeral expenses.

The Evidence

[11] The following evidentiary material was relied upon by the Plaintiffs:

(a) Plaintiffs' bundle of documents – Exhibit "A" consisting of:

(i) Johannes Tekete's employer's certificate and

(ii) Sitsila's Funeral Services C.C. receipt;

(b) An extract from the Quantum Yearbook by Robert J Koch – 2005, Exhibit "B" and

(c) An extract from the Quantum Yearbook by Robert J Koch – 2024, Exhibit "C";

[12] The Plaintiffs called three witnesses, namely:

(a) Ms Mamakoetlane Magdelinah Sekepane;

(b) Dr Hannes Swart and

(c) Ms Nosisana Mercy Tekete.

[13] The Defendant called two witnesses, namely:

(a) Ms Moeneebah Roberts and

(b) Ms Olivia Hendricks.

Summary of the Evidence

[14] Ms Mamakoetlane Magdelinah Sekepane ("Ms Sekepane"), the biological sister of the deceased mapped out her career path which was also confirmed by Dr Hannes Swart ("Dr Swart"), the expert Industrial Psychologist, in his report and during his viva voce testimony. Ms Sekepane stated that she commenced work at PEP stores as a sales person and was promoted to the position of store manager in Lesotho. Thereafter, she took up employment at Pirates, Crisps & Snacks as a supervisor. Ms Sekepane then commenced working as a chef for French Corner after which she was employed at Anatoli's Restaurant as an assistant chef. She then commenced work at Het Bakhuys from 2001 until 2006 as head cook. Ms Sekepane went on to work at Waterblommetjie Restaurant as a chef and ultimately became Head Chef at Seidelberg Wine Estate. She stated that she is currently employed as the Head Chef at

Hemelhuis. As she took the court through her culinary journey, Ms Sekepane explained what she earned at the different places of employment.

- [15] According to Ms Sekepane, the deceased was previously employed as a police officer, but lost his job. She then managed to arrange casual employment for the deceased at Het Bakhuis around 2003 / 2004. According to Ms Sekepane, the deceased, although employed on a casual basis, would work 3 days a week when they were not so busy and between 3 to 5 days a week when they were busy. They were mostly busy according to Ms Sekepane as they catered for many big functions at Het Bakhuis. She orated that the deceased was employed as a kitchen hand and was able to assist with various duties and had the ability to cook well. She further explicated that the deceased worked with the meat and performed duties as a griller. Ms

Sekepane elucidated that he was taught the skills he acquired and although he did not receive any formal training; he was able to perform a variety of duties from cooking to setting up events. Ms Sekepane orated that the deceased earned R250 per day at the time.

- [16] During cross-examination, Ms Sekepane was challenged about her work history in light of the fact that she did not receive formal training as a chef. Ms Sekepane, explained that they are a family who enjoy cooking and that is where her love for cooking was birthed. She reiterated that she is mostly self-taught. Ms Sekepane stated that all the siblings matriculated. Ms Sepe Kane, wasn't able to comment on the suggestion that the Spaza shop business that the deceased had was unsuccessful.

- [17] Dr Hannes Swart holds a PHD in Industrial Psychology and has been practising since 1995. He was instructed by the Plaintiffs to provide an opinion regarding the deceased's probable career path. Dr Swart testified that he had compiled three reports. From the collateral information in respect of the deceased, he established that the deceased matriculated and went on to become a police officer. According to his source information, the deceased was suspended from the police force and thereafter commenced employment at the Castle of Good Hope with the assistance from Ms Sekepane on a casual basis where he earned R250 per day. [1] Dr Swart was confident that Ms Sekepane would have looked out for a work opportunity for the deceased no matter where she was employed. Dr Swart opined that in current terms, the deceased would have been earning between R5000 and R6000 per month. He explained the factors that he considered for him to derive at the conclusion that the deceased would have progressed to a semi-skilled level.[2]

- [18] Dr Swart was referred to the Joint Minute where the issues that he and Dr Crous agreed on were recorded as well as the issues they did not agree on, especially on the view by Dr Crous that the deceased would always have been unskilled.[3] Dr Swart maintained the view that the deceased was more than unskilled as he was employed as a police officer, had grade 12 and

functioned at a lower semi-skilled level. Dr Swart further opined that the deceased would have been where Ms Sekepane is today, earning in the region of R9 500 per month which was, in his view, not inconceivable. His calculations were based on the retirement age of 65 years.

[19] During cross-examination it was suggested that the requirement standard to enter the police force would not have been high. Whilst Dr Swart was unable to comment on the actual requirements that had to be met, he opined that there had to have been a minimum threshold requirement for selection as a policeman at the time. Counsel for the Defendant further suggested that the work ethic of the deceased was problematic as he was dismissed twice and was re-appointed. Dr Swart stated that based on the personal file of the deceased, he was reinstated because he was a good detective. He conceded that a factor to consider would be someone's propensity to lean towards crime, however he stated that he doesn't work on the basis that the deceased would have a propensity to lean towards crime for the rest of his life.

[20] During cross-examination Dr Swart was challenged for not considering the collective agreement for the purposes of his report. Dr Swart indicated that he was not sure whether Het Bakhuis was party to a collective agreement. He conceded that he did not check and opined that there is no evidence that they stuck to a wage agreement. He was confronted about not going into detail about the deceased's Spaza shop endeavour and retorted that there was no evidence that the Spaza Shop had failed. Dr Swart retorted that the Spaza Shop happened somewhere at the beginning of his career in 1990 when he was 20 years

of age. It was suggested to Dr Swart that he was indulging in objective professional speculation.

[21] Nosisana Mercy Tekete (Mrs Tekete), testified that she was married to the deceased. She confirmed that he passed away on 31 December 2005 as a consequence of being shot. She confirmed the names and dates of births of the Second and Third Defendants, she confirmed that she was employed at JM Services at the time of the death of the deceased where she earned approximately R1300 per month and at times R1500 with overtime. As at 2005 she held the position as cleaner. According to Mrs Tekete, the deceased was the main breadwinner as he earned more than her at the time. She testified that both the Second and Third Defendants did not finish school. She confirmed that she provided for their needs. According to Mrs Tekete, the Third Defendant is still dependent on her. She also confirmed that she paid the funeral expense in the amount of R10 270.[4]

[22] Two witnesses were called to testify on behalf of the defendant. Moeneebah Roberts (Ms Roberts), testified that she is employed at Het Bakhuis at the Castle, where she has been employed for approximately 30 years. She currently holds the position of Events Manager for the last approximately 10 to 15 years. She stated that her current monthly salary is R10 150 which translates into approximately R121 000 per annum. She described what her job entails and explained that she works with 2 other permanent staff members and between 5 to 15 casual staff members, which depends on the size of the event that is being catered for.

- [23] Ms Roberts confirmed that she knew the deceased, the late Johannes Tekete who worked at Het Bakhuy's, during the period of 2001 to 2004, as a scullery assistant as a casual employee. She described what his job entailed, inter alia, the cleaning of the kitchen area and the prepping of meals. According to Ms Roberts, Mr Tekete's (the deceased) job description did not change over this period and neither did his salary. He was paid R250 per day with no increase in 5 years.
- [24] During cross-examination Ms Roberts confirmed that Mr Herman Kotze, who has subsequently also passed on in 2011, was her former boss and manager. She also confirmed that Ms Sekepane was an accomplished Head Chef, who trained under Cass Abrahams. Ms Roberts further confirmed that the hospitality industry has fluctuating periods of business, for example, in winter they would be busy for 2 to 3 days and in summer between 4 to 5 days per week and at times there may be no events. Ms Roberts stated that she encountered Mr Tekete as a pleasant gentleman with whom they didn't have problems. She also confirmed that Ms Sepekeane, the deceased's sister left Het Bakhuy's in the period of 2006 to 2007 as she followed Cass Abrahams.
- [25] Ms Roberts testified that the increment in her salary was slow over the years, receiving no benefits as they worked for a club which fell under the umbrella of the SANDF. According to Ms Roberts, casual workers would come and go.
- [26] Olivia Hendricks (Ms Hendricks), testified that she is employed at Het Bakhuy's since 2000 with approximately 24 years' service. She explained that she started off on a casual basis as a scullery assistant, earning R250 per day when work was available. Ms Hendricks explained that she is now permanently employed at Het Bakhuy's as the Head Chef even though she has no formal training or qualification. She stated that she earns a monthly salary of R5 500. She further confirmed that she has people working under her, but the number would be dependent on the size of the event.
- [27] Although she expressed her disquiet about her salary, Ms Hendricks stated that she lacks the paper-work to enable her to find employment elsewhere and receive the salary on par with what she currently does. Ms Hendricks further confirmed that she worked with Mr Tekete the deceased in 2001. She described the extent of their job description, which essentially was that of assisting the Head Chef with preparing meals and cleaning. She furthermore confirmed that they earned a salary of R250 per day in 2005.
- [28] During cross-examination she confirmed the seasonal business of the industry. She confirmed what Ms Sepekeane testified in relation to the deceased helping with preparing the meat. Ms Hendricks confirmed that despite Ms Sekepane's lack of qualifications, she landed a job at Seidelberg where she earns R16 000 per month, reaffirming that she was being underpaid for what she does. She also confirmed that no-one had any problems with the deceased and that the trend has been that people leave for better pay.

Considerations in Assessing Loss of Support

[29] It is undisputed that the deceased was the breadwinner at the time of his demise. It is further undisputed that the Plaintiffs' loss of support commenced at the time of the demise of the deceased, being 31 December 2005. The crisp issue for determination as previously identified, is the amount of damages that the Defendant is liable to pay the Plaintiffs, with the view to financially placing the dependants as far as practicably possible in the same position they would have been in had the deceased not been killed. In other words, a determination is to be made with regard to the loss of past and future support of the deceased's wife and their two children.

[30] In assessing the loss of support the following considerations will be paramount:

- (a) The deceased's income at the time of death and his probable career path;
- (b) The portion of the deceased's income to be allocated for the loss of support claim;
- (c) The First Plaintiff's income to be allocated to the loss of support claim;
- (d) The age of dependency in respect of the Second and Third Plaintiffs;
- (e) Any remarriage contingencies to be applied and
- (f) General Contingencies.

[31] It is trite that a court has a very wide discretion with regard to contingencies. The court in *Smart and Others v South African Railways and Harbours*[5] applied the guiding considerations considered in *Jameson's Minors v C.S.A.R* [6], where the following was held:

'...the difference between what the dependents of the deceased would now enjoy if no compensation were awarded and what they may reasonably be expected to have enjoyed if the deceased had continued to live must be a main factor in arriving at a determination. That involves a consideration in the first place of what source of income, if any, has accrued to the dependents consequent on the death of the deceased which they did not have before.'

The deceased's income at the time of his death and probable career path

[32] Ms Sekepane, the First Plaintiff, Ms Roberts and Ms Hendricks assisted with the collateral information that Dr Swart used to compile his reports. The evidence on record is that the deceased was working at Het Bakhuys at the time of his death, earning R250 per day as confirmed by way of an Employer's Certificate, received into evidence as Exhibit "A". The witnesses called by the Defendant, Ms Moeneebah Roberts and Ms Olivia Hendricks also confirmed that the deceased's earnings as per Exhibit "A", is a true reflection of what the deceased earned at the time of his death.

- [33] According to Ms Sekepane, she assisted many of her family members with employment and speculated that she would have been able to assist the deceased with employment at the places where she worked. Ms Sekepane confirmed that the plan was always to secure a permanent position for the deceased as she had done for her other family members. Ms Sekepane foreshadowed that the deceased would in all likelihood have followed her after she left the employ of Het Bakhuis.
- [34] Ms Sekepane's evidence, was furthermore corroborated by Ms Roberts and Ms Hendricks insofar as it relates to the seasonal periods akin to the catering industry. In this regard, it is apparent that casual workers would work approximately 5 days a week during the busier summer months and about 2 to 3 days per week during the quieter winter months.
- [35] It is manifest that Ms Roberts and Ms Hendricks are the only remaining employees at Het Bakhuis. Of seminal importance is the fact that they conceded that casual staff, more often than not leave for better remuneration. It is noteworthy that both Ms Roberts and Ms Hendricks lamented about their current income at Het Bakhuis which was not on par with what others are earning in similar positions at other entities.
- [36] Dr Swart confirmed that he had established that at the time of the demise of the deceased, he was working at Het Bakhuis for a period of 4 years from 2001 to 2004. Based on the collateral information received, Dr Swart stated that he accepted that the deceased was earning R250 per day. According to Dr Swart, the deceased would only have been employed for a period of 8 months of the year, if regard is to be had that the catering industry is seasonal. He stated that the deceased would have earned an income of approximately R6000 per month as earlier stated, which accords with the evidence of Ms Sekepane who testified that the deceased had earned between R5000 and R7000 per month. Dr Swart testified that in his opinion, the deceased would have at least earned a minimum salary of R41 500 per annum during 2005.
- [37] During the course of the trial, additional information came to hand regarding the employment of the deceased, more particularly at the time when he was a police officer. Dr Swart was recalled and stated that he had insight into the full personal file of the deceased. The deceased was employed as a Special Constable on 22 September 1990 until 26 July 1994 when he was dismissed. The deceased was again appointed in 24 November 1995 until 09 October 1996 as a Special Constable. On 10 October 1996 until 09 March 1998 the deceased was appointed as a Constable. The deceased was on salary level 04 with Notch of R30 396 per annum.[7]
- [38] According to Dr Swart, based on the new information received, he opined that the deceased would have functioned at a semi-skilled level. Dr Swart testified that he would be satisfied to accept that the deceased would have earned a lesser income, which equates to what a Constable would have earned on level 4 during 2005 as confirmed by the Quantum Yearbook, marked Exhibit "B". Dr Swart demonstrated this conclusion in reference to the Quantum Yearbook, 2005, where the following was illuminated:

1. Using the salary scales for government departments, a Constable would have earned, R49227 at level 4 per annum.[8]
 2. According to the approximate earnings levels table for non-government workers, a semi-skilled worker would earn in the region R26 000 – R42 000
- R74 000 per annum.[9]
 3. In terms of the earning scales for Paterson grades, semi-skilled workers would earn a basic salary of between R41300 – R54800 per year.[10]
- [39] According to Dr Swart, it would be unlikely that the deceased would have remained at semi-skilled level. The deceased would have been 34 years old in 2005 and his projected retirement age is 65 years. The deceased after leaving the police force, entered the labour market. Dr Swart also projected that the deceased's career would have plateaued at the age of 45 years at which stage it would be foreshadowed that he would have featured on an upper-semi-skilled level.
- [40] Dr Swart opined that the deceased would have at least progressed to the Upper Quartile semi-skilled level, earning R218 000 per annum as per the 2024 values at the age of 45 years and that he would thereafter have earned an income on a similar level but with increases as per earning inflation up until the retirement age of 65 years. In considering the current earning guidelines, the Quantum Yearbook, 2024 "Exhibit "C", was referenced where the following was highlighted in support:
1. The earnings of non-corporate workers on a semi-skilled basis, earned between R83 000 and R218 000 per annum (Median Upper Quartile), which equates to an amount of R150 000 per annum on average.[11]
 2. The starting salary of a constable, based on salary scales for government employees would be in the region of R216 033 to R262 707;[12] bearing in mind that the deceased at the time of his dismissal was at level 4.
- [41] The Defendant challenged Dr Swart's findings on various grounds which included the scope of what he did at Het Bakhuis. It was put to Dr Swart during cross-examination, that there is no job description of a kitchen hand and suggested that a kitchen hand is essentially nothing other than "a glorified labourer". The Defendant, relying on the evidence of Ms Roberts and Ms Hendricks, argued that the deceased was never a chef, never cooked, but helped peel potatoes and onions and cleaned the scullery. It was furthermore highlighted that the evidence of Ms Roberts and Ms Hendricks contradicted the evidence of Ms Sekepane who testified that the deceased would have worked 5 days per week for 8 months of the year.

[42] The Defendant also challenged the calculation by Dr Swart and proposed that a mathematical calculation be applied to determine what the deceased's income would have been, based on Dr Swart's report that the deceased would have earned R250 per day as a casual employee, working 5 days per week during summer and 3 to 4 days per week in winter. In this regard, it was suggested that the following calculation be applied:

'5. If one takes a month comprising 22 working days even working for a full summer month this translates to R5 500.00 per month. In (sic) one takes a winter month where the deceased would have worked 3 to 4 days per week and one takes t days per week instead of 3, one arrives at a figure of R4 500.00 per month.

6. If one favourably splits the year into 2 being 6 months of winter and 6 months of summer, based on the above the deceased would have earned:

6 x R5 000.00 (Summer)

6 x R4 500.00 (Winter)

Total: R57 000.00 ÷ 12 months = R4 750.00 per month'[13]

[43] It was furthermore contended that Dr Swart offered no explanation as to how he arrives at his calculation that the deceased earned "at least R6000.00 – R7 000.00 per month"[14]. It was further mooted that whilst the difference appears small, once actuarially calculated the difference is significant.

[44] Inconsistencies in Dr Swart's reports were raised by the Defendant. In this regard the following was contended referring to the report dated 12 October 2021:

'Here he reports at p 4 that the deceased "was a very good chef" and further down the same page reports that the deceased worked "3½ days for 4 months of the year and 5 days per week for the remaining 8 months of the years (sic)". The relevance hereof is that in his previous report alluded to above the deceased only worked 5 days per month during the summer months which was just over a year increased inexplicably. However, even more curiously, despite this dramatic increase in working time, her still at p 5 reports the deceased as earning "at least R6 000.0(sic) – R7 000.00 per month. This too is inexplicable...'[15]

[45] Furthermore, Counsel for the Defendant challenged Dr Swart's prognosis that the deceased would have reached a semi-skill level. This contention is based on the evidence that Mrs Hendricks commenced working at the same place as the deceased prior to him working there; that she is still currently employed there in her capacity as a cook and still earns an amount of R250 per day, approximately 23 years later. In further amplification, it contended that the court is to consider that Mrs Hendricks has a clean record and was never dismissed from her employ, as was the case with the deceased when he was employed as a police officer.

[46] In addition, Counsel for the Defendant requested that the Court considers the concession made by Dr Swart that unemployment in South

Africa is currently running at 40%. Counsel for the Defendant argued that the “deceased’s meteoric rise in income in the labour market as forecast by Dr Swart is what he termed as a leap of faith.”[16]

[47] It was furthermore argued that the evidence of the Ms Sekepane regarding the deceased’s postmorbidity career path is to be cautiously

approached and as her testimony does not serve as a basis for contending that the deceased was an exceptional performer in his

socio-economic category.[17]

[48] Counsel for the Defendant submitted that the Court is to adopt a common-sense approach when determining the deceased’s career path, considering the socio-economic conditions at the time, the lack of the deceased’s formal qualifications, his employment record with SAPS as well as the current employment circumstances of Ms Roberts and Ms Hendricks.

[49] The Defendant did not call its expert, Dr Crous to testify, but attempted to place reliance on the findings of Dr Crous in its Heads of Argument. Counsel for the Plaintiff argued that because the evidence of Dr Crous was not led, the court cannot have regard to his report or the submissions made insofar as it relates to the report compiled by him. It was argued by Counsel for the Defendant that the Court does not give up its duty to consider the basis of the conclusions reached by Dr Crous. Even if the Court is to have regard to the report by Dr Crous, some of his findings which differ to that of Dr Swart, could not be tested or challenged through cross-examination.

[50] To suggest that the deceased would have been or should be assessed on the same level as Ms Roberts and Ms Hendricks is, in my view, a blinkered approach as their circumstances are unique. On their own evidence, many casual employees have come and gone, mostly seeking greener pastures financially. Their decision to stay at Het Bakhuys is a personal choice, based on their own unique circumstances and considerations.

[51] It is trite that a Court is not bound to accept an expert’s evidence and is free to reject it and to decide for itself where the expert’s evidence is not of “appreciable help”.[18] However, this court, cannot find any persuasive reason why the expert opinion of Dr Swart should not be followed. This court having regard to the evidence of the expert witness Dr Swart, is enjoined to consider this matter on a balance of probabilities, which includes the evidence in its entirety. Dr Swart places reliance on an assessment on a non-corporate level. I am satisfied that Dr Swart considered the necessary factors to support his conclusion that the deceased would have been employed at a semi-skilled level, which in my view was reasonable and properly considered.

[52] Having regard to the evidence in its entirety, in the exercise of my discretion, I am of the view, based on the balance of probabilities, that the deceased's income and probable career path would have been as follows:

- (a) The deceased would have earned R41 500 per annum as at 31 December 2005;
- (b) The deceased's income would have progressed to a current amount of R150 000 per annum as per the 2024 values;
- (c) The deceased's income would have progressed to an income of R218 000 per annum as per the 2024 levels at the age of 45 years;
- (d) Increases would have been coupled with earnings inflation and that
- (e) The deceased would have retired at the age of 65 years.

The portion of the deceased's income to be allocated for the loss of support claim

[53] It is not in dispute that the deceased was the breadwinner. It is generally accepted that the total income of the breadwinner is to be apportioned between the family members. It is trite that the allocation will be dependent on the facts of each case.[19]

[54] It was contended that one-half of the deceased's income should be allocated to the First Plaintiff and the other half to the Second and Third Plaintiffs proportionately; in other words, 25% for each of the children. There is nothing on record to persuade the Court why this allocation would not be fair, reasonable and equitable and as such, the proposed allocation, in my view ought to be followed.

The First Plaintiff's income to be allocated to the loss of support claim

[55] In *Ongevallekommissaris v Santam Verseekeringsmaatskapy Bpk*[20] Vieyra J it was held that:

‘What a wife loses as a result of the death of her husband is the support which the deceased would have been able to afford and would probably have afforded his wife had he not been killed (cf. *Hulley v Cox*, supra at pp 213-214. It derives from the marital relationship.’[21]

[56] Dr Swart, referring to his report, stated that at the time of the deceased's passing, the First Plaintiff worked at J & M Cleaning Services. She left the employ in 2009. At the time when he interviewed the First Plaintiff could not recall what her income was at the time. He opined that had she still been employed as a cleaner, she would have earned approximately R4500 per month. In 2010 she commenced volunteer work and is still employed in this capacity where she earns R2400 per month.[22] He explained, how he was able to derive at his projection using the Koch Quantum YearBook, which set out the earnings guidelines for the year 2005.[23]

- [57] Dr Swart went on to explain what factors he had considered to form an opinion regarding the First Plaintiff's post traumatic income. He also indicated that the First Plaintiff augmented her income by rendering cooking services to Eliso Care Society.[24]
- [58] The First Plaintiff testified that at the time of her husband's death, she was earning approximately R1350 per month. Dr Swart proposed that the amount of R1667 per month be utilised for the calculation, which would be in line with the income stream of a Cleaner at the time of the deceased's demise. In augmentation hereof, Dr Swart referenced Exhibit "B".
- [59] Although Dr Swart based his calculation on the earnings guideline for the year 2005, it is my view that the best evidence approach should be adopted, which is the viva voce evidence of the First Plaintiff who testified that she was earning approximately R1350 per month. Therefore, in the exercise of my discretion, it is my view that the amount as per the testimony of Mrs Tekete is to be accepted.

The age of dependency in respect of the Second and Third Plaintiffs

- [60] The First Plaintiff testified that the Second and Third Plaintiffs were still residing with her. According to the First Plaintiff, the Third Plaintiff is currently 20 years old and still financially dependent on her. Dr Swart orated that the Second Plaintiff is unemployed and did not progress beyond grade 11.[25] According to Mrs Tekete, both children did not finish school. Dr Swart also confirmed that he made provision in his calculation in respect of the children up until the age of 18 years. This is one of the issues on which both Dr Swart and Dr Crous agreed on as contained in the joint expert report.
- [61] Counsel for the Plaintiff argued that young people are more dependent on their parents these days contending that the Court should adopt a fair and reasonable approach and rule that the dependency age of the Second and Third Plaintiffs is to be set at 21 years.
- [62] It is the Defendant's contention that the Second and Third Plaintiffs are both adults. It was submitted that in light of the fact that neither of them was called to testify regarding their dependency age, the age of dependency should be 18 years, which is the age of majority.

[63]

In *Mfomadi and Another v Road Accident Fund*[26] it was held that:

'A parent's duty to support a child does not cease when the child reaches a particular age but it usually does so when the child

becomes self-supporting. Majority is not the determining factor (see *Smith v Smith*).'

[64]

Hulley v Cox[27] refers to the possibility of a dependant becoming "self-supporting." In *Kekana Tshogofatso obo Motshwaede Mmapula Lorraine Vs. Road Accident Fund*[28] it was pointed out that:

‘... all the facts of the matter must play a role in reaching a just and equitable decision.[29]

Measuring compensation for loss of support is an exercise of judicial discretion in the interest of justice, taking into account the difference between the current position and the position that the minor child would have been in, had the deceased not died.[30]

[65] This court is ever mindful that it is to reach a just and equitable decision. In doing so, this court is to have regard to the evidence currently on record. The Second and Third Defendants did not testify. Inasmuch as this court is to have regard to the fact that the deceased would still have been in a position to support the Plaintiffs financially up until the age of 21 years, had it not been for his demise, there is not much information on record regarding the Second and Third Defendants for the Court to conclude that the age of dependency ought to be 21 years.

[66] Therefore, based on Dr Swart’s expert opinion, in the exercise of my discretion, I find that it would be reasonable that the Second and Third Plaintiffs’ dependency age is to be set at 18 years.

Any remarriage contingencies to be applied

[67] It is trite that our jurisprudence recognises two types of contingencies, namely, a general contingency for the vicissitudes of

life and an additional contingency for the possibility of remarriage or re-partnering.[31]The Plaintiff is, at the time of writing this judgment, currently 56 years old. The evidence on record is that she has not remarried.

[68] In *Peri-Urban Areas Health Board v Munarin*[32] it was held that:

‘A widow is therefore entitled to compensation for loss of maintenance consequent upon the death of her husband, but any pecuniary benefits, similarly consequent, must be taken into account. To suggest that she is obliged to mitigate her damages by finding employment is to mistake the nature of her loss. What she has lost is a right – the right of support. She cannot be required to mitigate that loss by incurring the duty of supporting herself. If she does obtain employment, it is more appropriate to regard her earnings as being the product of her own work than as consequent upon her husband’s death. Marriage prospects are relevant because marriage would reinstate her right of support...’

[69] In *Ongevallekommissaris v Santam Bpk*[33] it was held that:

‘In South Africa the contingency of remarriage is usually taken into account. If the purpose of an award for damages for loss of support is borne in mind the possibility of the plaintiff remarrying is a very real consideration. The possibility of a young widow remarrying shortly after the death of her husband and receiving damages for loss of support calculated over a period of 40 years is completely unrealistic. Allowing for the contingency is obviously realistic. [Hulley v Cox 1923 AD 234 at 244]’[34]

[70]

The various approaches provide useful guidance in terms of the development of the jurisprudence on the application of contingencies.

The “attributes approach” takes into consideration a general contingency for the vicissitudes of life and an additional

contingency that considers the individual claimant’s prospects of remarriage or re-partnering which may be financially beneficial.[35]

[71]

The “actuarial calculation approach” is based on generalised statistical norms to determine the financial implications occasioned by the possible reacquisition of remarriage or re-partnering. [36] The “actuarial calculation approach” applies both a general contingency for the vicissitudes of life and an additional

contingency based on actuarial statistical normative calculations. The actuarial normative standards have been criticised in *LD v Road Accident Fund* [37] because of outdated data statistics and adopted the approach applied by the Australian court:

‘Unless the facts of a particular case clearly demonstrate that a higher than normal, and, special contingency for remarriage is to be deducted, such further contingency ought not to be deducted.’[38]

[72] Having regard to the age of the First Plaintiff, I am of the view that it is unlikely that she will remarry in the future and as such, do not deem it necessary to consider a remarriage contingency.

General Contingencies

[73]

The “one general contingency approach”, applied by the court in *MV and Others v Road Accident Fund*[39] applies only one contingency for the general vicissitudes of life except where the facts clearly demonstrate a higher than normal, special contingency for remarriage or re-partnering.

‘In considering the aspect of remarriage, I am of the view that there are no special circumstances to warrant a further deduction. Remarriage is part of the vicissitudes of life and should not be considered separately in this case.’

[74] The “one general contingency approach” applies only one contingency for the general vicissitudes of life except where the facts clearly demonstrate a higher than normal, special contingency for remarriage or re-partnering.

There appears to be no guidelines as to what factors constitute special circumstances. In my view, a Court ought to be guided by the unique facts of each case as a one size fits all approach would be too rigid and unrealistic.

[75] In *RAF v Kerridge*[40] it was held that:

‘Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings, they include inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill-health, death, and the myriad of events that may occur in one’s everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of a claimant. This Court, in *Quedes*, relying on Koch’s *Quantum YearBook 2004*, found [that] the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but it is a convenient starting point.’

[76] Robert J Koch in *The Quantum YearBook 2024*, regards the sliding scale as half (½) per cent contingency deduction per year to retirement age which equates to 25% for a child, 20% for a youth, and 10% in the middle age. According to Koch, deductions of 5% for past loss and 15% for future loss, remain the so-called “normal contingencies”.

[77] Based on these guidelines, the Plaintiffs proposed that general contingency deductions of 5% for past loss of support and 10% for future loss of support would be appropriate. After careful consideration I am of the view that the Plaintiffs’ proposal, based on Dr Swart’s expert opinion, regarding the contingencies appear to be fair and reasonable.

Costs

[78] At the outset of the hearing the Court’s attention was drawn to the fact that the Plaintiffs had previously provided the Defendant with a Calderbank Offer. It was submitted that the said offer will be disclosed to the Court, if so required, following the judgment in this matter. The Plaintiffs indicated that argument will be presented, in the event that the amount awarded by the Court is in excess of the Calderbank Offer, to motivate why the Plaintiffs would be entitled to costs on the attorney and client scale as from when the Calderbank Offer was served on the Defendant.

[79] Both parties addressed the court on the issue of costs. However, in light of the fact that this matter has not yet reached its conclusion and in light of the fact that the Court has not made a final determination on the issue of quantum, it is my view that the issue of costs is to be held over for later determination. The parties will be afforded an opportunity make final submissions on the issue of costs as the previous addresses on costs did not deal with the amended Rule 67A considerations.

Order

[80] In the result, the following order is made:

1. The matter is adjourned sine die;
2. The Court directs the parties to instruct ARCH Actuarial Consulting CC to calculate the loss of support in respect of the First, Second and Third Plaintiffs on the following terms:
 - (a) That the Plaintiffs were dependent on the deceased's income at the time of his death on 31 December 2005;
 - (b) The Plaintiffs' dates of birth are:
 - (i) First Plaintiff:
29 April 1968;
 - (ii) Second Plaintiff:
16 October 1995;
 - (iii) Third Plaintiff:
23 May 2003.
 - (c) The deceased's income and probable career path would have been as follows:
 - (i) The deceased would have earned R41 500 per annum as at 31 December 2005;
 - (ii) The deceased's income would have progressed to a current amount of R150 000 per annum as per the 2024 values;
 - (iii) The deceased's income would have progressed to an income of R218 000 per annum as per the 2024 levels at the age of 45 years;
 - (iv) Increases would have been coupled with earnings inflation;
 - (v) The deceased would have retired at the age of 65 years.
 - (d) The First Plaintiff's income at the time of the deceased's death is determined to be R1350 per month.
 - (e) The Second and Third Plaintiffs' dependency age is determined to be 18 years;
 - (f) General contingencies of 5% for past loss of support and 10% for future loss of support are to be applied;
3. The matter is to be re-enrolled upon receipt of the actuarial report to deal with the remaining issues on quantum and costs;
4. Costs are to stand over for later determination.

ANDREWS, AJ

APPEARANCES: Counsel for the Applicant: Advocate E Benade Instructed by: Lester and Associates Counsel for the Respondent: Advocate Van J van der Schyff Instructed by: The State Attorney Heard on: 23 and 30 November 2023; 13 and 14 March 2024; 17 and 22 April 2024 Delivered: 07 May 2024 – This judgment was handed down electronically by circulation to the parties’ representatives by email.

- [1] Dr Swart Report, para 10 pages 100 – 101.
- [2] Dr Swart Report, para 3, page 111.
- [3] Joint Minute, pages 204 – 2017.
- [4] Exhibit “A”.
- [5] At page 363.
- [6] 1908 TS 575
- [7] Index, page 39A.
- [8] Exhibit “B”, page 106.
- [9] Exhibit “B”, page 107.
- [10] Exhibit “B”, page 108.
- [11] Exhibit “C”, page 131.
- [12] Exhibit “C”, page 132.
- [13] Defendant’s Heads of Argument, paras 5 – 6, page 2.
- [14] Dr. H Swart Report, dated 20 August 2020, page 11.
- [15] Defendant’s Heads of Argument, para 11.
- [16] Defendant’s Heads of Argument, para 17, page 5.
- [17] Defendant’s Heads of Argument, paras 20.1 – 20.2, page 7.
- [18] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972
- (1) SA 589 (A) at 616H; *Michael and Another v Linksfield Park Clinic (Pty) Ltd* 2001
- (3) SA 1188 (SCA) at para 37.
- [19] *Smart v SAR & H* (1928) 49 NPD 361.
- [20] *Ongevallekommissaris v Santam Verseekeringsmaatskapy Bpk* 1965
- (2) SA 193 (T).

- [21] At 205H.
- [22] Dr Swart Report, para 7.1 pages 96 – 97.
- [23] Koch RJ ‘The Quantum Yearbook’, page 106 – 109.
- [24] Dr Swart Report, para 5 page 121.
- [25] Dr Swart Report, para 7.2 page 97.
- [26] (34221/06)
- [2012] ZAGPPHC 152 (3 August 2012) at para 30.
- [27] *Hulley v Cox* 1923 AD 234 at 244 ‘A father for instance would cease to maintain a son who became self-supporting, or a daughter who married; and allowance would have to be made for those contingencies in assessing compensation.’
- [28] (Case No: 2019/26724) [2023] ZAGPJHC 495 (16 May 2023) at para 36.
- [29] *Protea Assurance Co Ltd v Lamb* 1971
- (1) SA 530 (A) at 535.
- [30] *RAF v Monani* 2009
- (4) SA 327 (SCA) at paras 2-6
- [31] *Kekana Tshegofatso obo Motshwaede Mmapula Lorraine Vs. Road Accident Fund* (supra), para 59.
- [32] 1965
- (3) SA 367 at 376.
- [33] *Ongevallekommissaris v Santam Bpk*
- [1998] ZASCA 93; 1999
- (1) SA 251 (SCA).
- [34] See also *Members of the Executive Council Responsible, for the Department of Road and Public Works, North West Province v Oosthuizen* A671/07)
- (2009) ZAGPPHC 16 (2 April 2009) at para 45.
- [35] *Peri-Urban Areas Health Board v Munarin* 1965
- (3) SA 367 (A) at p.376; *Constantia Versekeringsmaatskappy Bpk v Victor* NO 1986
- (1) SA 601(A) at 615A and *YK v Road Accident Fund* [2020] JOL 46847 (FB) at para 44.
- [36] *Esterhuizen and Others v Road Accident Fund* 2017

(4) SA 461 (GP) (6 December 2016).

[37] (14606/2016)

[2018] ZAGPPHC 181 (5 February 2018) paras 33-35.

[38] At para 37.

[39] (1705/2017)

[2019] ZAFSHC 131 (25 July 2019) at para 14.

[40] 2019

(2) SA 233 (SCA) at para 44.

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