

SOUTH AFRICA / JUDGMENT

T.L and Others v L.V (84635/2017) [2020] ZAGPPHC 805 (27 November 2020)

[2020] ZAGPPHC 805

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

84635/2017

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IN THE HIGH COURT OF SOUTH
AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 84635/2017

REPORTABLE: YES/NO

OF INTEREST TO OTHERS

JUDGES: YES/NO

REVISED

DATE: 27 NOVEMBER 2020

In

the matter between: T[....]
L[....]
FIRST PLAINTIFF
T[....]
L[....]
N.O.
SECOND PLAINTIFF
T[....]
L[....] N.O.
THIRD PLAINTIFF
T[....]
L[....]
N.O.
FOURTH PLAINTIFF
and
L[....]
V[....]
DEFENDANT

JUDGMENT

TLHAPI J

- [1] The first plaintiff's claim is for the loss of support on behalf of herself and her three ' minor children, her daughter T[....] and two sons O[....] and A[....].
- [2] It is common cause that the plaintiff, Ms T[....] L[....]'s ("Ms L[....]") husband the Late Morne L[....] ("the deceased") lost his life on 16 June 2017 after an assault by the defendant. At subsequent criminal proceedings the defendant pleaded guilty to culpable homicide.
- [3] In these proceedings the merits were conceded and the outstanding issue related to the quantum of damages. Two witnesses testified being Ms L[....] and her attorney Mr Beyers. The defendant did not testify or call any witness.
- [4] Ms L[....] was married to the deceased in community of property. When she met her husband he was employed in the family business set up by his father. Ms L[....]'s evidence revolved around what she determined to be the deceased's monthly and or annual income. Although she was employed prior to meeting the deceased and also after the birth of her first and second children she stopped working so that she could take care of the family after the birth of her youngest son A[....] who was born in 2011. The family business ERG Merchants Gauteng (ERG Gauteng) was a closed corporation. The deceased later became a member in the closed corporation together with his brother and sister. ERG's core business entailed the supply of various building supplies and other commodities to its other ERG branch in Swaziland.

- [5] The deceased was tasked with sales and marketing and this involved a lot of travelling outside the country particularly to Swaziland. Although the bank statements reveal that he travelled to Zambia, Ms L[...] was not certain what business he pursued in that country. Ms L[...] testified that the deceased was the one responsible for making most of the income for the business. He would travel to Swaziland on a weekly basis, stay over for a few days and return before end of the week. After the retirement of his father during 2013 he played a major role in decision making in the business and his brother and sister were tasked mainly with the administrative side of the business, with his sister doing the accounting for the business. The business activities were concentrated in Swaziland which was also the main source of income for ERG CC.
- [6] According to Ms L[...], even though she did not know much of how the business was operated, she testified that her husband was in a position to maintain a lifestyle which enabled them to purchase their residence on Midstream Estate and, they could afford sending the children to a private school also situated within Midstream. The deceased gave her a monthly allowance which was deposited into her bank account and if he was unable to do so, he would give her cash amounts ranging between R5000.00 to R10000.00. After the death of her husband the residence had to be sold and this was reflected in the Liquidation and Distribution Account which was discovered. She presently lives in a rented house at Midstream and her children still attend the same school. She is presently employed but not on a full-time basis.
- [7] The deceased indicated to her during the middle of 2016 that he wished to leave the family business to establish his own, and that he would operate from Swaziland. According to Ms L[...] the deceased had a business partner in Swaziland even though he still continued to be employed by ERG CC. The deceased suffered a heart attack during December of 2016 and he received a policy pay out from Discovery. After recuperating for a couple of months he resumed his quest to start up his own business in Swaziland where he had built up clientele and he had one assistant. She did not know if the deceased was a registered tax payer in Swaziland and had no inside knowledge of how he operated the said business.
- [8] Ms L[...] testified that she had difficulty finding information on the how the deceased's business was run for purpose of establishing what the deceased's income was, in order to quantify her claim. The deceased's family, in particular his siblings, refused to give her any information regarding ERG's business operations. With regard to the Swaziland Business, she did not know the deceased's partner very well and there was no information she could source from that end. The executor availed the deceased's bank statements from the Standard Bank and the First National Bank accounts. As already indicated the family home was sold and, the proceeds were deposited in the estate to be administered in terms of the laws of intestacy. There were claims lodged against the estate, the major one being for the outstanding mortgage bond and one major creditor. The couple were married in community of property however, the Liquidation and Distribution Account erroneously recorded the marriage as being out of community of property. The assets for distribution were allocated

to her in terms of the Last Will and Testament.

- [9] Her attorney, Mr Beyers, who assisted in instituting this action, testified on the efforts he engaged to assist his client in sourcing information relating to the finances of the deceased, for purposes of quantifying the claims herein. He testified that he contacted Mr JM Coetzee, a tax practitioner who was the accounting officer for the ERG entities. He also dealt with the deceased's tax matters. Mr Coetzee was reluctant to give any information and he stated that ERG had closed down and, he no longer has contact with them. Mr Coetzee told him not to contact him again. He stated that there was no purpose in engaging him any further. He also tried to obtain information from the deceased's brother who was not helpful. The deceased's brother informed him that he was not

responsible for doing the books at ERG but that his sister did them and later the brother relocated to the Cape. The deceased's sister was not contacted. He requested another firm of attorneys which specialized in company matters to assist with information about ERG businesses in Swaziland, and for them to establish whether the deceased had been registered as a tax payer in Swaziland. This effort came to naught.

- [10] Ms L[...] set out to prove that the deceased was capable of maintaining a lifestyle she and her children were accustomed to. She testified that having received the deceased's bank statements for the period 2014 to 2017 she drew up spread sheets, annexure "B", to illustrate which amounts constituted income and expenses of the deceased which supported their lifestyle. Credits not earmarked for something else inclusive of those amounts identified as salary were regarded as income. Salary was reflected as either paid by ERG Benoni or Lakeside or ERG (Pty) Ltd. The latter were from Swaziland.

- [11] In order to determine the deceased's monthly income annexure "D" was prepared from the bank statements which was a schedule of fixed monthly and general/variable expenses. The fixed expenses during the period 2016/ 2017 amounted monthly on average to R74 789.00, which would have required an annual income of R 897 468.00 to meet his fixed expenses only. The variable expenses on average per month amounted to R26 919.67

and per annum an amount of R323 036 04 would have been required. Added together it was contended that the deceased, to meet his monthly obligations would have been required to earn a monthly income of R101708.00 and an average annual income of R1 220 504.00.

- [12] In as far as remarriage was concerned plaintiff testified that she had gone out a few times and decided that she was not ready to consider any relationship with another man. She had to deal the children who still missed their father. Remarriage was also not on the cards for her because she was responsible for the three minor children and especially so because the youngest would still be with her for a longer time.

- [13] It was contended by the defendant that tax assessments which were discovered were for the years 2016, 2017 and 2018. Other tax returns made available during the trial were for the years 2013, 2014 and 2015. The returns reflect the following income earned, being in 2013 an income of R501 036.00; 2014 an income of R501 036; 2015 an income of R524 036 and in 2016 an income of R501 000 and nil for the years 2017 and 2018.
- [14] Although the defendant did not testify his counsel relied on the assessments and bank statements and, prepared annexure "F" which gave a breakdown of the various entries and descriptions in the bank statements to determine what was received as salary income as opposed to other income and expenses. The plaintiff was cross examined on the debits and credits also on those items she had identified as salary which were not narrated as coming from ERG Benoni / Lakeside and this included those reflected as salary from foreign deposits. Ms L[...] readily conceded that she was not given any other information to verify these entries as income other than that she believed them to be income because they were used to pay for the expenses as seen from the bank statements. She also conceded that there was no evidence to prove that the deceased was registered as a tax- payer in Swaziland.
- [15] It was also established in cross examination that the deceased operated an overdraft facility on his cheque account with Standard Bank which limit was now and then increased and this was before he opened another account with First National Bank. There was a revolving credit facility which was linked to his cheque account; he had received monies from other sources for example from his parents; from a money lender (Direct Axis); the income received from the sale of a motor vehicle was also considered income generated by the deceased. Ms L[...] was also cross examined on certain payments which despite income received, were dishonoured by the bank. The status of the credit cards was questioned and she confirmed that they were paid from the Standard Bank account and, that they were used to maintain the lifestyle of the family. She was also cross examined on the content of the Liquidation and Distribution Account. She confirmed that she received the whole amount available for distribution which she had used to maintain the family. It was pointed out to Ms L[...] that she relied on credits in the deceased's bank accounts held with Standard Bank and First National bank which exceeded the income declared to the Receiver of Revenue as annual income and she conceded.
- [16] It is worthwhile to have regard to the joint minutes of the actuaries Mr Willem Boshoff for the plaintiffs and Mr Johan Sauer for the defendant under the heading 'Attempt to resolve differences.' The complexity of the case was acknowledged and the actuaries indicated that the differences in their opinion was attributable (i) 'to information on the different earning/ expenses and that they would defer to an expert who in this instance should be a forensic auditor, because such determination fell outside their scope and responsibility, to determine the deceased's applicable earning/ ability to cover expenses' and (ii) Mr Sauer mentioned that actuaries were not qualified to do financial statements from information obtained from source documents and bank statements, that it was the forensic auditor who could assess "true profit generated by the deceased, separated from money transfer flows, expenses,

refunds and loan capital." The actuaries agreed to follow the court's ruling on applicable general contingencies to remarriage and on past and future loss of earnings.

THE

ISSUES

- [17] The only issues relate to the earning capacity of the deceased to determine his monthly and annual income, which should be considered for calculating the loss of support claim payable to Ms L[...] and her three minor children and, as to what contingencies were in the circumstances applicable. The issue relating to costs and the finalization of the exact quantum payable was to be determined after a determination of the issues herein.

THE LAW

- [18] It was common cause that the Ms L[...] and the children had suffered monetary damages in the form of a loss of support, and that reliance to prove the income of the deceased was placed on bank statements of the deceased held at the two banks already mentioned . There were also the tax returns which stated what the declared income was and upon which the deceased had been taxed. It was contended by counsel on behalf of the plaintiffs that the best available evidence in the form of the deceased's bank statements had been placed before the court to assess what was believed to be income of the deceased.
- [19] It was common cause that the lack of vouchers and information made it impossible to ascertain which of the amounts stated in the bank accounts were utilised by the deceased's accountant to calculate the income declared in the tax returns. In the calculations exhibited in annexure "F", where counsel for the defendant had added up only those amounts narrated as salary from ERG to calculate income received, there would still be a shortfall to make up the difference in the amount declared as income in the tax returns.
- [20] It was contended further that the difficulty experienced by Ms L[...] and Mr Beyers in obtaining documentary evidence relevant to the deceased's income and, information into the financial affairs of the two entities where the deceased was employed and, where he was a member or partner, should not be used to non- suite the plaintiff's in advancing the claims against the defendant. The best evidence had been availed to the court in the form of the bank statements of the deceased. In *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SC), the court emphasised a court's responsibility to assess the quantum of damages from the evidence available to it and the following was stated:

"[25] where a loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence tendered to give effect to the finding of proved reduction in loss of income- earning capacity. As long as almost a century ago in *Hersman v Shapiro* the court said the following:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence: before it, there are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damages has been suffered, the Court is bound to award damages."

[21] The necessity to award damages where the best evidence was available was also endorsed in *Esso Standards SA (Pty) Ltd v Katz* 1981

(1) SA 964 (A). In the *Kerridge* matter the Road Accident Fund took the view that *Kerridge* had failed to prove that he had suffered any past or future loss of income because he did not produce any evidence of earnings from the family business. The best evidence available in that matter was that of an expert who testified to having seen the financial statements of the business and, that she had also

established that *Kerridge* drew a monthly salary of R5000.00 per month from the family business. *Kerridge* had aspired to become a diesel mechanic. An Industrial Psychologist had done comparisons in that profession by using the Paterson scale, to establish what his pre- and post-morbid salaries would have been for purposes of the calculations. The issue in the end was about what contingencies should have been applied. In this instance, the facts are distinguishable in that only the banks statements and the tax returns were availed.

[22] It was submitted for the plaintiffs that the fact that the fixed and variable expenses were paid without fail was proof that there must have been another source of income. It was contended that it made no sense in the calculations on behalf of the defendant to admit a monthly income of R42 000.00, where Ms L[...] had convincingly demonstrated that the deceased could afford to pay R74 000.00 of the fixed expenses. It was contended that as mother of the house she had also demonstrated and she had knowledge that the deceased could also afford to pay the variable expenses in the average of R26 000. 00. Counsel for the plaintiffs rejected the contention that the tax returns reflected the true and only income of the deceased. As I see it, counsel's motivation is that the court cannot rely on the declared income as stated in the tax returns because the figures are not supported by the version of Ms L[...]. According to him the defendant did not testify, he did not have a version and that he had failed to tender any evidence to dispute the version of Ms L[...]. In my view it should not be about the defendant having no version, it should be about what the experts, being the actuaries say their difficulty was. The actuaries stated that they would rely in the circumstance on input by a forensic auditor and, according to Ms L[...] the Industrial Psychologist declined to assist because he could rely solely on bank statements to establish what the deceased's earnings were.

[23] Counsel for the defendant contended that the principles laid down by *Southwood J* in the unreported appeal case of *Member of the Executive Council Road and Public Works Northwest Province and Others v LiseMari Oosthuizen* [A671/2007 TPD] Case Number 33736/2003 dated 2 April 2009, a decision of the full court, were applicable. Ms Oosthuizen's deceased husband was a practicing advocate and she sought to rely on external evidence to

contradict the tax returns and fee book. The court found that even where the evidence of the 'party bearing the onus' had not been contradicted, the "onus could only be discharged by adducing credible evidence'. At paragraph [22] (2) Southwood J stated what constituted taxable income in terms of section 11 of the Income Tax Act 58 of 1962 read with the definitions of 'gross income and 'income' in section 1 :

"the first step in the calculation of taxable income is the determination of the taxpayer's gross income. And in determining the taxpayer's gross income all amounts which accrued to the taxpayer in the year of taxation must be taken into account i.e. all amounts to which the taxpayer becomes entitled in the year constitutes gross income - *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 (2 SATC 16) at 207-10 (SATC at 18-21); *Commissioner for Inland Revenue v Peoples Stores (Pty) Ltd* [1990] ZASCA 1; 1990 (2) SA 353 (A) at 367D. According ly, using the deceased's bank account to calculate the deceased's gross income is not a proper method of calculating gross income."

At [23] Southwood J stated:

" Before considering the reliability of the respondent's evidence regarding the deceased 's earnings it is essential that the objective evidence relating to the deceased's financial position be analysed. The evidence that he had a substantial practice and received substantial amounts of cash must be considered against the backdrop of objective evidence. The court a quo did not do so and did not consider how these facts affected the credibility and reliability of the witnesses and the cogency of their evidence."

- [24] It is important in this matter to recap Ms L[...]'s evidence about the business activities of the deceased. He was the sales and marketing person for ERG Gauteng CC, he was also one its members together with his father and siblings. The core business activities were conducted in Swaziland and they entailed the sale and supply of building material and other related commodities. During 2016 the deceased expressed a desire to go it alone by establishing his own business in Swaziland where he had identified a partner. One should not lose sight of the fact that while he had expressed this intention, the bank statements reveal that he continued to be paid a salary by ERG Benoni / Lakeside and by zapps ERG (Pty) Ltd. I understood the latter to emanate from ERG Swaziland (the existing business). In my view Ms L[...] bore the onus to prove on a balance of probabilities that, in what was a short period, the deceased did indeed establish a business of his own in Swaziland with his partner. Having regard to these facts the question arises, how did ERG CC conduct its business in Swaziland; would the deceased have established a business with a similar name to the parent business; why would he still be paid by ERG Benoni or Lakeside and ERG (Pty) Ltd.
- [25] Ms L[...] was in my view honest with the court when she made concessions during cross examination about her lack of knowledge, regarding the activities of the family business both locally and in Swaziland. As I see it, not even the executor of the deceased estate accounted for such interests in the business, of membership or shareholding, which could have been reflected in the liquidation and distribution account as claims favouring the

estate. Furthermore, there is a claim for R161 000.00 against the estate and Ms L[...] testified that it was for an amount advanced to the deceased for purposes of setting up the new business shortly before his death. It was contended by counsel that the deceased passed away prior to appropriating the funds as agreed. There is no evidence to prove this allegation because the

amount is reflected as a claim against the estate and is included in the total liabilities. The amount would be paid from the proceeds in the deceased estate, as provided for in the recapitulation statement, in the liquidation and distribution account annexed to the papers.

[26] In his submissions and heads of argument counsel for the plaintiffs contends that the deceased was busy with restructuring of his business in Swaziland. As I see it, there was no evidence tendered by Ms L[...] relating to a restructuring of the business ERG locally or in Swaziland . In my view, there can only be a restructuring of an existing business or a setting up of an entirely new business undertaking. I understood her evidence to mean the latter view and not that there was a restructuring. Even if I am

mistaken about the meaning attributed to the word restructuring, and except for her word, there was no evidence tendered to show that ERG Swaziland was being restructured to be taken over by the deceased or that a new business came to fruition. The evidence in this regard is mainly speculative and cannot be regarded as proof on a balance of probabilities.

[27] In Ms L[...]’s schedules, exhibit 'B' and, in the later schedule drawn up by counsel annexure 'D', there is no comment on the effect the overdraft facility had on the calculation that is reflected as income and there is nothing said about the fact that at times some payments were not honoured by the bank. This is so despite the rejection of the calculations of the defendant as exhibited in annexure "F", although there is a concession by Ms L[...] that some bond repayments were duplicated in the calculations. Counsel for the defendant addressed the ever-increasing overdraft facilities in cross examination and questioned whether it could be said that deceased could afford to and maintain the lifestyle which she testified about.

[28] It is true that the calculations in "D" were not disputed, however, in my view that is tantamount to over simplifying the circumstances under which the defendant has been placed and expected to dispute the evidence of Ms L[...]. As stated in Oosthuizen supra the lack of contradiction does not absolve the one who bears the onus of adducing credible evidence. It is true as conceded on behalf of the defendant that it did not mean that Ms L[...] was being deceitful, she too was expected to make the best out of what she could recall regarding the activities of the deceased from the bank statements.

[29] It is evident that Ms L[...] had no insight whatsoever into how ERG was operated and into the activities of the deceased and she was honest to have made that concession. I am just of the view that a better attempt should have been made to place cogent evidence before the court. It is no excuse that nothing could have been obtained from the deceased's siblings, in particular the sister who did the books and from Mr Coetzee. The possibility of them being subpoenaed coupled with a subpoena duces tecum was not taken up and this could have

shed light and probably provide assistance to the court. Mr Coetzee was not only the accountant for the deceased, he was the accountant for ERG over a number of years. It is my view that at least he could have shed some light. If he still possessed his working documents the parties could have gained insight into the business and as to where information to complete the tax returns on behalf of the deceased were sourced from.

- [30] To anticipate that deceased's family and accountant would have turned out to be hostile witnesses, amounts to speculation and does not assist the plaintiffs. The executor also could have been subpoenaed. In my view the liquidation and distribution account does not give a full picture of the estate of the deceased as far as it would have indicated the value of his interests in the businesses. Ms L[...] portrayed what she believed to have been the deceased's financial standing without the support of financial statements in the businesses. In as far as the marriage was incorrectly stated in the Liquidation and Distribution Account as one out of community of property, the correct narration of in community of property would not in my view be of consequence because as the distribution indicates, there was a will and that the deceased had bequeathed his half (50%) to Ms L[...].
- [31] I am in agreement with counsel for the defendant that the income as reflected in the tax returns should be considered as the deceased's income. However, I would take it further and say that it reflected income as earned in the Republic of South Africa only because the returns indicate that Pay As You Earn (PAYE) and Unemployment Insurance Fund (U.I.F.) were deducted by the employer. In my view the amounts deducted and remitted to the Receiver and the Fund are amounts payable by registered employers with regards to income earned as a salary in the Republic of South Africa. I see no reason why the income reflected in the bank statements as salary and emanating from a foreign country, Swaziland in this instance, should not be regarded as income and to be added to the that reflected in the tax returns as declared income. It was the obligation of the deceased to have disclosed such income to the Receiver of Revenue. The Liquidation and Distribution Account does make provision for a possible claim by the Receiver in the amount of R50,000.00. It is not clear to me on what grounds such amount was reserved and it is also not an issue to be considered because it was not addressed at trial.
- [32] As a result of the complex nature of the claim, I caused a letter to be addressed to the both parties and requested fresh actuarial calculations to be availed based on the amount on the tax returns plus those amounts reflected as salary in the bank statements emanating from Swaziland. I also asked that the actuaries have regard to the heads of argument of the defendant and the contingencies commented upon. I am told by attorneys of the plaintiff's in a letter dated 15 September 2020 that attempts were made to engage the defendant's attorneys, that the parties agree on the amounts to be availed to the actuaries for a recalculation. The defendant's input was not received and no attempts were made by them to respond to my request. In view of the fact that I have not received any response from the defendant's attorney, I shall accept the adjusted figures by the plaintiff which were made available to the actuaries for a recalculation, and the actuarial report does state that they

took into consideration the contents of my letter to the attorneys.

Re-marriage Contingency

[33] It is a general principle that a remarriage contingency needs to be applied where applicable, however, the trial judge has a discretion to consider what is right according to the circumstances of the case; Southern Insurance Association Ltd v Bailey NO 1984

(1) SA 98 at 98 E-F. Counsel for the defendant contended in his heads of argument that a remarriage contingency is to be applied when the

youngest of the minor children turns 18. Although Ms L[...] was only 35 years old when the deceased died, she was 42 years old when she testified and when the recalculations were ordered and she had not as yet remarried. On the proposal on behalf of the respondent as to when the contingency is to be made applicable Ms L[...] will be 52 years of age. It was further contended that a remarriage contingency of 20% would be a fair adjustment. Counsel for the plaintiff contended that no additional remarriage contingency deduction to the one already considered by the actuaries should be considered along the reasoning of Millar AJ, in L D v RAF (14606/

2016) [2018] ZAGPPHC 181 (5February/2016). Millar AJ as at paragraph 29 stated that the determination of such a remarriage contingency had to take into account all of the evidence, furthermore, that it was a discretionary exercise by the court.

[34] In Esterized supra Toomey J agreed with and, took into account the approach of our Courts in Huley v Cox 1923 AD 234 at 244, which had regard to a dependant's entitlement to be compensated for 'material loss, not to improve their material prospects'. In Peri-Urban Areas Health Board v Munarin 1965 (3) SA 367 (A) at 3768-0 the court stated the following:

" A widow is therefore entitled to compensation for the loss of maintenance consequent the death of her husband, but any pecuniary

benefits similiary consequent must be taken into account.... ... What she has lost is a right - the right to support

Marriage prospects are relevant because marriage would reinstate her right of support.

[35] In Esterhuizen it was proposed for the plaintiff also a woman with three children that a 20% remarriage contingency be applied whereas the defendant argued for a 39% contingency. Tolmay J held that a fair contingency was 27%. She took cognizance of the fact that it was not in all instances where second marriages resulted in financial support for the surviving spouse and that such possibility had to be taken into account when considering a

remarriage contingency. In making such determination she stated the following at paragraph 14

'To determine the Plaintiff's prospects of remarriage and the possibility of financial support is to gaze into the proverbial crystal ball. I take into consideration all the aspects alluded to in evidence. I take note of the fact that the care of the children might make it more difficult for her to focus on her own life and will probably impact on her social life. She is relatively young, and I think one can accept that a younger woman might be more inclined to remarry, not based on appearance or desirability but rather based on the fact that one might be more inclined when you are younger to take another chance at marriage.'

[36] Millar AJ in *L D v Road Accident Fund* supra, having considered the authorities which also endorsed the discretionary powers of the court, stated that although in certain cases statistics relating to re-marriage were used, he disagreed with the contention in Esterhuizen paragraph 6 thereof, that such calculation constituted 'a simple actuarial contingency'. A decision to marry he said was seldom a 'commercial one or one arrived at mathematically'. He expressed two difficulties. The one was in the reliance in many cases on what was said to be the latest edition of Koch's Quantum Year Book data. Not only was the book outdated the statistics based on the census were obtained during an era 'when the fabric of our society was different' and where a large percentage of the population had been excluded. The second difficulty was the 'practical prejudicial effect of a special contingency for remarriage.' It was demonstrated how the contingency when applied would have the effect of a plaintiff having to find a replacement marriage partner or suffer 'a substantial' drop in the standard of living, which would be more prejudicial to younger widow or widower. In this matter no evidence was tendered as to why a remarriage contingency should not be considered.

[37] It was common cause that for purpose of the calculation the parties had agreed on the age of dependency at age 22. Allowance was made for earnings at inflation up to the age of

70. The defendant had argued that the deceased had suffered a heart attack and it was unlikely that retirement would extend to the age of

70. Although no evidence was produced with regard to a retirement up

to the age of 70 it is envisaged that from the evidence any postulations should show that the deceased would have run and sustained his business up to that age. No such evidence is available and I see no reason why the retirement age in these circumstances should not be reduced to 65 years. The deceased had been self-employed and my view is that from his income and lack of any financial statements one cannot conclude that he would continue to generate income for the family beyond 65, in particular for his wife and himself after the children had attained majority.

[38] The recalculation requested by me took into consideration that which was argued in the heads of argument for the defendant. The calculations excluded Ms L[...]'s earnings. Ms L[...] had not been employed for several years before her husband's death and her employment after death was of a temporary nature. The calculations also deducted what was paid to her as an accelerated benefit out of the deceased estate being half of the deceased's share in the community of property.

- [39] The parties met again during November to consider the content of my ruling. This is in line with the defendant's proposition in the defendant's heads of argument and involves a recalculation of the awards. In the supplementary heads of argument by the defendant certain questions were asked as to the exact meaning and implications of my ruling and I wish to confirm what I meant. Although no evidence was tendered by an Industrial Psychologist to determine the deceased's earning capacity it is common cause that the problem was the reliance on bank statements only which made it impossible for this expert to compile a report. This was also identified as a problem by the actuaries.
- [40] Having ruled that to the amounts reflected in the tax returns be added those sums which are reflected and titled salary in the bank statements emanating from ERG (Pty) Swaziland, I further reiterate that it should only be those amounts reflected as salary due to the deceased, and not any other amount. The parties must agree on the total amounts to be referred for recalculation. I further rule that an average of these amounts, that is, the amount in the tax returns and the Swaziland salary be taken to postulate the deceased's loss of earnings until retirement at the age of 65. Although a 20% income generating contingency was suggested to be deducted I recommend that this be reduced to 10%. In calculating the total amount of loss of earnings should be deducted interim payments already made. The other contingencies as suggested should remain. As at date of recalculation Ms L[...] was 42 years and the contingencies to be applied are 7.5% and 20% for future less 20% remarriage contingency. T[...] was 14 years old and contingencies to be applied are 7.5% on past loss and 6% on future loss. O[...] was 13 years old and contingencies to be applied are 7.5% on past loss and 7% on future loss. A[...] was 8 years old and contingencies to be applied are 7% on past loss and 9% on future loss.
- [41] The parties must provide me with a draft order reflecting the awards due to each of the plaintiffs and providing for costs to be reserved till finalization of the dispute. The draft order will be made and order of Court and form part of this

judgement.

TLHAPI J

JUDGE OF THE HIGH COURT

ATTORNEYS OF THE PLAINTIFFS DAWIE BEYERS ATTORNEYS

COUNSEL FOR THE PLAINTIFF ADV MM VAN ZYL SC

ATTORNEYS FOR THE DEFENDANT PHILLIP DU TOIT ATTORNEYS

COUNSEL FOR THE DEFENDANT ADV GJ SCHEEPERS

MATTER HEARD ON 21 FEBRUARY 2020

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tl-and-others-v-lv-unknown-topic-agpphc-2020--6a3ea5123b1caa912980a258>

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