

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No:2019 /15424

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

DATE 9 April 2024

SIGNATURE

IN THE MATTER BETWEEN:

L[...] C[...] W[...]

FIRST PLAINTIFF

L[...] C[...] W[...]

SECOND PLAINTIFF

K[...] L[...] W[...]

THIRD PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SIWENDU J

[1] The court is called upon to adjudicate an action for a claim for loss of support. The plaintiff, Mrs L[...] C[...] W[...] (Mrs W[...]) brought the action against the defendant, the Road Accident Fund (RAF) in her personal capacity and as mother of two minor children, C[...] L[...] W[...], and K[...] L[...] W[...]. The children are cited as the second and third plaintiffs in the action.

[2] The claim follows the death of her husband and their father, Mr U[...] W[...] (the deceased) in a motorcycle accident on 26 May 2018. He was 43 years old. The

deceased and Mrs W[...] were married out of community of property in December 2008. The RAF defended the action and at first disputed liability on the grounds that Mrs W[...] had not established that she was married to the deceased. It also disputed the paternity of one of the minor children. All issues of liability and paternity were subsequently settled except for the question of loss of support. The plaintiffs suffered loss because of the death of the deceased. The trial proceeded on this basis.

[3] The dispute about the loss of support centres on the evidence of income earned by the deceased and the extent of the loss of support due to the plaintiffs. Only two witnesses were called to testify, namely the plaintiff and Dr Johann De Beer, an Industrial Psychologist.

Deceased's Earnings

[4] Mrs W[...] testified that while the deceased was alive, they lived an above average lifestyle. Their children attended private schools at St Dominick's and Christian Brothers's College (CBC). They dined out in expensive restaurants frequently. They enjoyed regular vacations at well know domestic holiday destinations like the Drakensburg and Umhlanga Rocks. The deceased provided all their financial needs, most of which the deceased paid for in cash.

[5] The deceased matriculated at Sunward Park High School in Boksburg. He had no formal qualification but worked as a site manager at Strongbow Construction (Pty) Ltd (Strongbow), a construction company owned by his father. The company operated in the construction sector and serviced the high end residential market. On occasion, the deceased invited Mrs W[...] to visit some of the projects he worked on. Although Strongbow was a registered company, there were no IRP5 returns furnished during discovery or in evidence. The deceased was not a registered taxpayer.

[6] According to Mrs W[...] the deceased often carried a lot of cash up to R 20 000 00 at any one time, which he used to pay employees and provide for their household needs. She recalled that the deceased received payment in cash for building a house in Parkrand. Other than this, she had no direct knowledge of the internal workings or the financial position of Strongbow. The deceased did not

involve her in his financial affairs. The deceased's father could not assist her, and she was thus not able to obtain an employment certificate from him. She testified that to the best of her knowledge, the family's monthly expenses were R43 000.00 per month.

[7] When questioned about the separation reported by Dr De Beer in his expert report, Mrs W[...] informed the Court that although she had left to live with her parents in the South Coast of KwaZulu Natal, the children lived with deceased. She visited them over weekends and Mr W[...] provided her with financial assistance.

[8] The often cited decision in *Hersman v Shapiro & Company*¹ (*Hersman*) makes plain that if that evidence is not available recourse must be had to such evidence as is available; the next best evidence must be led. In the present matter, the only other objective evidence of the deceased's income was in six bank statements tendered in evidence for the period from February 2018 to June 2018. Funds received into the account ranged from R189,400.00, R294,400.00, R59 200.00 to R31,050.00.

[9] Dr De Beer, an Industrial Psychologist who prepared an expert report to quantitate the loss of support, testified that he had interviewed the deceased's father and Mrs W[...] to aid him prepare the report. He informed the court that Ms W[...] left the deceased four years before his passing, due to relationship problems. The couple was separated but not formally divorced. Ms W[...] advised him that the deceased was involved in another relationship and had a drinking problem. Despite the separation, the deceased still provided her with some financial assistance.

[10] The particulars of claim state that the deceased earned an average income of R92 500 per month, as indicated in the Industrial Psychologist report. Dr De Beer testified that the deceased was also involved with a brick company named Makhulu Bricks and was also involved in trading used cars and motorcycles.

[11] According to Dr De Beer, the base salary of a construction manager according to payscale.com ranges from R149 000 per annum to R735 000 per annum, with an

¹ 1926 TPD 367 at 379.

average/median of R29 058 per/month/R348700 p/a. Income of a site manager ranges from R22 500 to R417500 per month. The average salary is reported to be R37 500 per month/R444 000 p/a. In the absence of documentary proof of income, based on the collateral information in the bank statements, De Beer accepted that the deceased's income varied considerably from month to month. He agreed that he could not independently verify Ms W[...]s report of income levels of R100 000 per month.

[12] Dr De Beer postulated that the deceased would have remained engaged in the same ventures until retirement age at 65 years. He testified that the assumptions should be based on the likely pre-accident earnings of approximately R100 000.00 per month/R1 200 000.00 per annum which would have likely increased with inflation. Dr De Beer agreed that a higher than normal contingency deductions should be applied.

[13] The expenses of the family were about R39 000 excluding the children's school fees. It was pointed during the hearing that the deceased no longer owned a home but lived in a rented home. Nevertheless, when regard is heard to the level at which the deceased provided for the education needs of his children, evident from the payments made off the bank statements, the evidence is suggestive of income levels which enable the deceased to maintain a good standard of life for himself. It should be borne in mind that at the time of the accident, Mrs W[...] was working for herself in the South Coast as a Sports Coach. The approximation of the household expenses would be less than the amount suggested in my view.

[14] It was submitted that the approximation of deceased's income should be taken at R92 500.00 per month as per the actuarial calculation which is within the limit of the monies earned by the deceased as provided for in the banking accounts. I pause to mention that this was arrived at by adopting the R100 000.00 recommendation made by Dr De Beer to which was included R 85 000 00 suggested by Mrs W[...] divided by two. As said, the court in *Hersman* states that where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages

suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.

[15] However here, I am not persuaded by the computation advanced in the light of Mrs W[...]’ testimony. As I understand it, although the deceased often had cash in hand, he used part of the monies available to him to pay employees and or buy materials for the construction sites he worked on. On this basis, it cannot be said with certainty that all the amounts deposited in the deceased’s bank account was his “income.” Accordingly, the approximate income can only be objectively ascertained from the household expenses incurred, evidence of his extramural activities and the children’s education expenses and extramural activities. On the best evidence available, the probable approximation of the income of the deceased was R 85 000.00 per month.

[16] Other than the above in respect of the monthly income, I accept the deceased would have remained employed at Strongbow Construction as a Site Manager until he retired at the age of 65. Increases in his earnings would have been equal to the corresponding increases in the Consumer Price Index (CPI).

[17] Other than the base monthly income determined above, I agree with the approach adopted by the actuary in the calculations, that an allowance for tax, interest, inflation, and mortality is necessary. To cater for general contingencies in the broad sense, the normal contingencies of 5% should be deducted from the actuarial values of the past loss. However, in so far as general contingencies, the determination lies in the discretion of the Court. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life"².

[18] The following consideration come into play to a determination of an appropriate contingency deduction: The deceased was at a productive phase of his life. Although he had other siblings, they were not involved in the family business which he operated with his father. The evidence is that Strongbow builds designer

² *Southern Insurance Association Ltd v Bailey NO*, 1984 (1) SA 98.

houses in upmarket residential areas. However, the economic downturns, property cycles and booms as well as the downturn in the construction industry sector would have had a bearing which would potentially lower his incomes in real terms.

[19] As Mr De Beer testified, another consideration is the deceased's love of motorcycling as a hobby ultimately led to an untimely death. In addition, based on a report by Mrs W[...], Dr De Beer also recorded and confirmed in evidence that the deceased was prone to excessive use of alcohol, which is partly one of the reason Mrs W[...] separated from the deceased. For this reason, a higher than normal contingency deduction should be applied to the future loss. Although the matter involved a different industry and the degree of the inadequacy of the evidence differs from the current case, in *Mfomadi v RAF*,³ the court applied a contingency deduction of 40% to the computation of future loss to balance the inadequacy. I am of the view that a contingency deduction of 30% is reasonable and appropriate, and thus balances out all the above considerations.

Computation of the Loss

[20] With regards to the children, Section 15(1) of the Maintenance Act 99 of 1998 entrenches the common law duty of supporting a child on both parents, who share this obligation jointly according to their respective means.⁴ The court in *B v B and another* makes it plain that the incidence of the duty of support in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. This duty arises and subsists until the child becomes self-supporting regardless of the attainment of the age of majority.⁵

[21] Measuring compensation for loss of support is an exercise of judicial discretion in the interest of justice, considering the difference between the current position and the position Mrs W[...] and the children would have been in, had the

³ (34221/06) [2012] ZAGPPHC 152 (3 August 2012)

⁴ Section 15 (1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

⁵ [1999] 2 All SA 289 (A)

deceased not died.⁶ The RAF did not particularly challenge the deceased's duty of support towards the children or the duration of such support.

[22] Dr De Beer presented the second plaintiff's school reports for 2021 (while he was in Grade 8; results) reveals that he had achieved marks falling mostly between the Substantial (60-69%) and Meritorious (70— 79%) ranges. He is born in August 2006 and is currently in Grade 11. He will likely be in Grade 12 in 2025. He wants to qualify as a commercial diver or a professional sailor after completing matric. He will still be financially dependent on Mrs W[...] for approximately two to three years after completion of a course of study. There was no basis to gainsay that he might have been dependent to 2028 or 2029 (which the actuary took as 30 June 2029).

[23] The third plaintiff on the other hand was younger at the time of the deceased's death, born in August 2011. Her scholastic reports of 2021 (while she was in Grade 4) reveals that she had achieved marks falling mostly between the Substantial (60— 69%) and Meritorious (70—79%) ranges. She will likely be in Grade 12 in 2029. She wants to qualify as a veterinarian requiring a minimum of 6 years of study or as a beautician and cosmetologist, requiring a minimum of two years earning an associate degree and Two or more years completing an internship after completion of Grade 12. Here too, there no basis to gainsay that she might have been dependent to 2034 or 2035 (which the actuary took as 30 June 2035).

[24] I agree with Dr De Beer that with regards to the children, that various eventualities may still influence their future and career choices. I am nevertheless satisfied that the calculation of the duty of support can be reckoned from the date of calculation and to 30 June after their 22nd and 23rd birthdays respectively. As to the contingency deduction to be applied to the future loss, for both children, again, in *Mfomadi*, a contingency deduction 20% was applied the loss of support claim of a dependent minor child. She had failed matric and had to repeat the grade. In this case, a general contingency deduction of 15% to the future loss is appropriate.

⁶ *RAF v Monani* 2009(4) SA 327(SCA) at paras 2-6

[25] The matter turns differently when it comes to Mrs W[...]. She lived apart from the deceased for four years. She earned some income as a sporting coach (swimming coach), albeit this varied from year to year. The RAF submitted that her claim for loss of support should be considered with serious caution because she had separated. Although she testified that the deceased continued to support her while living with her parents in KZN, she could not state how much or the extent of this support. Ms W[...] indicated that she is blacklisted, as she is not able to repay a loan that she secured while married to Mr W[...].

[26] The submission by the RAF accords with the points raised earlier and the actuarial report, which rightfully premised the calculation of Mrs W[...]’ loss of support on the basis that she was partly and not fully supported by the deceased’s income at the time of his death. This also accords with the evidence that she took out a loan which she conceded indicates that she sourced other means to support herself other than the deceased. Nevertheless, contrary to the actuary, which assumed that she would have been dependent on the deceased until his retirement at age 65, the separation points to other preponderances about the longevity of the marriage and the duty of support.

[27] Allied to the above is whether Mrs W[...]’ claim should include an additional contingency deduction based on prospects of remarriage or re-partnering over and above the general contingency deduction applicable. There has been much debate about the principle that a claim for loss of support by the spouse of a deceased breadwinner will be influenced by the probable remarriage of the surviving spouse.⁷ It is not necessary for me to enter the pros and cons of the debate, save to observe that in this case, all these factors can be accommodated by applying a higher than normal general contingency deduction. With regards to Mrs W[...], a higher contingency deduction of 60% is appropriate given the factors dealt with above.

[28] In sum, I find that (a) the probable approximation of the income of the deceased was R 85 000.00 per month; (b) the calculations should take account of

⁷ See *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) at 376D; *Marine and Trade Insurance v Katz* 1979 4 SA 961 (A) at 978-980.

the after tax income that the deceased could have earned had there not been an accident; (c) a contingency deduction of 30% is applicable to the future loss; (d) the second plaintiff will be financially dependent for three years after completion of a course of study; (e) the third plaintiff will be financially dependent for four years after completion of a course of study - from the date of calculation and to 30 June after their 22nd and 23rd birthdays respectively.

[29] With respect to both children, a general contingency deduction of 15% to the future loss is appropriate. With regards to Mrs W[...], a higher contingency deduction of 60% is appropriate given the factors dealt with above. The approach above is reflected in the amended actuarial calculation, encompassed in the order.

[30] In the result, I make the following order.

1. The Defendant shall pay to the Plaintiff the capital amount of R4 630 008 (*Four million six hundred and thirty thousand and eight rand*) made up as follows:

L[...]	W[...]:	R1 780 784-00
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C[...]	L[...]	W[...]:	R1 031 354-00
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K[...]	L[...]	W[...]:	R1 817 870-00
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2. Payment shall be made within 14 days into the trust account of Leon JJ van Rensburg Attorneys, namely:

Account Holder:	Leon J J van Rensburg.
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Bank:	ABSA
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Branch:	President, Germiston
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Account number:	2[...]
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Branch code: 3[...]

3. The Defendant shall be liable for interest on the capital amount at the rate of 11,25% p.a. calculated from 15 calendar days of date of this order to date of full and final payment, both days inclusive.
4. The Defendant shall pay the Plaintiff's taxed or agreed party costs on the High Court scale in accordance with the discretion of the Taxing Master, including, but not limited to:
 - a. The costs of counsel on trial to date, namely 20th, 21st and 22nd February 2024, including counsel's consultations with the attorney, plaintiff, experts and witnesses and the drafting of a case summary and/or heads of argument.
 - b. The costs of the attorney's consultations with the experts.
 - c. The costs of the experts *infra* in preparing their reports, addendum reports and statutory forms, in consulting with the attorney and/or counsel as well as their preparation, reservation and qualifying fees, if any:
 - i. PG Human Actuaries.
5. The parties shall first attempt to settle the Plaintiff's party and party costs. If the costs are not agreed, the Plaintiff shall:
 - a. Serve a notice of taxation on the Defendant.and
 - b. Allow the Defendant 14 calendar days to make payment of the taxed costs.

6. The Defendant shall be liable for interest on the costs at the rate of 11,25% p.a. calculated from 15 calendar days of the date of agreement thereto or taxation, whichever is applicable, to date of full and final payment, both days inclusive.

NTY SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This Judgment is handed down electronically by circulation to the Applicants' Legal Representative and the Respondent by email, publication on Case Lines. The date for the handing down is deemed 9 April 2024.

Date of hearing: 21 and 22 February 2024

Date Judgment delivered: 9 April 2024

Appearances:

For the Plaintiffs: Adv W Louw

Instructed by: Leon JJ Van Rensburg Attorneys

For the Defendant: Mr Mdlovu

Instructed by: State Attorney