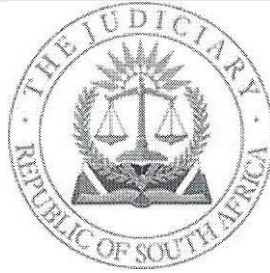


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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: 1705/2017

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

In the matter between:

M V

First Plaintiff

M Z N.O.

Second Plaintiff

(in her capacity as a mother and
the guardian of L H)

M V N.O.

Third Plaintiff

(in her capacity as a mother and
the guardian of D H)

and

ROAD ACCIDENT FUND

Defendant

CORAM: MOROBANE, AJ

JUDGMENT BY: MOROBANE, AJ

HEARD ON: 14 MAY 2019, 3 JUNE 2019

DELIVERED ON: 25 JULY 2019

[1] The Plaintiff brought an action for damages for loss of support arising out of the death of N H ("the deceased"), as a result of motor vehicle collision on 20 December 2014. The action is brought against the Defendant in terms of the Road Accident Fund Act 56 of 1996.

[2] On 20 November 2018, the parties settled the merits and the matter was set down for the determination of the quantum. No evidence was led at the trial as the parties agreed to file heads of argument dealing with contingencies. I was then requested to adjudicate the matter without hearing of further arguments. The agreement between the parties was made an order of court.

[3] In terms the court order, the Defendant's actuary report by GW Jacobson Consulting Actuaries (Pty) Ltd was accepted into record and marked as exhibit "A". The Defendant had agreed to pay the Plaintiff's past and future losses as reflected in Basis II on the scenario of age 21 of the report. The only issue to be determined is the application of contingencies based on the calculations by GW Jacobson.

[4] In the heads of argument, the Defendant argued that the Court must first consider whether the First Defendant has indeed suffered any loss. This argument is contrary to the court order of 14 May 2019, the terms of which were explained at the preceding paragraphs. The relevant provisions of the court order reads:

'2 The gross past loss and gross future loss amounts of the Plaintiffs as

calculated, computed and reflected in Basis II on the scenario of age 21 of exhibit "A", as referred to in paragraph 1 *supra*, are the amounts to be paid by the Defendant to the Plaintiff.

3 The said amounts as referred to in paragraph 2 *supra* is exclusive of the contingencies calculations still to be determined by the Court.'

[5] The issue of quantum was settled between the parties as encapsulated in the court order. This settlement has obviated the need to determine whether the First Plaintiff suffered any loss arising from the death of the deceased. In terms of the court order, the only outstanding issue to be determined by the Court is the calculation of contingencies. The manner in which this issue was raised, is an attempt by the Defendant to vary a court order without following the correct procedure. It is trite that an order of a court of law stands until set aside by a court of competent jurisdiction.¹ In the light of the foregoing, the court order must be obeyed.

[6] When considering the assessment of a proper allowance for the contingencies, the Court held that arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidentially practiced by ancient prophets and soothsayers and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office.²

[7] The agreed Basis II of the report by GW Jacobson is on the assumption that each child would have been dependent until the age of 21 years. A contingency deduction of 5% was applied across the board for the Plaintiffs' past losses. It resulted in the net past losses of R298 133.00 for the First Plaintiff and R149 066.00 for each child. On the future losses, a contingency deduction of 10% was applied which amounted to the net loss of R268 784.00 and R332 895.00 for each child respectively.

[8] As far as the future loss for the First Respondent is concerned, a deduction of 15% was applied. A further 20% remarriage deduction was made which resulted in

¹ Bezuidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (ECO) at 229 B-C

the R1 236 034.00 future loss.

[9] The parties had not taken issue with the contingency deductions of 5% from the Plaintiffs' past losses. In the same breath, the Plaintiff submitted that the normal contingencies should apply as it was not justified to deviate in the present case. The normal contingencies deductions are 5% in respect of past loss and 15% in respect of future loss.

[10] On the contrary, the First Plaintiff submitted that a contingency of 10% should be deducted from her future loss. She further submitted that a 5% contingency deduction should be applied for future loss of each child. However, the Plaintiff has already submitted that compelling evidence does not exist in this case. In *casu*, a deviation from the normal contingency deduction would be unjustified. The contingency deduction as proposed by the Plaintiffs is not accepted. I am of the view that the contingency deductions of 10% on the future loss of each child was correctly applied by the actuary.

[11] The actuary has applied remarriage deduction of 20% over and above the normal contingency applied. While the Defendant supported the deduction, the Plaintiff submitted that additional contingency for remarriage should not be considered separately. The correct approach is to judge each case on its own merits.

[12] As to the remarriage contingency, the principle to be applied in respect of the deduction of contingencies generally, is set out in ***Southern Insurance Association Ltd v Bailey NO***³ that where method of actuarial computation is adopted a Judge has "a large discretion to award what he considers right"

[13] In ***Peri-Urban Areas Health Board v Munarin***⁴ the court said that a widow is entitled to compensation for loss of maintenance consequent upon the death of her husband, but any pecuniary benefits, similarly consequent, must be taken

² Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W) at 392H-393A

³ Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at 116G

⁴ Peri-Urban Areas Health Board v Munarin 1965 (3) SA 367 (A) at 376B-D

into account.

[14] 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. In this regard, a 25% contingency deduction is realistic in respect of future loss of the First Plaintiff.

[15] Consequently, the Plaintiffs are entitled to the relief claimed subject to the contingency adjustments indicated above. There is also no reason why a costs order should not be awarded to the Plaintiffs.

[16] In the premise, I make the following order:

1. The Defendant is ordered to pay to the Plaintiff in her personal capacity the sum of R1 661 405.00 (One million six hundred and sixty-one thousand four hundred and five rand).
2. The Defendant is ordered to pay to the Plaintiff in her representative capacity as guardian of L H the sum of R417 850.00 (Four hundred and seventeen thousand eight hundred and fiftyrand).
3. The Defendant is ordered to pay to the Plaintiff in her representative capacity as guardian of D H the sum of R481 961.00 (Four hundred and eighty-one thousand nine hundred and sixty-one rand).
4. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs, including but not limited to the costs set out hereunder:
 - 4.1 The reasonable qualifying, reservation, attendance fees, costs of reports and expenses of the Rhinus du Plessis from Quantum actuaries, including the costs of witnesses duly subpoenaed and costs of counsel.
 - 4.2 Payment of the capital amount shall be made without set-off or deduction, within 30 calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer.
 - 4.3 Payment of the taxed or agreed costs shall be made within 14 days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;

4.4 No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;

4.5 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at the statutory rate per annum, compounded.

5. In the event that costs are not agreed:

5.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record; and

5.2 The plaintiff shall allow the defendant 14 days to make payment of the taxed costs.

V.M. MOROBANE, AJ

On behalf of the plaintiffs: Adv. PC Ploos van Amstel
Instructed by:
Hill McHardy & Herbst Inc.
BLOEMFONTEIN

On behalf of the defendant: Adv. NM Bahlekazi
Instructed by:
Maduba Attorneys
BLOEMFONTEIN