FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 68/2015

In the matter between:

SALMINA HERCULINA JOHANNA OOSTHUYZEN **1st Plaintiff**

ZANE OOSTHUYZEN **2nd Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 15 AUGUST 2018

DELIVERED ON: 25 OCTOBER 2018

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[1] The issue of liability was resolved on the basis of 100% in favour of the Plaintiffs. The Defendant in other words conceded that an incident occurred on the 1st of April 2011 at approximately 15h15 in Collins Street, Arboretum, Bloemfontein during which incident Mr. Jakobus Hendrikus Oosthuyzen, being a pedestrian at the time, was killed through the negligence of the insured driver.

[2] The following facts are common cause between the parties:

(a) The deceased and the First Plaintiff were husband and wife;

(b) The Second Plaintiff is the grandchild of First Plaintiff and the deceased;

(c) The deceased had a legal duty to financially support and maintain both the First as well as the Second Plaintiffs;

(d) The deceased passed away as a result of the incident referred to above when he was hit by the vehicle driven by the insured driver;

(e) Both First and Second Plaintiffs were deprived of the deceased’s financial support as a result of the deceased’s death;

(f) The deceased supported and maintained the First and Second Plaintiffs during his lifetime and more specifically at the date of the incident;

(g) The deceased would have continued to financially both Plaintiffs had he not pass away as a result of the incident;

(h) The deceased would have financially supported the Second Plaintiff until he became self-sufficient;

(i) The deceased had the financial ability to maintain the First and Second Plaintiffs;

(j) The deceased's income, during his lifetime, consisted of:

(i) income from his job at an average of R3 559,00 per month;
(ii) income from his pension at R15 279,00 per year; and
(iii) medical subsidy at R12 168,00 per year.

(k) The First Plaintiff was not employed during the existence of the marriage and is currently still unemployed;

(l) The First Plaintiff receives half of the deceased's monthly pension which she will continue to receive until she passes away;

(m) The First Plaintiff inherited the property where she currently resides together with the Second Plaintiff.

(n) The deceased was 71 years old when he passed away and would have retired at the age of 75;

(o) The First Plaintiff was 69 years old at the time of the incident and the Second Plaintiff 18 years old.

[3] The issues to be adjudicated upon are:

(a) whether the money derived from the pension should be regarded as income for the First Plaintiff; and

(b) the amount as calculated in the actuary report filed on behalf of the Plaintiffs.

[4] The aim of the Assessment of Damages Act, 9 of 1969 was to amend the law relating to the assessment of damages for loss of support as a result of a person's death. In terms of Section 1 thereof in any action in which the cause arose after the commencement of the Act, when damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account. "*Benefit"* means any payment by a friendly society or trade union for the relief or maintenance of a member's dependents. "*Insurance money"*

includes a refund of premiums and any payment of interest on such premiums. In regards to "*pension*", it includes a refund of contributions and any payment of interest on such contributions and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment.

[5] According to the evidence, the First Plaintiff monthly receives half of the deceased's monthly pension. This fact was also conceded by the Defendant as part of the facts to be common cause. It was further agreed that the First Plaintiff will continue to receive the latter until she passes away. Prior to the deceased's death, the full portion payment was made to the deceased himself which of course he received and, in all probability used, for the support of both Plaintiffs and more in particular First Plaintiff as well as himself.

[6] After the deceased's death half portion of the deceased's pension now befalls the First Plaintiff. This is indeed an income which befalls the First Plaintiff and indirectly also the Second Plaintiff as a result of the death of the deceased. In view of the provisions of the Assessment of Damages Act, such pension benefit should, however, not be deducted from the amount to be awarded as loss of support due to the deceased's death.

[7] As part of the dispute regarding the amount to be awarded to the Plaintiffs as loss of support due to the deceased's death, one of the contested issues is the quantification of such loss and in particular whether the income from the deceased's estate

amounted to an accelerated benefit such that is should be regarded as negativing or reducing the loss of the Plaintiffs.

[8] From the liquidation account handed in as an exhibit, it appears that the value of the immovable property situated as Gascony Street, Helicon Heights, Bloemfontein, is in the amount of R463 640,00. According to the argument of *Mr. De la Ray,* appearing on behalf of the Defendant, this value of the house should be considered to be a so-called "*accelerated benefit"* and is therefore to be deducted from the amount as loss of support which may be awarded to the Plaintiffs.

> *"The measure of damages for loss of support is, usually, the difference between the position of the dependent as a result of the loss of support and the position he or she could reasonably have expected to be in had the deceased not died: Joubert (Ed) the Law of South Africa (1st Re-issue) Vol. 7, par. 89, citing Jameson's Miners v Central South African Railways 1908 TS 575 at 603; Hulley v Cox 1923 AD 234; and Legal Insurance Co. Ltd v Botes 1963 (1) SA 608 A. The particular equities of the case must also be taken into account and an adjustment made where appropriate: Botes above at 614 F – H, where Holmes JA said that the trial judge 'has the discretion to award what under the circumstances he thinks right.' Thus any addition to the dependent's income arising from the death of the deceased must be deducted from the total amount of the loss."*[1]

[9] *Mr. De la Ray* argued that the inheritance of the residential property, meant that because of the First Plaintiff receiving such inheritance, certain debts had been paid earlier had it not been for

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1 Lambrakis v Santam Ltd 2002 (3) SA 710 SCA par 12..

the receipt of such property. For that reason, *Mr. De la Ray* argued that the inheritance of the property should be regarded as an accelerated benefit and therefore deducted from the amount of loss of support claimed by the Plaintiffs.

[10] In **Lambrakis v Santam Ltd** *supra* Lewis AJA (as she then was) stated that where property is inherited by a dependent, in determining the extent of such dependent's loss the court should take into account not the value of the property but that of the accelerated accrual.

> "*This entails accessing the probabilities of the dependent having inherited the property should the deceased not have been killed through the wrongdoing of the defendant, but dying from a different cause at a later date."* [2]

[11] In **Maasberg v Hunt ARS & Hepburn Ltd** 1944 WLD the Plaintiff had inherited, as her husband's heiress, his half of the joint estate. The only asset in the joint estate was indeed a plot of ground, a dwelling house, and furniture half of which the Plaintiff inherited from her husband. At page 13 to 14 Ramsbottom J (as he then was) said the following:

> "*If it is claimed that a deduction should be made for the accelerated receipt of the inheritance, an addition must be made for the value of the accommodations supplied by Maasberg to the Plaintiff. I think that the one may fairly be set-off against the other. The answer to the argument that she can now sell the property and use the money is I think that, if*

2 P. 715, C – D.

> *she did so she would have to provide herself with accommodation elsewhere at her own expense – presumable out of the proceeds of the sale. She has lost the value of the accommodation which her husband provided and whether that is compensated by the share of the house which she had inherited or by what she could get for that share if she were to sell, the result is the same. No deduction can be made on this head.”*

[12] On the same basis it was held in **Mohan and Others v Road Accident Fund** 2008 (5) SA 305 D that no deduction should be made in this regard.

[13] In this regard Nicholson J said the following at 309 A – B:

> “*I was informed that the widow, that is, the first plaintiff, and her son would live in the matrimonial home for the foreseeable future. I understand that the daughter has moved out. There was, therefore, no indication that the house as such or any part thereof would be let out or sold to provide some benefit that had not accrued prior to the death of the deceased .”*

and, more importantly at 309 F – G:

> “*The First Plaintiff would have to rent suitable accommodation or buy a similar house if she sold the matrimonial home. <u>To all intents and purposes she is in no better a situation than she was prior to the death of her husband. (My emphasise)</u>. No evidence was directed to showing that there was any different benefit. I cannot therefore make any deductions in this regard.”*

[14] In the present matter all indications are also to the effect that the First Plaintiff together with her grandson will be staying in the

home which she inherited from the deceased for the foreseeable future. Although it may be taken that Zane might at some stage move out from this property there is no indication that the First Plaintiff will not be staying there. For that reason also I find that the inheritance of the house by the First Plaintiff does not constitute an accelerated benefit and should therefore not be deducted from any amount awarded to the Plaintiffs as damages.

[15] The actuarial report compiled by Messrs Munro Actuaries, calculated on figures as at 1September 2018 contains two scenarios in regards to whether the age of dependency of Zane, being the grandson is to be 18, alternatively 21 years.

[16] According to the evidence of Zane himself, he was 18 years of age when the deceased passed away. He then did not complete his Grade 12 at school but attended a college where he qualified as apprentice. After qualifying as such he obtained employment for which he earned approximately an average of R3 600,00 per month. Before that he also worked as a waiter , as many students do, at a local restaurant. It appears that he was the age of 20 when he obtained his first employment.

[17] Everything considered, it appears that although Zane did obtain his first employment at the age of 20, he was not at that stage yet able to fully look after himself because as he testified, he was still as is the position today, residing with his grandmother. I therefore find that on the two scenarios presented by the actuaries, the age of dependency in regards to Zane should be 21 years. As stated, it was conceded by the Defendant that the deceased had a duty to

support in regards to both the Plaintiffs. In the words of Holmes JA:

> "*The trial judge has the discretion to award what under the circumstances he thinks right.*"

[18] Therefore the following order is made:

ORDER

1. Defendant is ordered to pay Plaintiffs the amount of R905 405,00;

2. In the event of such damages not being paid within 14 days from the date of judgment, interest at the rate of interest *a tempore morae,* shall be payable;

3. Defendant is to pay the costs of suit.

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J.J.F HEFER, AJ

On behalf of the Plaintiffs : Adv. D. de Kock
Instructed by Webbers Attorneys
BLOEMFONTEIN

On behalf of Defendant : Adv. H. de la Ray
Instructed by Maduba Attorneys

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