



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

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

Case number: 4904/2014
4905/2014

In the matter between:

ESTELLE LABUSCHAGNE

First Plaintiff

RENIER LABUSCHAGNE

Second Plaintiff

And

ESTELLE LABUSCHAGNE

Plaintiff

THE ROAD ACCIDENT FUND

Defendant

CORAM:

LEKALE, J

HEARD ON:

10, 11 AND 13 MAY 2016

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

13 JUNE 2016

BACKGROUND AND INTRODUCTION:

- [1] In a civil action the plaintiff, as *dominus litis*, is obliged to furnish proper and full instructions necessary for successful litigation to her legal representative, as the captain of her boat, if she has any, for the latter to decide on appropriate legal course to follow in order to secure the relief desired by the former. Failure on the part of the plaintiff to so furnish full information may result in the captain deciding on the wrong course to follow and, consequently, steering the boat in the wrong direction. This proposition is evident from the facts *in casu*.
- [2] On the 26 December 2009 and at or near Koppies Road in Sasolburg the motor vehicle in which the first plaintiff under case number 4904/2014(the first plaintiff), who is also the plaintiff under case number 4905/2014, was travelling together with her husband (the deceased), who was the driver, was involved in a collision with another motor vehicle. In and as a result of the said collision the first plaintiff sustained fairly severe bodily injuries while the deceased, on his part, passed away.
- [3] Following the collision the first plaintiff and second plaintiff, who is the former's stepson and the deceased's biological son, eventually issued summons against the defendant for loss of support under case number 4904/2014 on the basis that the collision was caused by the sole negligence of the driver of the other vehicle who was insured by the defendant. The first plaintiff, further, instituted action against the defendant under case number 4905/2014 for general damages and loss of income.

- [4] On the 23 February 2016 the two matters were consolidated per agreement between the parties. The defendant, further, conceded merits under case number 4905/2014 and agreed to settle the first plaintiff's claim relating to general damages leaving special damages to the court for determination. The matter was postponed with costs being directed to be in the cause.
- [5] The consolidated matter now serves before me for determination of first plaintiff's quantum of special damages relating to loss of income under case number 4905/2014 and the two plaintiffs' respective quanta of special damages relating to loss of support under case number 4904/2014.
- [6] At the commencement of the proceedings the parties, through their respective counsel, announced that the medico-legal reports of Drs PA Olivier, JR Becker, S Moagi and Moloto be admitted in evidence per agreement. Such reports were accordingly admitted as exhibits "A" to and including "E".

ISSUES FOR DETERMINATION:

- [7] The parties are at variance on the quantum of first plaintiff's claim for loss of income with the defendant contending that she is entitled to no award at all regard being had to, *inter alia*, the fact that, on her own evidence before the court, she was the co-owner of the income generating family business which continued to trade under the second plaintiff and to generate revenue after the

collision until it was, eventually, sold in 2014 and, further, that she made three attempts at securing employment since the collision.

[8] The dispute between the parties is, further, related to the question whether or not the first plaintiff suffered loss of support in the light of her evidence to the effect that she was, effectively, in partnership with the deceased in the family business in question.

[9] The parties are, furthermore, in dispute over whether or not the second plaintiff suffered loss of support regard being had to the fact that he took over the family business and traded for his own account after the deceased's death earning R7000.00 per month until he sold the same long after attaining 21 years of age.

PLAINTIFFS' VERSIONS:

[10] In support of their respective cases the plaintiffs testified under oath and adduced the evidence of one expert witness as follows:

10.1 Jürgen Reiner Becker: He is an industrial psychologist by profession and consulted with the first plaintiff to investigate the accident and its sequelae on her. He found from, *inter alia*, the report prepared by Dr Olivier that the first plaintiff sustained fairly severe injuries that rendered her suitable only for sedentary work requiring a very accommodative employer. Prior to the collision the first plaintiff worked at the family business. Expectations were that she would earn in the region of R4500 per month in future because, prior thereto, she was gainfully employed at R4200 per month.

She and her husband did not draw any salaries from the family business as at the date of the collision. The business was, however, doing well and generated around R30 000 per month as net income. They lived well because the business provided for them. She has 20% prospects of securing such accommodative sedentary employment in the current economic atmosphere. The hip problems she is experiencing requires further medical intervention which, as pointed out in Doctor Moagi's report, would further render it difficult for her to compete favourably in the open labour market.

10.2 Estelle Labuschagne: Prior to joining the family business she was employed by a security company as an administrator earning R4200 per month. She and the deceased agreed to start a business and she secured a personal loan in the amount of R50 000 as capital for starting the business in question. Although nothing was put on paper she was a partner in the business with the deceased doing further private work to augment the income generated by the business. The expectation was for her to eventually earn in the region of R4500 *per* month. The income from the business and the deceased's private projects ensured that they lived well at home. The business generated net income of about R30 000 per month and carried a lot, if not all, of their expenses. After the collision Absa bank informed her that the deceased had left a will bequeathing the whole of his estate to his first wife, as the survivor, and the business, thus, went to her. The deceased's first wife, in turn, passed the business over to the second plaintiff as her son. Since

the collision she applied, without any success, for suitable work on three occasions. She tried to resume work at the family business after the collision but could not manage as she could not carry the stuff she used to handle in the past. She and the deceased never discussed the shares in the business but she believed that she was entitled to half of the business.

10.3 Renier Labuschagne: He is currently 24 years of age and is employed as a teacher in Mokopane. He was in matric in 2009 when the deceased met his untimely death. He was supposed to go to university in 2010 to study Electrical Engineering and had successfully applied for admission at the University of Pretoria and the University of North West, Potchefstroom campus. The deceased, as his father, was to pay for his university education and was in the process of actually doing so insofar as he had already paid the irrefundable application fee. He was familiar with the family business because he used to assist the deceased thereat. After the collision he took over the family business and used to take first plaintiff to the business to work but it did not work out. He actually got frustrated with the first plaintiff because she could not pull her weight at the business following the accident.

The business was doing well particularly in 2010 as a result of the FIFA World Cup tournament. Business was good to the extent that he even decided to pay himself R7000 per month. The net income was more than R30 000 per month.

Business was, however, not doing so well when he sold it in 2014. He could not handle business and his studies at the same time. He is currently studying towards B Ed degree.

CONTENTIONS FOR AND ON BEHALF OF THE PARTIES:

Defendant closed its case without leading any oral evidence and only submitted argument on the evidence before the court.

THE PLAINTIFF PARTIES' SUBMISSIONS:

- [11] Mr de la Rey for the plaintiff parties submits to, *inter alia*, the effect that it is clear from available evidence that the first plaintiff would have been able to command R4200 per month were it not for the collision. In his view it is further patent from evidence that the deceased was able to support the plaintiffs and would have continued to do so but for the accident. The plaintiffs needed the relevant financial support from the deceased who was both legally bound and able to provide the same.
- [12] The first plaintiff is entitled to compensation for loss of income as well as loss of support as set out in the actuarial reports handed in as evidence *per* agreement between the parties. The fact that she was a partner in the family business does not serve to defeat her claims and can, in an appropriate case, only affect applicable contingencies. Second plaintiff's claim for loss of support should also be allowed in accordance with the said actuarial reports. He, further, reminds the court that it enjoys a wide discretion on the

issues involved and is not bound by actuarial calculations although they are more than informed estimates.

THE DEFENDANT'S CONTENTIONS:

- [13] On behalf of the defendant Mr Sander submits that the plaintiff parties failed to prove their respective claims insofar as the essence of a claim for loss of income is to remunerate the plaintiff for the loss of income capacity while for a claim for loss of support to succeed, the plaintiff must establish the need for support, among others. A claim for future loss of income lies when a plaintiff is unable to generate income in future due to bodily injuries. In this regard he laments the fact that Dr Becker testified before the first plaintiff *per* agreement between the parties and, as such, could not be afforded an opportunity to comment and express an opinion on her evidence.
- [14] The first plaintiff, as a co-owner of the family business, could still generate income from the business which exceeds her claim by far. She, however, elected to surrender her share in the business. Her claim for loss of support suffers the same fate as a co-owner of the business. The second defendant suffered no loss of support because he acquired the family business and generated good income therefrom. He is presently employed and studying towards a degree with financial assistance from his employer.
- [15] According to the defendant the claims should be dismissed alternatively, the first plaintiff's claim should be subjected to at least 30% to 35% contingency deductions.

RELEVANT LEGAL PRINCIPLES:

- [16] The court retains wide discretion in the assessment of damages based on loss of income and support which cannot, in general, be assessed with any degree of mathematical accuracy. (See **AA Mutual Insurance Association Ltd v Maqula** 1978 (1) SA 805 (A)).
- [17] It is true that the court is obliged, as of duty, to assess damages and award compensation if it is certain that pecuniary damages have been suffered. (See **Hersman v Shapiro and Company** 1926 TPD 367 at 379).
- [18] In a claim for loss of support the remedy relates to material loss and seeks to place dependants of the deceased bread-winner “in as good a position , as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered.” (See **Legal Insurance Company Ltd v Botes** 1963(1) SA 608 (A) 614E-F) As a general principle a dependant plaintiff must prove material loss caused by the death of the benefactor in order to be awarded damages for loss of support. Such material loss can only be ascertained “by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source, comes to him by reason of the death”. (See **Indrani & Ano. v African Guarantee & Indemnity Co.** 1968(4) SA 606 (D&C) 607G-H and **Hulley v Cox** 1923 AD 234 at 243)

- [19] Contingencies, negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There exists no hard and fast rule regarding contingency allowances. A dependant's post-death earnings are not deductible in the determination of his claim for loss of support unless they are consequent upon the death of the benefactor in the sense that there exists a direct or causal connection between such earnings and such death. (See **Peri – Urban Areas Health Board v Munarin** 1965(3) SA 367 (A) at 376A- D and **Gwaxula v RAF** [2013] ZAGPJHC 240 para [25]).
- [20] It is imperative, in a claim for loss of support, for the claimant to establish the need for support as well as the fact that the person from whom support is sought both bears a legal duty to provide the same and is, in fact, able to so. (See **Senior NO v National Employers General Insurance Co Ltd** 1989 (2) SA 136 (W) at 139D-F).
- [21] In **Lambrakis v Santam** 2002(3) SA 710 (A) *para* [12] the court found that “The measure of damages for loss of support is, usually, the difference between the position of the dependant as a result of the loss of support and the position he or she could reasonably have expected to be had the deceased not died. ...The particular equities of the case must also be taken into account and an adjustment be made if appropriate. ... Thus an addition to a dependant's income, arising from the death of the deceased must be deducted from the total amount of the loss.”

- [22] The defendant gets absolved from the instance if upon an evaluation of the evidence as a whole, the plaintiff's onus of proof has not been discharged because the plaintiff has not proved his claim against the defendant. It is not a bar to the plaintiff reinstituting the action in so far as it has not prescribed. As opposed to a positive finding that no claim exists against the defendant **"it is the appropriate order when after all the evidence the plaintiff has failed to discharge the normal burden of proof"**. (See **PRINCIPLES OF EVIDENCE** Revised 3rd Edition, P J Schwikkard and S E Van der Merwe, at Chapter 32, page 578.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

AD CASE NO 4904/2014

- [23] Plaintiffs submitted actuarial reports in evidence as well as reports by the industrial psychologist Dr Becker in support of their claims. It is however patent from such reports that the experts involved relied on the information at their disposal in compiling the relevant reports and expressing the relevant opinions. The reports are, as such, as correct as the information on which they based. The reports attribute the R30 000 monthly net income of the family business to the deceased and calculate loss of support for each plaintiff on that basis.
- [24] The first plaintiff's evidence in court differs substantially from the information given to Dr Becker insofar as it is clear therefrom that

she, as the claimant, was the co-owner of the family business from which the income which supported the whole family inclusive of herself was derived. It is, further, apparent from both her evidence and that of the second plaintiff that the business in question was doing well insofar as it was generating at least R30 000 per month as net income at the time of the accident and thereafter.

[25] It is, further, not in dispute that following the death of the deceased the second plaintiff took over the family business and continued trading until 2014 when he sold the same. He derived good revenue therefrom and tried to accommodate the first plaintiff thereat without success.

[26] The question in the instant matter as far as the second plaintiff's claim is concerned is whether or not he needed the relevant support or suffered material loss as a result of the death of his deceased father. It is not in dispute that he was dependent on the deceased in the amount set out in the actuarial reports at the time of the deceased's death. It is, further, true that the deceased supported him, as his father. It is furthermore patent from undisputed evidence that he did not acquire the business directly from the deceased's estate as an inheritance and, as such, it cannot *prima facie* be regarded as an accelerated benefit to him flowing directly from the death of the deceased. He, therefore, suffered material loss as a result of the deceased's death. In my view his income from the business cannot be taken into account when determining his claim because, but for the death of his father, he would not have worked. There exists no direct or causal

connection between such earnings and the death of the deceased insofar as same are “**the product of [his] own exertion in keeping the business going.**” The preceding notwithstanding the fact that such death made it possible for him to assume control of the business and to virtually step into the deceased’s shoes immediately after the latter’s demise (See **Nochomowitz v Santam Insurance Co. Ltd**1972(1) SA 718 (T) at 727G-H).

[27] The first plaintiff’s position, as at the time of the collision and thereafter, is clear from her oral evidence. The income attributed to the deceased in the actuarial reports was actually their joint income as co-owners of the family business. They made joined decisions in the business and the business bank account was in their names jointly. She kept the bank card and the deceased had to come to her whenever he needed money. She advanced the R50 000 capital amount which started the business and, although they never discussed the shares in the business, she believes and the facts suggest that she owned half of the business. The deceased was under administration and the accounts were in her name. She would have been liable for business debts. They pooled their resources together to start the business as partners. The business never stopped trading as a result of the accident and continued to generate net income of at least R30 000 per month until it was sold in 2014.

[28] At the time of the collision the first plaintiff was, in effect, earning income from the business as a partner insofar as the business, not the deceased, provided for her and her earning capacity in that regard was, as such, *stricto sensu* not injured. It is not

apparent from available evidence that the deceased supported her, in addition to her share of the proceeds from business, and, if he did, to what extent. The onus is on her to prove the same and, in my judgment, she has not.

AD CASE NUMBER 4905/2014

[29] First plaintiff, as the sole plaintiff in this matter, claims past and future loss of income in the total amount of R2 212 848.00 as per Mr de la Rey's submissions supported by actuarial reports. Mr Sander, for the defendant, contends that the claims should either be dismissed or reduced substantially in the light of the plaintiff's *viva voce* evidence as corroborated by second plaintiff.

[30] As pointed out with regard to the claim under case no. 4904/2014, the actuarial calculations in the instant claim are not based on the first plaintiff's earning capacity, as the co-owner of the income-generating family business, at the date of the accident. In my judgment she did not, on her own evidence, sustain any loss of income as a result of the collision insofar as her earning capacity in that regard was not affected thereby. If she suffered any such loss, same was the result of either the transfer of the business to the second plaintiff or the sale thereof by him. It was for her to enforce her rights in that regard. The defendant, however, conceded 100% liability for her damages for loss of income on the basis of, *inter alia*, the reports of Drs Olivier and Becker. The onus on her in this regard is, thus, limited to proof of the amount of her damages. In my judgment the reports in question, inclusive of the actuarial reports, are relevant to the period after the sale of

the business, which was no longer performing well, in 2014. She has, however, not discharged the burden resting on her as far as part of her claim for past loss of earnings is concerned. After the business was sold she would, most probably, have reverted to her pre-entrepreneurial position for a living but for the collision which left her suitable only for sedentary work at the mercy of a very accommodating employer.

- [31] She, therefore, suffered loss of income from and including 2014 with the result that available actuarial calculations need to be adjusted accordingly in respect of past loss of income. I am, further, persuaded by the facts in the instant matter that fairness places applicable contingency deductions for past and future loss of income at 5% and 20% respectively. The exact date on which the business was sold is not before the court. For the sake of finality and fairness to the plaintiff I accept that the sale took place at the very beginning of 2014. In the result R311 927.00 relative to the years from 2010 to and including 2013 must be deducted from her past loss of earnings as per actuarial reports.

COSTS

- [32] The general principle with regard to costs is that the successful party is entitled to its costs in that same follow the event unless cause exists for holding otherwise. I am persuaded by the circumstances in the instant matter that fairness dictates that:

32.1 recognition be taken of the fact that defendant conceded merits and effectively accepted liability for 100% of first

plaintiff's proved or agreed damages for loss of support, among others. The first plaintiff was, as such, in law and equity entitled to approach the court to prove quantum of her damages in the absence of agreement on the same;

32.2 no order as to costs be made against the first plaintiff.

ORDER

- [33] In consequence defendant shall pay the plaintiff under case number 4905/2014 the capital amount of R1 900 921.00 (one million nine hundred thousand and nine hundred and twenty one rand) for loss of income.

- [34] Defendant shall, further, provide plaintiff under case number 4905/2014 with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act No 56/1996 to compensate her 100% for the costs of future accommodation in hospital or nursing home or treatment of or rendering of a service or supplying goods to her, arising out of the injuries sustained in a motor vehicle collision on 26 December 2009.

- [35] An order of absolution from the instance is granted in favour of the defendant in respect of first plaintiff's claim for loss of support under case number 4904/2014 with no order as to costs.

- [36] Defendant shall pay the capital amount of R238 927.00 (two hundred and thirty eight thousand and nine hundred and twenty

seven rand) to the second plaintiff under case no. 4904/2014 for loss of support.

[37] The total of the capital sums in paragraphs [33] and [36] above shall be paid within 14 days of date hereof, after which interest shall accrue thereon at the rate of 10,25% per annum.

[38] Defendant shall, further, pay plaintiffs' costs in both matters on the High Court scale as between party and party, as taxed or agreed, including but not limited to the following:

- (i) all costs attendant upon the obtaining of payment of the total capital amounts;
- (ii) counsel's fees;
- (iii) the reasonable travelling and accommodation fees of second plaintiff's legal representatives;
- (iv) the qualifying fees and all reasonable and necessary fees and disbursements of expert witnesses referred to herein below. It is recorded that it shall be in the discretion of the Taxing Master to determine whether the experts are entitled to be compensated for reasonable and necessary traveling expenses:
 - (a) Dr P A Olivier [Orthopaedic surgeon];
 - (b) Dr J Becker [Industrial Psychologist];
 - (c) Quantum Actuarial Services CC [Actuaries].

[39] Payment of the taxed or agreed costs shall be effected within 14 days of date of agreement or taxation, after which the agreed or taxed costs shall accrue interest at the rate of 10.25% per annum.

[40] In the event of costs not being agreed, second plaintiff shall serve the notice of taxation on defendant's attorneys of record.

[41] Payment of capital amounts as well as party and party costs shall be made to plaintiffs' attorneys of record by means of electronic transfer of funds to the account specified hereunder:

Name of account : Madeleyn Inc.

Name of bank : ABSA

Branch : Santyger

Branch code : 632005

Account No : [.....]

LJ LEKALE, J

On behalf of plaintiffs: Adv. H E de la Rey
Instructed by:
Symington & De Kok
Bloemfontein

On behalf of defendant: Adv. A Sander
Instructed by:
Maduba Attorneys
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