Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NR : 799/2011

JUDGMENT

S. M. M. PLAINTIFF

AND

THE ROAD ACCIDENT FUND DEFENDANT

DATE HEARED: 25; 26; APRIL 2013 & 02 MAY 2013
DATE DELIVERED: 24 JULY 2013

PHATSHOANE J

1. Mr D. J. P. M., the deceased, died in a motor vehicle collision on 28 September 2010 at the age of 36. This gave rise to a claim for damages for loss of support in the amount of R4 083 978.75 by Ms S. M.M., the plaintiff, in her personal capacity as the widow and in her representative capacity as the mother and natural guardian of her two minor children, S….. And R………. Minne, against the Road Accident Fund (RAF), the defendant. The merits and quantum were separated in terms of Rule 33(4). The only issue to be determined is the quantum of damages as the defendant has conceded liability for 100% of such damages that the plaintiff is able to proof.

2. The plaintiff, now aged 39, was married in community of property to the deceased for 13 years when he died. S and R were born of this marriage on [...] 2001 and [...] 2006, respectively. S is disabled.

3. The deceased worked at Black Rock Mine, Northern Cape Province, and earned R34 932.67 per month (in 2010) from which the family subsisted as the plaintiff was unemployed at the time of the deceased's death. She commenced working a year later.

4. It is in dispute whether there are accelerated benefits to be deducted from the amount to be awarded to the plaintiff; whether a contingency should be factored in for the plaintiff's possible remarriage; whether S has a normal life expectancy; whether S should receive two parts of the family income instead one part from the deceased date of death; and lastly; whether the social and disability grants that the children will receive from date of the judgment should not be deducted from the amount of damages.

5. Mr Jethro, for the defendant, contended strenuously that the apportionment of maintenance should be effected in accordance with the common actuarial approach of two parts to each parent and one part per child. To appreciate the dynamics it is important to have regard to the evidence adduced for the plaintiff. No evidence was led on behalf of the defendant.

6. Dr Wynand Johannes Herholdt is a paediatrician. He consulted S for the first time when she was three years old during 2004. She had just started to experience convulsions. Her last visit to him was on 02 February 2012 when she was about 10 years old. S suffers from *spina bifida,* a congenital disorder with no cure. She has typical milestone delays. She weighed 15kg as opposed to 22kg at the age of 10 or 11. She is in a state of paralysis. She cannot speak, walk, or sit properly on a wheel chair. At times she must lie down. She cannot control her stools or urine and wears nappies. She also showed signs of impaired intelligence. She is completely dependent on others and cannot be left alone in any given moment. Her condition is irremediable. Her financial need is well above that of a normal child. She would not be able to work to earn an income. She will be more sickly than normal. She will be prone to lung and bladder infections. She will need physiotherapy, anti-convulsion treatment and occupational therapy permanently.

7. The plaintiff testified that S cannot chew and lives on a liquidized diet. A special machine was bought for this purpose. The plaintiff pays R250.00 for physiotherapy and the same amount for occupational therapy per consultation which totals R2000.00 monthly. She spends at least R450.00 on her nappies monthly. She also spends money on her wet wipes. She has to pay for S's paediatric visits and blood tests every 6 months. A special new wheel chair has to be bought for her which will cost at least R20 000.00. S expenses increases as she grows.

8. The plaintiff intimated that the deceased spent twice on S than on the plaintiff and Ruben. The same spending continues to this date. She employs a domestic worker to assist in preparing the children for school. If S was not disabled it would not have been necessary to have a domestic worker who stays full time with the family. She is of the view that her chances of remarriage are quite minimal as she does not have a social life. It is not everyman that would accept her with a disabled child.

9. R is a grade 1 learner. His school fee is about R600 monthly while S's remedial school fee is about R1 640 per month. Ruben is doing well at school and his prospects of furthering his studies after 18 years of age are good.

10. Mr Ian Walsh Morris, an actuary in the employ of Human & Morris Actuaries, has 28 years of experience in this field. He assessed the value of the loss of support suffered by the plaintiff and her two minor children. As at date of calculation, 28 April 2013, the deceased would have earned R487 288 per annum. The increment was assumed at 6% per annum from date of the accident to date of the calculation. He has also assumed that the deceased would have paid tax according to the relevant tax tables which apply to the relevant tax year. From the date of calculation onwards the 2013/2014 tax tables were applied to constant real income. He had assumed that the deceased would retire at the age of R65. He also assumed that R would require parental support up to the age of 18 years alternatively 21 years while S would require support for life. He used two scenarios for the computation of the family income. Scenario 1 assumes that the pre-accident net family income would have been apportioned two parts to each parent and one part to each child deemed to be in receipt of parental support. Scenario 2 assumes that the pre-accident net family income would have been apportioned two parts to each parent, two parts to S and one part to R whilst deemed to be in receipt of parental

support. The two calculations were premised on two postulates, firstly on the understanding that R will be self-sufficient at the age of 18 whereas the other calculation is based on R being self- dependent at the age of 21.

11. Mr Morris applied general contingency deductions of 7.5% to past and 10 % to future losses of support for the plaintiff and R and a deduction of 7.5% to past and 15% to future losses of support for S. Remarriage contingencies in respect of the plaintiff were ignored and no contingencies had been applied to the state grants.

12. Mr Morris was supplied with information in respect of the proceeds of the insurance policies and pension. This cannot be brought into the reckoning in the acceleration of benefits.

13. In arriving at his final figures of the loss of support he deducted an amount of R40 322.25 from all figures in respect of the care dependency grant for S and child support grant for R, being the payment received by the plaintiff from the South African Social Security Agency (SASSA) as at 25 April 2013. This was the sum total of the evidence presented to support the plaintiff's claims.

14. The defendant filed a report of Munro Actuaries who applied the same contingency percentages as Mr Morris for the past and future loss of support for the plaintiff and her two minor children. Mr Jethro, for the defendant, contended that there is hardly any disparity between the reports of Munro Actuaries and that of Human& Morris. If this is the case, it defies understanding how the defendant would pursue this matter to trial stage at such considerable costs.

15. It is well settled that the compensation to which the plaintiff is entitled is only for the material loss caused to him/her by the accident, and not for mental suffering or distress, or to improve his/her material prospects. There can be no hard and fast rules, and a liberal discretion must necessarily lie with the Court to award what, in the circumstances, it considers equitable. But there are in the authorities certain guiding considerations. See **Hulley v Cox 1923 AD 234**; **Smart and Others v South African Railways and Harbours 1928 49 NPD 361**. In **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)** at 116G-117A Nicholas JA held:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per HOLMES JA in Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."

16. Mr Jethro contended that the plaintiff failed to declare all the assets of the joint estate to the Master of the High Court. The only two assets declared were furniture to the value of R5000.00 and a Mazda Drifter to the value of R100 000.00 and therefore half of the joint estate assets to the amount of R52 500.00 should be deducted. Mr Morris contended that the vehicle and the furniture cannot be regarded as accelerated benefits which fall to be deducted. This is because the plaintiff owned at least half of these assets by virtue of her marriage in community of property. In any event it is impossible to divide a couch and a vehicle which the plaintiff had used before the deceased's death.

    I am disinclined to allow this deduction. Quite apart from the fact that the amount is negligible, the evidence revealed that the plaintiff lost R23 000.00 for the vehicle in issue because she settled the balance outstanding in respect thereof in the amount of R153 880.40 and sold it for R130 000.00.

17. Mr Jethro further argued that there was a pension benefit due from the employer in the amount of R767 677.34 and about R329 004,58 invested for the children of which the plaintiff received R480.00 per month; that Old mutual paid money from a policy in the amount of R9 516.72; a death benefit of R194 873 and the equal accident benefit of R194 873. In addition the plaintiff received R37 101.00 from the Unemployment Insurance Fund.

18. Insurance money, pensions or benefits which have been or will or may be paid as a result of death may not be taken into account for the purposes of quantifying loss of support (See **LAWSA**, second edition Vol 7 at 77 para 89; Sec 1(1) of the Assessment of Damages Act, 9 of 1969. Mr Jethro persisted that the accident benefit of R194 873 is a deductible accelerated benefit. There is no evidence that this amount was an accident benefit. None of the parties called Old Mutual to give an explanation on the contents of its letter to plaintiff in respect of this benefit. Even if the policy was an accident benefit it forms part of the policy that paid out on death of the deceased and therefore not deductible.

19. Counsel for the RAF argued further that a contingency should be factored in for the plaintiff's probable remarriage as she is not yet 40 years of age. He contended that 15% for future contingencies should be applied in respect of the plaintiff (including her prospect of remarriage) and referred me to the following remarks by Botha AJ in **Nochomowitz v Santam Insurance Co Ltd 1972 (1) SA 718 (T)** at 726G-H:

"The next matter in issue is the deduction, if any, to be made from the plaintiff's gross loss for her prospects of remarrying. It is common cause that the South African statistical figure of 7 per cent in respect of a widow of the age of the plaintiff is no reliable yardstick to adopt. As far as the evidence is concerned my impression of the plaintiff as I observed her in the witness-box is that she is of presentable appearance for her age, and that she has an intelligent and pleasant personality. It is obvious from her evidence, however, that she had a very high regard and affection for the deceased and that she is in consequence over critical of all other men. On this basis I consider that the chances of her remarrying are slender. Nevertheless, although neither of the actuaries allowed for any deduction in this respect, and although Mr. Wulfsohn argued that this was a case of de minimis, I think that some effect should be given to the contingency of remarriage, and I fix the deduction to be made at 2 per cent of the plaintiff's gross loss."

20. The facts in the above case are quite distinguishable from the present. In that case no mention is made of a disabled child. *In casu*, the plaintiff has devoted her life to her children. My observation is that she is cultured, smart and neat. From her evidence she does not have much of a social life as she goes to work, church and home where she spends time with her children. She is not in a relationship with any man and foresees none. In her words it is not everyman that would accept her with the disabled child. The

remote chances of her re-marriage are minimal. I cannot see why further deductions should be allowed for this remote prospect. If she does get beneficially married it will remain an issue of *de minimis non curat lex*.

21. Insofar as S's life expectancy is concerned Mr Jethro argued that 20% for future contingencies (inclusive of her life expectancy) should be applied. The paediatrician testified that he is not an expert in the field of life expectancy and could not speculate on this aspect, but submitted nevertheless that there is no reason why Suandri could not live up to the age of 80 years if she is well cared for. As he puts it, even people with "dreaded diseases" live on to the age of 80. This testimony remains uncontroverted. As already highlighted in the contingencies applied by Mr Morris 15% contingency on future loss of support for S had been factored in as opposed to 10 % applied to the plaintiff and R. This should cater for any possible diminished life expectancy.

22. Mr Jethro contended that in accordance with the traditional norm the apportionment of family income should be two parts per parent and one part per child. In Joubert **LAWSA**, Vol 7 para 89, the following passage appears:

"(T)he portion of the deceased's income devoted to support of the plaintiff – involves an estimate of how much the deceased would have continued to set aside for the deceased's own use and for expenses, and how much for his or her dependants. It is always necessary to accommodate special factors – for instance, that one child would require a larger share than his or her siblings, and that as children become independent so the surviving spouse would receive a greater proportion of the income. In the absence of such special factors, the common actuarial approach is to allocate two parts of the deceased's income to each parent and one part to each child."

23. See also **Groenewald v Snyders 1966 (3) SA 237 (A)** at 247F-H.

"In bread-winner cases it might sometimes be possible to prove the value of the lost support by reference to the cost to the dependant of continuing in the same standard of living. This, however, is impractical, if not impossible, where the deceased and his dependants (each of whom has an individual claim) have been living as a family entity in a joint household. In that event, especially in the average case where the deceased has been spending his available income on the maintenance of himself and his family, a recognised approach is to apportion his nett income among the members of the family on a basis appropriate to the facts. No invariable

formula for apportionment can be laid down, since the support of the family may involve more expenditure on one member than on another, for example if one of the children is an invalid with high medical expenses personal to himself."

24. As already alluded Mr Morris presented two scenarios in his calculation. The contingencies and statutory cap had been applied to his calculations. The first is based on S receiving 1/6 of the family income and the second based on S receiving 2/7 of the family income. He testified that if the Court finds that S should receive one part (1/6) and R will be self-supporting at the age of 18 an award of R3 841 147.75 should be made (scenario 1 age 18). If the Court finds that S should receive one part of the family income and R becomes self-supporting at the age of 21 and award of R3 888 202.75 should be made (scenario 1 age 21). If the Court finds that S should receive two parts of the family income (2/7) and that R will be self-sufficient at the age of 18, the Court should award the plaintiff R4 049 398.75 (scenario 2 age 18). If the Court finds that S should receive two parts of the family income and R will be self-dependant at the age of 21 an amount of R4 083 978.75 should be awarded (scenario 2 age 21).

25. The evidence is very telling that much more was spent on S than on R and the plaintiff. It can hardly be expected of the plaintiff to keep an accurate record of what was and is expended on each member of her family. There is equally nothing suggesting that the plaintiff's knowledge of her family's financial affairs is questionable as Mr Jethro sought to argue. The expenditure for their maintenance and upkeep is largely undisputed and is sufficient for a conclusion to be drawn that Suandri would require a high level of support and that scenario 2 should apply.

26. To say that R's loss of support claim should be determined on the basis that he would be self-sufficient at the age of 18 as opposed to 21 has no logical basis. There is no reason to speculate that R may not wish to further his studies beyond 18 years of age. It is the plaintiff's wish that R should further his studies after his matriculation. In any event, from the actuarial calculation of Mr Morris the difference in the loss of support at 18 and 21 years of age is not very substantial.

27. Not much should be said about the care dependency grant and social grant which the children received from SASSA as this has already been deducted. When the plaintiff receives her award of damages from the defendant any future social grants should cease

ipso facto. The calculation and determination of the loss of support by Mr Morris were not questioned by the defendant. On the whole I am satisfied that the actuarial computation based on (scenario 2 age 21) should apply due to the extraordinary circumstances of this case.

28. Quite astonishingly, in its closing arguments, the defendant still required the Court to provide a formula for the assessment of the loss of support claim with the necessary deductions for the purposes of further actuarial calculations. The defendant had its chance. It filed the actuarial report of Munro actuaries on 13 February 2013. At the end of the plaintiff's case it closed its case without tendering evidence. There is no point in delaying this matter with recalculations any further. As I pointed out earlier this case may well have been settled.

29. **On the question of costs**. Mr Jethro argued that the RAF was entitled to costs in respect of the aborted proceedings of 06 and 07 February 2013. He contended that a Rule 35(3) notice was served on the plaintiff on 08 January 2013 but despite this most of the documents requested to quantify the plaintiff's claim were furnished on 06 and 07 February 2013. Mr Botha, for the plaintiff, argued that the defendants are not entitled to the wasted costs of 06 and 07 February 2013 as most of the documents they requested were in their possession in any event, for example, the deceased post-mortem report, details of the benefits received and birth certificates.

30. It is to be noted that the plaintiff filed a notice in terms of Rule 35 (6) on 23 January 2013 calling on the defendant to inspect the documents at the offices of her attorneys. I am, in the circumstances, unable to find that the plaintiff has frustrated the conclusion of the trial by employing dilatory tactics and therefore deserving to be mulcted in the wasted costs for the proceedings of 06 and 07 February 2013.

31. Mr Jethro further contended that the plaintiff is not entitled to Dr Robert J Koch's qualifying fees as his actuarial calculations were not relied upon and he was not called as a witness. Counsel argued that it was not necessary for the plaintiff's legal representative to travel to Cape Town to consult with Dr Koch when there were other methods of communicating with him. He argued that there was similarly no need for Mr Morris to have testified as his report is hardly different to that of Munro Actuaries.

32. Pertaining to Dr Koch's fees, Mr Jethro may have a point. Dr Koch's valuation date is at 04 December 2012. Four months later the plaintiff obtained a fresh report from Mr Morris abandoning that of Dr Koch. I cannot see why the plaintiff should not carry her own costs.

33. In view of the fact that Mr Morris's actuarial report was not formally accepted by the defendant in evidence I am satisfied that he was a necessary witness and should receive his qualifying fees.

34. On the whole I could find no good cause why costs should not follow the success of plaintiff's action.

Order:

35. In the result:

(1) The Road accident fund, the defendant, is ordered to pay Ms Susanna Maria Minne, the plaintiff, the amount of R4 083 978,75 (four million and eighty three thousand nine hundred and seventy eight rand and seventy five cents) calculated as follows:

1.1 In her personal capacity: R 1 768 873.00
1.2 On behalf of S M: R 1 721 081.75
1.3 On behalf of R M : R 594 084.00

(2) The defendant is to pay the plaintiff's taxed or agreed party and party costs on a High Court scale which shall include:

2.1 The qualifying fees of the following experts: Mr Ian Morris and Dr WJ Herholdt;
2.2 The reasonable fees of Mr Ian Morris and Dr Herholdt for travelling, accommodation and attending the trial;
2.3 The reasonable travelling costs and accommodation of the plaintiff's legal representative to attend the trial.

(3) The Defendant is to pay interest on the capital amount at the rate of 15.5% per annum, calculated from 14 (fourteen) days of the date of this order.

(4) The defendant is to pay the aforesaid amounts into the following nominated trust account of the plaintiff's attorneys:

Elliott Maris Wilmans & Hay
Standard Bank Trust account Number: 0……………………..
Branch Code: 0…………………………..

MV PHATSHOANE
JUDGE
NORTHERN CAPE HIGH COURT

On behalf of the Plaintiff	Adv C.H. Botha
Instructed by	Elliott Maris Wilmans & Hay
On behalf of the Defendant	Adv P.J.D Jethro
Instructed by	Nongogo, Nuku Inc c/o Towell & Groenewaldt