<u>FREE STATE HIGH COURT, BLOEMFONTEIN</u>

REPUBLIC OF SOUTH AFRICA

Case No: 4002/2009

In the matter between:

<u>ANITA HUGHES</u> **Plaintiff**

and

<u>ROAD ACCIDENT FUND</u> **Defendant**

<u>JUDGMENT BY</u>: **MATHEBULA, AJ**

<u>HEARD ON</u>: **23 AUGUST 2011**

<u>DELIVERED ON</u>: **22 SEPTEMBER 2011**

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[1] The plaintiff instituted an action against the defendant for loss of support for herself and her minor daughters. The claim arose out of a motor vehicle accident that occurred on the 11th April 2006 at the T-junction of Van Riebeeck Street, Petrus Steyn in which her husband ("the deceased") was killed. The plaintiff alleged that the deceased carried a duty of support towards her as well as the minor children and that whilst alive he maintained them.

[2] At the outset of the trial, the defendant conceded the merits in

favour of the defendant. The parties also agreed to proceed with the claim for the plaintiff because the minor children have since attained the age of majority. The other important aspect is that the plaintiff amended paragraph 8.1 of the particulars of claim by substituting the amount of **R2 557 918,00** with **R3 001 337,00**. The defendant did not object to the amendment. I accordingly made the appropriate order on all these issues. The only issue in dispute to be determined is the quantum of damages.

[3] The only witness to take the stand was Leon Gabriel le Roux. He is an Associate General Accountant registered with the Institute of Chartered Accountants of South Africa (SAICA). He has been practicing as such in Ficksburg since 1989. The deceased was his client.

[4] Their relationship started when the deceased was still farming with his father. According to him the deceased was a good and successful businessman. As his farming operations grew from strength to strength, he founded **Maluti Air** and started

a flying school. He was both a pilot and an instructor. He recruited widely including **Europe** and these trainees stayed at his lodge situated on the **Tati Farm**. In their interaction, he also got to know his family and was aware that he provided for them.

[5] In 2004 the deceased and three others founded **Interactive Trading CC** which was essentially a dairy venture. At the time of his demise in 2006 about 27 million litres of milk had been delivered. This business experienced phenomenal growth under his leadership to an extent that the net income before tax increased by 770%. An astute businessman that he was, he saw a niche in transport and purchased three (3) trucks. As a result of the growth he was planning to buy-out others together with his business partner one **Mr Prinsloo**. Unfortunately they both perished in the same accident and the business has since folded after their deaths.

[6] He testified that he prepared the financial statements of the businesses in accordance with the **Generally Accepted**

Accounting Principles. He referred to the various businesses conducted by the deceased and that some in particular **Glen Morgan CC** did not conduct any business. He was aware that the trusts of which the plaintiff was both the trustee and income beneficiary were operating at a loss. As a result there is a pending action to remove one **Mr Snyman** as a trustee.

[7] **Mr Strydom** submitted that there is uncontested evidence regarding the income of the deceased at the time of his death. The conclusion as per the expert was that an income of **R457 000,00** per annum has been established. This is based on the outstanding performance of **Interactive Trading CC** which would have been well over the inflation growth.

[8] **Mr Steenkamp** submitted that the situation of the plaintiff was not a desperate one and that a contingency deductions of at least 50% must be applied. The plaintiff has a possible source of income in the form of the trusts. She was in control of a substantial amount of assets and income because she is a trustee and an income beneficiary. I will return to this

argument at a later stage.

[9] It was accepted as a trite principle of law that the plaintiff will be entitled to damages insofar as there has been actual pecuniary loss **as a result of the wrongdoing of the insured driver. See <u>EVINS v SHIELD INSURANCE CO LTD</u>** 1980 (2) SA 814 (A) at 838 A; **<u>LAMBRAKIS V SANTAM LTD</u>** 2002 (3) SA 710 at 714 F. The real contention between the parties is espoused by **Lewis AJA** (as she then was) in **<u>LAMBRAKIS</u>** *supra* at 714 H [11] – [14] that is:

> "A quantification of the loss and the determination of whether the income from the deceased's estate amounted to an accelerated benefit such that it should be regarded as negative or reducing that loss".

In order to measure such damages for loss of support one must take into cognisance the difference between the current position of the plaintiff and the position that could have existed had the deceased not died. In coming to the correct award I must exercise my discretion judicially and in the interests of justice.

[10] The submission of **Mr Steenkamp** is based on the Joint Last Will of the deceased and the plaintiff. **Clause 1.7.2** reads as follows:-

> "The trustees of the mentioned trusts shall pay the residue of the net income, generated from the bequests to my wife for a period of 10(ten) years from date of my death, after payment of all costs in relation to the bequeathed trust assets and any business ventures which may be conducted and also for necessary and useful improvements, interest and capital payments on outstanding loans, payment of debts and income and other taxes."

The plaintiff is listed as both the trustee and income beneficiary.

[11] In exercising my discretion I am guided by the test accepted by the court in assessing the difference between the past and the future. In this matter I am confronted with the uncontested evidence of the accountant who prepared the Financial Statements of the deceased. These financial statements appear on **pages 84 to 235** of the **exhibit "A".** On the basis of these statements, actuarial calculations were prepared in the form of a report by a renowned actuary **G.W. Jacobson.** The report is uncontested by

the defendant. As a result of the report the plaintiff amended the claim amount and there was no objection from the defendant.

[12] Apparently the trusts are not doing well at the moment and there is a dispute between the trustees. The plaintiff is 53 years of age and has not remarried. In terms of the will she will only be maintained up to 2016 in which case she will be 58 years old. This leaves her with very little opportunity of finding alternative means of support. The deceased was an astute businessman who would have been farming until well into his 70s or 80s as illustrated by the accountant of a number of his colleagues. These are all factors that must be taken into consideration when assessing the appropriate award for damages. It is the only yardstick at my disposal to make an educated guess as per the court in **LAMBRAKIS** *supra*.

[13] In this matter, I could find no basis upon which I can apply a higher contingency of fifty (50) percent as suggest by **Mr Steenkamp**. He forcefully urged me but could not substantiate it with documents or real figures. His argument was

neither based on fact or expert conclusion. The defendant with ample time to investigate and assess this matter did not tender any evidence to the contrary. On the other hand the evidence on behalf to the plaintiff remains uncontested and I can find no blemish. In fact it was submitted (which aspect was not denied) that the claim of the other victim namely **Prinsloo** was admitted and settled by the defendant on the basis of the financial statements similar to the one before me. I do not place much reliance on that aspect. Suffice to mention that there are sufficient reasons to accept the evidence on behalf of the plaintiff. I am satisfied that the plaintiff has discharged the necessary onus of proof and is entitled to be awarded the damages in accordance with the particulars of claim.

[14] The general rule applicable to costs should apply. The successful plaintiff is entitled to her costs. It was submitted by **Mr Strydom** that I should award the costs for the second day that the matter was set down.

[15] In terms of **section 24 (6) of the Road Accident Act, No 56 of**

1996 (as amended) summons can only be commenced with against the defendant after a lapse of 120 days after the claim had been lodged with the defendant. The purpose of this section is to enable the defendant to investigate, assess and decide on the claim. This matter was heard approximately two (2) years after the issuing of the summons. It is inconceivable that it will take 2½ years to properly instruct a legal representative on a matter. The matter was postponed to the second day in order to obtain the necessary instructions. On the second day proper instructions were not provided and counsel had to bat in the dark. There is no excuse for a public body to operate in that manner especially the one entrusted with such an important mandate. I am in agreement with **Mr Strydom** that the defendant must be ordered to pay the costs of the second day.

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

1. **The defendant must pay the plaintiff the sum of R3 001,337.00.**

2. **Interest at the rate of 15,5% a tempora morae in the event the amount of R3 001,337.00 is not paid within 14 days from the date of this judgment.**

3. **The defendant shall pay the plaintiff taxed or agreed costs which costs shall include the second day of trial, preparation, qualifying fees and attendance of the following expert witnesses:-**

   - **G.L. Le Roux; and**
   - **G.W. Jacobson**

M. A. MATHEBULA, AJ

On behalf of the plaintiff: Adv. S. J. Strydom
Instructed by:
Schoeman Maree Inc.
BLOEMFONTEIN

On behalf of the defendant: Adv. M. Steenkamp
Instructed by:

Webbers Attorneys
BLOEMFONTEIN