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: 478/2022

In the matter between:

L[…] L[…] B[…] Plaintiff

(ID. No. 5[…], in her capacity as mother and guardian of her minor children P[…] B[…] and K[….] O[…] B[…])

And

ROAD ACCIDENT FUND Defendant

(Link: 5155036)

CORAM: VANZYL, J

HEARD ON: 23 JANUARY 2024

DELIVERED ON: 19 JUNE 2024

Background:

[1] The plaintiff instituted action against the defendant in her capacity as mother and natural guardian of the minor children P[…] B[…] and K[…] O[…] B[…] ("the

children") for damages in the form of loss of financial support they suffered as a result of a motor vehicle accident which occurred on 1 March 2020, within the jurisdiction of this court. As a result of the accident T[…] F[…] B[…] a pedestrian at the time of the accident, passed away ("the deceased").

[2] It is the plaintiff's case that the deceased is the father of the children and she pleaded as follows at paragraph 7 of the particulars of claim:

> "7.1 The minor children were born from the marriage between the plaintiff and the deceased.
>
> 7.2 The marriage subsequently came to an end by way of divorce on 20 February 2016.
>
> 7.3 At all relevant times of the accident the deceased was the biological father of the minor children.
>
> 7.4 At all relevant times of the motor vehicle collision and the lifetime, the deceased had a legal duty to support and contribute toward the maintenance of the minor children.
>
> 7.5 The deceased did support and contribute towards the maintenance of the minor children.
>
> 7.6 The deceased was at all relevant times employed.
>
> 7.6 Had the deceased not died as a result of the accident, arising from the reckless and/or negligent driving of the insured driver, would the deceased have been legally obligated to continue to support and contribute toward the maintenance of the minor children and would he have been able to do so until the minor children became self-supporting."

[3] In terms of the particulars of claim the plaintiff claimed R200 000.00 for past loss of support for each child and R800 000.00 for future loss of support for

each child.

Common cause facts between the parties:

[4] By the time the matter served before me the parties had settled the issue of liability and the defendant admitted to being 100 % (hundred percent) liable for the damages which may be proven by the plaintiff on behalf of the children.

[5] I was furthermore advised that it was no longer in dispute that the deceased is the father of the two children, that he had a duty to maintain them and that prior to his demise he was indeed maintaining them at the rate of R200.00 per month per child in terms of a maintenance order.

The actuarial report:

[6] The plaintiff obtained an actuarial report of an actuary, Mr Mellet, in support of the plaintiff's claim. Mr Grewar, on behalf of the plaintiff, and Ms Mhkwanazi, on behalf of the defendant, indicated to me that they have agreed to address me on the quantum of the plaintiffs claim on the basis of the calculations of Mr Mellet, which are, in principle, not in dispute.

[7] Mr Mellet made his calculations on two presumptions, namely that the minor children would have been dependent on the deceased until the end of the year in which they turn 18 years respectively and in the alternative, until the end of the year in which they turn 21 years respectively.

[8] Ms Mkhwanazi indicated that she holds instructions to offer as settlement an amount in-between the two calculated amounts. However, Mr Grewar indicated that he holds instructions to argue in favour of judgment in an amount based on the age of 21 years for the two children respectively. In this regard he submitted that I can take judicial notice of the high unemployment figure in South Africa and in Thaba Nchu, where the children reside, specifically. In support of his submission he referred to the fact that the older of the two children had passed grade 12 already a year ago at the age of 17 years, but she is still unemployed.

<u>Loss of support and the calculation thereof:</u>

[9] In **<u>Jowell v Bramwell-Jones</u>** 2000 (3) SA 274 (SCA) at para [22] of the judgment the Supreme Court of Appeal held as follows with regard to a court's duty to quantify loss:

> "[22]' … Whether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action and subject to what is said below, must be established on a balance of probabilities. Once the damage or loss is established a court will do its best to quantify that loss even if this involves a degree of guesswork. (See Turkstra Ltd v Richards, 1926 TPD 276 at 282 - 283.)"

[10] In an earlier judgment by the Supreme Court of Appeal in **<u>Hushon SA (Pty) Ltd v Pictech (Pty) Ltd</u>** 1997 (4) SA 399 (SCA) the court similarly held at 412H - I:

> "Yet there can be no doubt that Hushon did suffer a loss as a result of the defendants' wrongful conduct. In those circumstances a court has no option but to resort to the rough and ready method of the proverbial educated guess (the fourth method) and **to do the best it can on such material as is place before it** (cf *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* <u>1990 (3) SA 547 (A)</u> at 573G - J)." (Own emphasis)

[11] In **<u>RAF Practitioners Guide.</u>** HB Klapper, at paragraph 1.1.2 (updated September 2021 - SI 43), under the heading *"Prospective patrimonial loss"* the following is stated with reference to the judgment in **<u>Reay v Netcare (Pty) Ltd t/a Umhlanga Hospital</u>** [2016] 4 All SA 195 (KZP):

> "In a claim for loss of support, **<u>objective available and acceptable evidence of the loss must be presented.</u>** As a first step, the financial support which the plaintiff received and were accustomed to receive and which was lost as a result of the death of the breadwinner. The onus of proof in that regard rested

upon the plaintiff throughout and the plaintiff is required to produce such evidence as was available to discharge the onus. Where evidence should be available and should have been adduced, and the plaintiff did not adduce such evidence, the court will adopt a generous approach, requiring an adjustment to be made by the court in its assessment." (My emphasis)

[12] In light of the totality of the evidence which has been placed before me, I am convinced on a balance of probabilities that the children in fact suffered damages as a result of the death of the deceased.

[13] I am also convinced that the amount of damages should be calculated on the basis that the children would both have been dependent on the deceased until the end of the year -in which they turn 21 years of age respectively.

[14] However, in so far as Mr Grewar submitted that the amount of damages should be adjusted to a higher figure since the total yearly amount of loss is very low, there is no basis upon which I can do so on a mere random basis. There is no evidence available upon which I can make such an adjustment to the amount of damages. The damages are to be based on the amount of maintenance.

[15] The calculations in the report of Mr Mellet make provision for the usual actuarial principles and assumptions to be applied such as inflation, increase in income and maintenance etc. The calculations are also based on certain postulations. The same assumptions and postulations are to be applied in the final calculation of damages since the report as such have been agreed upon between the parties.

[16] The calculation in the actuarial report was done as at 1 April 2022. Considering the date of this judgment and order, the calculation obviously has to be updated and performed on the basis of my respective findings. I will consequently also make provision in my order that I may be approached in chambers with a draft order for purposes of obtaining an order in which the amount of damages which is to be paid by the defendant to the plaintiff is expressly reflected.

[17] The proposed draft order should also make provision for the payment of costs and all related issues on the basis of the findings in this judgment.

Contingencies:

[18] It is trite that it is for the court to determine the percentage of contingencies to be applied in a matter such as this.

[19] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in **Southern Insurance Association Ltd v Bailey N.O.** 1984 (1) SA 98 (A) at 113G and 116G - 117A:

> "Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.
>
> 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.

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Pr7ibilla* (1962) 36 ALJR 212 (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."'

[20] In the judgment of **Gillbanks v Sigournay** 1959 (2) SA 11 (N) the following was stated at 17 E - F in respect of contingencies in an estimation of a plaintiffs claim for loss of earnings:

"In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the estimated gross income to allow for unemployment benefits, insurance and so on. These contingencies would include –

(i) a possibility that plaintiff's working life may have been less than sixty-five years;
(ii) a possibility of his death before he reaches the age of sixty-five years;
(iii) the likelihood of his suffering an illness of long duration;
(iv) unemployment;
(v) inflation and deflation;

> (vi) alterations in the cost-of-living allowances;
>
> (vii) an accident whilst participating in sport such as hockey or cricket, or at any other time which would affect his earning capacity; and
>
> (viii) any other contingency that might affect his earning capacity."

[21] In the judgment of **Dlamini v Road Accident Fund** (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at paras [30] - [32] the court dealt with and applied some guidelines referred to by Koch in The Quantum Year Book:

> "[30] Koch refers to the following as some of the guidelines as regards contingencies:
>
> > 'Normal contingencies' as deductions of 5% for past loss and 15% for future loss.
> >
> > 'Sliding scale': 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on Goodall v President Insurance 1978 (1) SA 389.
> >
> > 'Differential contingencies' are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.
>
> [31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred."

[22] From the aforesaid it is evident that I can also not make a random upwards adjustment in the amount of damages on the basis of contingencies, as submitted by Mr Grewar. That is not the purpose of contingencies.

[23] When considering contingencies, there are in my view no exceptional circumstances or factors applicable to the present matter. I deem it fair and just to both parties that a 5% contingency should be applied to both the past loss of income and future loss of income. Such a percentage will make provision for a balanced consideration of both possible favourable and adverse contingencies.

Costs:

[24] There is no reason why the defendant should not pay the costs of the action, which costs are to include the costs of the updated calculation by Mr Mellet as ordered hereunder.

Order:

[25] The following order is consequently made:

1. The defendant is liable to pay to the plaintiff 100% of the proven damages suffered by the children.

2. It is declared that an updated actuarial calculation is to be performed pertaining to the children's loss of support as a result of the motor vehicle accident on 1 March 2020, for purposes of which the plaintiff's attorney is directed to forthwith request the plaintiff's actuary to perform such a calculation in accordance with my relevant findings in this judgment, namely:

   2.1 The actuarial principles and assumptions, as well as the other postulations as applied in the report of Mr Mellet, dated 2 March 2022, are to be applied again.

2.2 The children's loss of support is to be calculated on the assumption that the minor children would have been dependent on the deceased until the end of the year in which they turn 21 years respectively.

2.3 The calculation is to be done as at 1 July 2024.

2.4 A contingency deduction of 5% is to be applied in respect of both past and future loss of support.

3. Leave is granted to the parties to approach Van Zyl, J in chambers, once the aforesaid calculation is received, with a draft order as agreed upon between the parties in order to obtain an order for the payment by the defendant to the plaintiff of the amount calculated as aforesaid, together with interest, costs and related issues.

C. VAN ZYL, J

On behalf of the plaintiff:	Adv. OM Grewar
Instructed by:	HJ Booysen Attorneys
	BLOEMFONTEIN
	hendrik@hjbooysenattorneys.co.za
On behalf of the defendant:	Ms. K. Mkhwanazi
Instructed by:	Office of the State Attorney
	BLOEMFONTEIN