Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 11676/2017

Before: The Hon. Mr Justice Binns-Ward

Dates of hearing: 24-25 February 2020
Date of judgment: 28 February 2020

In the matter between:

B B Plaintiff
(In her personal capacity and in her capacity
as mother and guardian of her minor sons,
K B (born 15 January 2004) and
S B (born 3 May 2006).)

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

BINNS-WARD J

[1] The subject matter of this action is a claim for compensation for the loss of financial support suffered by the plaintiff and her two sons consequent upon the death in a road accident, on 9 May 2015, of the late P B (hereinafter referred to as 'the deceased').

[2] The plaintiff had been married to the deceased at the time of his death. Two children were born of the marriage; K, whose date of birth was 15 January 2004, and S, who was born on 3 May 2006. It is common ground that the deceased and the plaintiff owed one another

and their children a duty of support, and that during the marriage the deceased had been the family's principal breadwinner. It is also common ground that the negligence of the driver of the motor vehicle that came into collision with the deceased's motor cycle in the incident in which he was killed caused the accident and resultant death. It was consequently accepted that, subject to the limitations imposed in terms of the Road Accident Fund Act 56 of 1996, the defendant is liable to compensate the plaintiff and her sons for their loss of support.[1] The only issue in the trial was the appropriate quantification of the award in damages, and even in that regard there was no dispute concerning the relevant facts. In addition, no issue has been taken with the approach as to how much of the deceased's and the plaintiff's respective earnings was, and would have been, applied in respect of their mutual and common duties of support; namely, two parts thereof to him or herself, two parts to the other spouse, and one part to each of their children while they remained dependant.

[3] The deceased had qualified as a computer programmer after leaving school, and at the time of his death, within the week of his 39th birthday, he had been employed by Suiderland Development Corporation (or that company's subsidiary, Suiderland Yellowstone) in its IT department for approximately 16 years. He had been appointed as an IT Manager in 2002 and by 2015 had reached 'senior management level', with no opportunity of being able to rise higher in his employer company. Although highly regarded by his employer, were he to seek to improve his earnings beyond the level at which he was being paid by the company, he would have had to obtain a position elsewhere or launch out in his own business. An industrial psychologist, Dr Richard Hunter, who testified at the instance of the plaintiff, opined that '[c]onsidering his age, education and training, employment history, as well as the collateral obtained, it seems reasonable to conclude that had [the deceased] not died in the accident, he would probably have remained with his employer … until normal retirement age'. I am in agreement with that assessment.

[4] At the time of his death the deceased was in receipt of an annual remuneration package worth R754 692 plus an incentive bonus of R50 000. It was accepted for the purposes of the trial that his total annual income would have increased over time to R1 400 000 in 2019 values by 2021, when he would have been 45 years old. It was assumed that from that point until he reached retirement his income would keep pace with inflation.

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[1] Section 17(1)(a) of the Road Accident Fund Act.

[5] The deceased underwent 'compartment syndrome surgery' on both of his legs about two years before his death. No expert evidence was adduced concerning the nature or effect of the condition that necessitated this surgery. From the plaintiff's evidence it would appear that it was directed at addressing a muscular condition in the deceased's calves. She said that the surgery had been successful in eradicating the pain that the deceased had been experiencing in his legs, and that, to the best of her knowledge, the condition and its treatment had not left the deceased exposed to complications later in life. Furthermore, three months before he died, the deceased was diagnosed as suffering from type 2 diabetes. The diagnosis was made incidentally during a routine medical check-up. The deceased was placed on medication and advised to change his diet and lifestyle in order to manage the condition. He had taken this advice to heart and, amongst other matters, had consulted a dietician. Nothing in the evidence suggested that the deceased's diabetic condition would shorten his working lifespan, assuming the condition were appropriately managed.

[6] The plaintiff had been employed since August 2014 on a half day basis as an office administrator at a karate school in Durbanville, which was the suburb in which she and the deceased had their family home. She earned an income of R5 500 a month. Prior to that she had been unemployed for three and a half years since 2011, when the deceased was transferred from Piet Retief to his employer's head office in Cape Town. She was in receipt of a pension after her husband's death, but it was payable for only one year.

[7] Had it not been for her husband's death, the plaintiff considers that it was likely that the family would have continued living indefinitely in Cape Town, where they were very happy. She said that it was unlikely that they would have emigrated as both she and her husband were content in this country, where their wider family still lives and, it would seem, is likely to remain. Only one member of her wider family, a cousin, lives abroad.

[8] The emotional and financial impact of her husband's traumatic death unsettled the plaintiff, however, and caused her to decide that it would be in the best of interests of herself and the children to start afresh somewhere else. As one of her grandparents had been born in the United Kingdom she was able to obtain an ancestral visa that allowed her to live and work in that country. Availing of that facility, the plaintiff and her sons emigrated to Britain in December 2016 and settled in Buckingham, where they have lived for the past three years. The boys attend 'The Buckingham School' there. It describes itself as 'a specialist sports college', but nothing in the evidence suggested that it was anything other than an ordinary school. The plaintiff has obtained employment in Buckingham on an income of £1 500 per

month. She and her sons reside in a house there that she rents for £905 per month. In the circumstances her evidence that she is currently unable to afford anything other than the bare necessities might well be an understatement.

[9] The plaintiff's older son, K, is doing satisfactorily at school. The evidence is that he is expected to complete his A levels and then proceed at the age of 18 to university. In the circumstances it is expected that he will continue to be dependent on his mother until he is 21.

[10] The younger son, S, suffers from attention deficit disorder. It would appear that he also has other learning difficulties. The plaintiff testified that despite these handicaps S has made progress over the years and that his performance at school has improved. It is nevertheless evident from his school reports, some of which were put in evidence, that he is unlikely to qualify to go to a university. The grading reflected in the school reports is not easy to follow, and I am not convinced that the plaintiff's evidence concerning their interpretation, more particularly concerning the significance of the column headed 'MEG' and the scoring in that column, was correct. The import of the acronym 'MEG' was not elucidated.[2] Mrs B, if I understood her correctly, understood the scoring under 'MEG' to be on a grading of 1-9, with 1 representing the lowest score and 9 the highest. If that were so, S's reported scores of between 1 and 3 would be very poor. The plaintiff's explanation of how the reports should be read does not, however, tally sensibly with their content. For example, S's MEG score of '*Level 1 Distinction*' for Business Studies in his year 9 report would not make sense if 1 reflected the lowest obtainable score. How could one succeed to the attribute of distinction with the lowest possible score? The MEG grading obtained by S for Construction, viz. '*Level 2 Pass*' also does not make sense in the context of the plaintiff's understanding of how the MEG scoring works.

[11] On the other hand, the teachers' comments in the columns of the reports headed '*attitude to learning*' and '*extended learning*', respectively, read with the '*report key*' that explains the scoring under those headings, include much positive and encouraging matter.

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[2] My own research on the internet suggests that, in the context of the UK education system, 'MEG' stands for '*minimum expected grade*'. The import of that concept seems somewhat esoteric, and to be properly understood for the purposes of the adjudication of the claim should have been explained through the evidence of an appropriately qualified expert. It is clear, however, that it does not denote an examination mark.

Those remarks are inconsistent with S having performed very poorly. For that reason, I am persuaded to accept the plaintiff's evidence, which was supported by Dr Hunter, that S is likely to proceed to a technical college when he leaves school at age 16 after writing his GCSE examinations. He would be expected to spend three years at college, and therefore remain dependent on his mother for support until the age of 19. That scenario was indeed accepted by the defendant's counsel for the purposes of quantifying S's claim for loss of support.

[12] Being a claim for loss of support, the quantification of what the court is permitted to award in damages is limited by the cap imposed in terms of s 17(4)(c)(ii) of the Road Accident Fund Act, which in this case falls to be read as follows:

> Where a claim for compensation under subsection (1)—
>
> …
>
> (c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding—
>
> (i) …
>
> (ii) R228 430 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.

The amount applicable in terms of s 17(4)(c)(ii) is the cap that had been determined by the Fund, in terms of s 17(4A)(a) of the Act, as being applicable at the date of the deceased's death.[3]

[13] The manner in which the calculation of a loss of support claim falls to be approached in the context of the cap introduced in terms of s 17(4)(c)(ii) has been settled by the appeal court's judgment in *Road Accident Fund v Sweatman* [2015] ZASCA 22 (20 March 2015); [2015] 2 All SA 679 (SCA); 2015 (6) SA 186. Two calculations fall to be made. The first is done on the conventional basis, taking into account the adjustments merited by the application of the positive or adverse contingencies that court considers appropriate in the given case. The second calculation is undertaken assuming that present value of the annual

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[3] Section 17(4A)(a) of the Act provides:

'*The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4) (c) quarterly, in order to counter the effect of inflation*'.

loss of support sustained by the claimant is in the sum provided for at the time of the breadwinner's death in terms of s 17(4)(c)(ii). The amount that falls to be awarded is the lower figure of the product of the two calculations.

[14] Calculations of the plaintiff's loss of support claim were made in accordance with the approach endorsed in *Sweatman* by the actuaries engaged by the plaintiff and the defendant respectively. The only difference between them in respect of their conceptual approach bore on the question of whether provision should have been made for the value of an accelerated inheritance benefit by the plaintiff, who had been the sole heir to her husband's estate. During the course of the trial, however, the parties reached agreement that insofar as there might have been any accelerated inheritance benefit, its effect on the calculation of the plaintiff's loss was negligible, and could therefore be ignored for the purposes of the computation of her loss of support claim. A note recording that agreement was handed in as exhibit B.

[15] There was nothing in dispute between the parties concerning the plaintiff's actuary's computation of the loss of support claim in respect of K on the basis that he would be dependent until the age of 21, and it was ultimately accepted that the calculation of S's claim should assume that he would remain dependant until age 19. As a calculation had already been done assuming that S would be dependant until he turned 18, the plaintiff's counsel indicated that the plaintiff would be content to accept that figure as representing the value of S's claim. I was informed by counsel that she was willing to do so because actuarial advice was that because of the effect of the statutory cap the difference between the present value of the claim calculated to age 18 and that calculated to age 19 was negligible. As matters transpired, a more precise calculation was actually done later, in circumstances to be described at the end of this judgment. Counsel were agreed that the computation of children's claims should be subject to contingency deductions of five percent in respect of past loss and 10 percent in respect of future loss.

[16] There was some debate in argument, however, as to level at which the plaintiff's personal claim should be subject to contingency deductions in respect of future loss. The plaintiff's counsel submitted that the rule of thumb in an unexceptional case such as the plaintiff's was to apply a 15 percent contingency deduction to allow for the general hazards of life over the reasonably long period that the plaintiff, who is currently 40 years of age, might reasonably be expected to survive. The defendant's counsel countered by arguing for a contingency deduction of 50 percent, which is exceptionally high. In support of his

argument, he suggested that the court should give significant weight to the plaintiff's remarriage prospects, and also that it should consider that, even if the deceased had not met an untimely death, there had been a prospect that when the children had left home the plaintiff might have obtained employment at a higher remuneration in real terms than that which she had been earning at the karate school.

[17] The plaintiff testified that she had not formed a romantic relationship with anyone in the almost five years since the death of her husband. She obviously could not exclude the possibility that she might eventually remarry, but, in her words, and she spoke convincingly, remarrying was 'not a priority'. Her evidence is that she dedicates all her free time and emotional energy to her two sons. It bears mention in this regard that the plaintiff has never in her lifetime had a relationship with any other person other than her late husband. They became romantically involved when the plaintiff was still at the school that they had both attended in Piet Retief, and were married five years later, when the plaintiff was aged 21. In all the circumstances I am not persuaded that the plaintiff's prospects of remarrying should weigh especially in making provision for a contingency deduction in respect of the actuarily quantified extent of her loss. They can be taken into account as part of the basket of general contingencies for which provision will be made.

[18] It should be remembered in this regard that the provision for contingencies, be they positive or negative, involves nothing more than a judicially intuitive tempering of the actuarily calculated loss with a view to trying to minimise the chances of the plaintiff being overcompensated, or the defendant over-penalised. The actuarial calculation of future loss is itself predicated on assumptions as to the likely course of events, which in the nature of things must be speculative to a greater or lesser degree depending on the facts of the case. The provision for contingencies is the best that can be done to allow for the unpredictable variations – sometimes referred to as the 'hazards' or 'vicissitudes' of life - that the fates will, after the award has been made, almost inevitably bring to bear on the accuracy of the actuary's predictive model. Making provision for contingencies is an incidence of the judicial discretion that is involved in determining any award in damages of the sort that, of necessity, entails making an estimation; cf. e.g. *Road Accident Fund v Guedes* [2006] ZASCA 19 (20 March 2006); 2006 (5) SA 583 (SCA) at paras 5 and 8 and *Road Accident Fund v CK* [2018] ZASCA 151 (1 November 2018).; [2019] 1 All SA 92 (SCA); 2019 (2) SA 233, at paras. 40-44.

[19] It has not proved necessary in the circumstances to express any determinative view about the dictum in *Esterhuizen and Others v Road Accident Fund* [2016] ZAGPPHC 1221 (6 December 2016); 2017 (4) SA 461 (GP) at para. 13, '*that it must also be borne in mind* [in the determination of contingencies] *that a second marriage may not result in financial support*', to which I was referred by the plaintiff's counsel. Suffice it to say that I am, with respect, doubtful about its correctness in principle. Any inherent right to continued support by virtue of a marriage is terminated if the dependant spouse contracts a subsequent marriage. The patrimonial advantages or disadvantages of the second marriage would therefore be irrelevant in the determination of contingencies in respect of the quantification of a loss of support claim following on the death of a spouse in the first marriage.

[20] With regard to the argument that account should be taken of the possibility that the plaintiff might in any event, irrespective of the intervention of her husband's demise, have obtained more remunerative employment later in her life, in the determination of the adverse contingencies, the defendant's counsel recognised that it would be necessary to distinguish the matter from the approach enunciated in this regard in the appeal court's judgment in *Peri-Urban Areas Health Board v Munarin* 1965 (3) 367 (A); [1965] 3 All SA 471, at 375G-376D (SALR), which approved the statement of the law set out by Vieyra J in *Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk* 1965 (2) SA 193 (T); [1965] 2 All SA 270, at 200A-206C, more especially, at 203F- H and 205H-206C (SALR). In the first of the aforementioned passages in *Ongevallekommissaris*, the learned judge stated:

> I have no difficulty about the relevancy of the widow's earning capacity in so far as that must be considered for the purpose of determining what proportion of the husband's earnings, had he lived, would have gone to the support of his wife. Although not bound to seek employment she may during her husband's lifetime in fact have earned an income by engaging in some remunerative occupation or professional activity, even despite the necessity of raising a family. Or the evidence may show that at some stage she would in all probability have undertaken remunerative work. These are factors which in my view have a bearing on the position, because they are germane to the determination of what in all the circumstances the husband would in fact have afforded to his wife had he not been killed. But that does not assist to determine in how far these factors must again be considered viewed in the light of the fact that the plaintiff is a widow earning a livelihood or having a potentiality so to do. (My underlining.)

In the second passage mentioned, he concluded:

> What a wife loses as a result of the death of her husband is the support which the deceased would have been able to afford and would probably have afforded to his wife had he not been killed … . It derives from the marital relationship. It releases a wife *pro tanto* from any economic necessity to find the

> amount involved from other sources, whether these consist of investments or the ability to earn a wage or salary or in any other manner. The loss is not merely a loss of a monetary nature. It is a loss of support, a benefit outside the orbit of her own earning capacity. That loss is not diminished because she has created or can create other sources of revenue, for the moneys to be derived from other sources have their origin elsewhere and do not constitute support. Should she decide to work after her husband's death, even assuming she had had no intention of doing so whilst her husband lived, she is not in any way minimising the amount of the loss of support. That loss remains. It seems to me that this is the correct view to take.

[21] My understanding of the import of this jurisprudence, by which I am bound, is that the dependant spouse's actual earnings at the time of the deceased's death and his or her probable future income had the dependant status continued but for the intervening death are matters properly taken into account in calculating her loss of support claim. This is so because they are relevant to the calculation of the extent to which dependant spouse would have actually been legally entitled to support from the deceased, currently and prospectively, at the time of his death. In other words, evidence on those matters goes to the essentially empirical calculation of the loss, being the value of the right to support that was lost upon the deceased's death. That has been done in this case on the basis of the evidence that the plaintiff was earning R5 500 per month at the time of her husband's death and its indication that, had he not died, she would have continued to do so in real terms for the rest of her working life. The calculation of the claim on that basis is supported on the probabilities. It would be inappropriate, applying the principle distilled in the two judgments just mentioned, to then provide for a contingency deduction to the loss, so calculated, so as to cater for the possibility that the plaintiff might subsequently improve her position by obtaining full day employment or employment at a higher rate of remuneration. The position was pithily summed up by Holmes JA in *Munarin* supra, at 376 (SALR): '*What* [the plaintiff spouse] *has lost is a right—the right of support. She cannot be required to mitigate that loss by incurring the duty of supporting herself*'.

[22] The plaintiff's personal claim was actuarially calculated applying a five per cent contingency deduction in respect of past loss (i.e. up to the time of the trial) and 15 per cent in respect of her future loss. Before the application of the aforementioned contingency deductions, the plaintiff's expectation of life had already been taken into account using the published mortality tables generally used for that purpose. In my judgment, the application of a 15 percent contingency deduction seems fair in all the circumstances. In arriving at the amount which it was suggested should be awarded, the actuary thereafter took into account

the effect of the statutory cap provided in s 17(4)(a)(ii) of the Road Accident Fund Act. As mentioned, the evidence in that regard was not in dispute.

[23] The calculations were revisited at my request, after the conclusion of argument, to deal with the effect of the evidence that S would probably be dependant not until the age of 18 or 21, as postulated in the expert evidence summary of the plaintiff's actuary, but actually until age 19. I was informed that the recalculation gave the following result:

[**Loss after Cap, contingencies and accelerated benefits**]

K to 21, S to 19	Past Loss	Future Loss	Total Loss
B B	R462 800	R3 835 500	R4 298 300
K B	R318 200	R 393 200	R 711 400
S B	R318 200	R 393 200	R 711 400
	TOTAL LOSS OF SUPPORT		**R 5 721 000**

[24] In the result the following order is made:

1. Judgment is granted in favour of the plaintiff in her personal capacity in the sum of R4 298 300;

2. Judgment is granted in favour of the plaintiff in her representative capacity as mother and natural guardian of K B (born 15 January 2004) in the sum of R 711 400;

3. Judgment is granted in favour of the plaintiff in her representative capacity as mother and natural guardian of S B (born 3 May 2006) in the sum of R 711 400;

4. The defendant shall be liable to pay interest on the aforesaid amounts *a tempore morae* at the rate of 10,25% per annum from 14 days after the date of this order to date of payment;

5. The defendant shall pay the plaintiff's costs of suit as taxed or agreed, which shall include the qualifying fees of Mr Charl du Plessis (actuary) and Dr Richard Hunter (industrial psychologist).

6. The defendant shall be liable to pay interest on the amount of the plaintiff's costs of suit, as taxed or agreed, at 10,25% per annum from 14 days of the *allocatur* of the taxing master or the date of agreement, whichever applies, to date of payment.

A.G. BINNS-WARD
Judge of the High Court