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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2019/26724

- (1) REPORTABLE: YES / **NO**  
(2) OF INTEREST TO OTHER JUDGES: YES/**NO**  
(3) REVISED: YES/NO  
DATE 16 MAY 2023

In the matter between:

**KEKANA, TSHEGOFATSO obo**

**MOTSHWAEDE, MMAPULA LORRAINE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

**Neutral Citation:** *Kekana Tshegofatso obo Motshwaede Mmapula Lorraine Vs. Road Accident Fund* (Case No: 2019/26724) [2023] ZAGPJHC 495 (16 May 2023)

**JUDGMENT**

**MAYET, AJ:**

## *Introduction*

[1] This is an action for loss of support arising from a motor vehicle collision which occurred on 29 June 2017 at Bophuthatswana Road, Meriting near Rustenburg between an articulated truck with registration number F[....]MP (“the insured driver”) and a Nissan 1400 light duty vehicle with registration number J[....]NW driven by Mr Kenny Thomas Motshwaede (“the deceased”).<sup>1</sup>

[2] The plaintiff lodged a claim in terms of the Road Accident Fund Act 6 of 1996 (“the RAF Act”) in her personal capacity as the deceased’s unmarried cohabiting partner as well as in her representative capacity, as the biological mother and natural guardian of their minor child (“the minor child”).<sup>2</sup>

[3] The defendant is the statutory body established in terms of section 2 of the RAF Act to administer the compensation fund. The defendant entered an appearance to defend and disputed both liability and the quantum of the claim.

[4] At the commencement of the trial, liability was to be determined based on the evidence of a single eyewitness called by the plaintiff, whilst the parties engaged in negotiations regarding possible settlement of the quantum. During the proceedings, the parties informed the court that settlement negotiations had reached an *impasse*. As a result, this court was tasked with determining both liability and the quantum.

[5] The plaintiff bears the onus to prove both liability and the quantum of the claim. To establish liability, the evidence must demonstrate:

- a. The plaintiff and the minor child had a legally enforceable right to claim financial support from the deceased;<sup>3</sup> and

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<sup>1</sup> It was not in dispute that the deceased died as a result of bodily injuries sustained in the collision.

<sup>2</sup> Born 16 August 2016.

<sup>3</sup> *Macdonald and Others v Road Accident Fund* [2012] JOL 29313 (SCA) at para 14 citing with approval *Evans v Shield Insurance Co. Ltd* 1980 2 SA 814 at 839 B Corbett JA: “...the basic ingredients of the plaintiff’s cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the

b. Negligence or a wrongful act on the part of the insured driver that caused or contributed to the collision which resulted in the death of the deceased.

[6] To establish quantum, the evidence must demonstrate that plaintiff and the minor child suffered actual financial loss in consequence of the death of the deceased.<sup>4</sup>

*Liability (colloquially referred as “the Merits”)*

[7] The RAF Act is, to an extent, a codification of our common law influenced by Roman-Dutch legal principles, modified and interpreted by judicial precedent. Section 17(1) of the RAF Act<sup>5</sup> provides compensation to dependants who have a legally enforceable right of support and who suffer harm caused by or arising from the insured driver’s negligence or wrongful driving of a motor vehicle.<sup>6</sup> The origins of the right in section 17(1) can be traced to the custom requiring payment of “*maaggeld*” or “*soengeld*” as financial reparation to obviate revenge by kinsmen of the deceased.<sup>7</sup> African customary laws contain analogous reparatory practices.<sup>8</sup>

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*death of the deceased, and (d) damnum, in the sense of a real deprivation of anticipated support.”*

<sup>4</sup> Voet 9.2.11; Grotius 3.32.2 *Macdonald and Others v Road Accident Fund* [2012] ZASCA 69 (SCA) at para 15 citing with approval *Jameson’s Minors v CSAR* 1908 TS 575 at p.603

<sup>5</sup> Section 17(1) of the Road Accident Fund Act 6 of 1996 provides that the Fund or an agent shall:

“(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.”

<sup>6</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para 25 *Jameson’s Minors v Central SA Railways* 1908 TS 575 at p.584 approved by the SCA in *Macdonald and Others v Road Accident Fund* [2012] JOL 29313 (SCA) at para 14.

<sup>7</sup> *Union Government (Minister of Railways) v Lee* 1927 AD 202 at p.220; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) at p.614B-E

<sup>8</sup> “*Homicide in traditional African Societies: Customary law and the question of accountability*” Professor Thandabantu Nhlapo, *African Human Rights Law Journal* vol 17 n.1 2017

[8] I mention this historical background to highlight the nature of the RAF Act which is designed to assist dependants by placing them in a similar position but for the death of the breadwinner.<sup>9</sup> Public funds are utilised to achieve the purpose assigned in the RAF Act.<sup>10</sup> In this context, the social legislative character of the RAF Act is obvious.<sup>11</sup>

#### *Legally enforceable duty of support*

[9] Section 17(1) of the RAF Act does not include all dependants who might suffer harm, only those who have a legally enforceable right to claim financial support.<sup>12</sup> A legal duty of support exists when the relationship between the dependant and the breadwinner is recognised by law as giving rise to a right on the part of the dependant to be supported.<sup>13</sup>

[10] It was not in dispute that the deceased was the unmarried cohabiting partner of the plaintiff and the biological father of their minor child. It was also not in dispute that the plaintiff and the minor child resided with the deceased and the deceased provided financial support for both during his lifetime.

[11] The duty to support a minor child arises out of section 28 of the Constitution, 1996 and the Children's Act 38 of 2005 ("the Children's Act").<sup>14</sup> The minor child has a right to claim support from both parents. In this regard, the

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<sup>9</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 at para 54.

<sup>10</sup> Section 5 RAF Act

<sup>11</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para 50.

<sup>12</sup> *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA) at para 13.

<sup>13</sup> *Road Accident Fund v Krawa* 2012 (2) SSA 346 (ECG) at paras 45-46 [full bench] citing with approval *Union Government v Warneke* 1911 AD 657 at p.666: "With the deceased's duty of support comes the defendant's concomitant right to receive and demand such support. It is that right which forms part of the plaintiff's patrimony. As stated in the *Warneke*, case "...the right of the claimant to demand assistance was a right of property, the deprivation of which by the culpa of the defendant would quite naturally found a claim for patrimonial damages." In *Waterson v Maybery Greenberg J*, with reference to the decision in *Warneke* explained it as follows: "If I read these passages aright, they establish that the existence of a legal duty by the deceased to the claimant is an essential to a claim of this kind. [...] The 'rights' which go towards making up the *universitas* must be legal rights, based on a reciprocal legal duty on some other person."

<sup>14</sup> *M v Minister of Police* 2013 (5) SA 622 (GNP) at p.635

deceased was under an obligation to support the minor child.<sup>15</sup> On the undisputed evidence, the deceased provided financial support and a legally enforceable right of support has been established for the minor child.<sup>16</sup>

[12] Concerning the plaintiff, our courts acknowledge that a culturally determined<sup>17</sup> and broader concept of “family”<sup>18</sup> requires the recognition of a duty of support by persons who are in family-like relationships.<sup>19</sup> In *Paixão v RAF*, the court stated:

“[t]he proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage.”<sup>20</sup>

[13] A duty of support is therefore established from the fact-specific circumstances of relationships from which it is shown that a binding duty of support has been assumed.<sup>21</sup>

[14] On the undisputed evidence, the plaintiff resided with the deceased, was the biological mother of their minor child and the deceased provided her with financial support. The inference to be drawn from these facts, notwithstanding the absence of an express agreement, is that there existed an implied or tacitly assumed reciprocal duty of support. The nature of the plaintiff’s relationship with the deceased is akin to marriage and on this basis, the evidence demonstrates a legally enforceable right of support for the plaintiff.

[15] Accordingly, I am of the view that a legally enforceable right to claim loss of support has been established for both the plaintiff and the minor child.

*Liability: Negligent or wrongful act*

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<sup>15</sup> *Groenewald v Snyders* 1966 3 SA 237 (A) at p.247A-B

<sup>16</sup> *Young v Hutton* 1918 WLD 90; *Union Government (Minister of Railways & Harbours) v Warneke* 1911 AD 657 at p.668; *Groenewald v Snyders* 1966 3 SA 237 (A) at p.247B-C.

<sup>17</sup> *Fosi v Road Accident Fund & Another* [2007] ZAWCHC 8; 2008 (3) SA 560 (C) at para 16.

<sup>18</sup> *Amod v Multilateral Vehicle Accidents Fund* [1999] ZASCA 76 at paras 7-11.

<sup>19</sup> *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA) at paras 5-12

<sup>20</sup> *Paixão v RAF* 2012 (6) SA 377 (SCA) at para 39

<sup>21</sup> *JT v RAF* 2015 (1) SA 609 (GJ) at p.613

[16] Statutory liability in terms of section 17(1) of the RAF Act only arises where the deceased was not the sole cause of the collision.<sup>22</sup> To discharge this onus, the plaintiff must show that the insured driver's negligent or wrongful driving caused or contributed to the collision. The evidence must demonstrate that the insured driver was at least "1% negligent."<sup>23</sup>

[17] The plaintiff called one witness, Mr Thamsanqa Mavumba (Mr Mavumba), an independent eyewitness. Mr Mavumba described Bophuthatswana Road as a single carriageway consisting of two lanes carrying traffic travelling in opposite directions. According to Mr Mavumba, Bophuthatswana Road has a wide shoulder, does not have streetlights, and is surrounded by bushes and some houses.

[18] Mr Mavumba recalled that on the evening of 29 June 2017, at approximately 20h20, he was walking on the shoulder of Bophuthatswana Road with his back facing oncoming traffic proceeding towards his home in Meriting. Whilst walking, Mr Mavumba heard a noise which caused him to glance back towards the road behind him. He saw the headlights of the insured driver's articulated truck and noticed that it was moving in a manner that he described as "*running away from potholes on the road*". He testified that he saw the insured driver's articulated truck move into the middle of Bophuthatswana Road but noticed that it was "*not going straight*". At this point, he became aware of the headlights of the deceased's vehicle approaching in the lane for traffic travelling in the opposite direction. According to Mr Mavumba, the insured driver's articulated truck was travelling at a speed much faster than the deceased's motor vehicle. He watched as the two vehicles "*bumped together*" and after the collision, the "*small car separated and went to the right*" and he saw the deceased "*pressed inside his vehicle.*"

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<sup>22</sup> *Law Society of South Africa and Others v Minister for Transport* 2011 (1) SA 400 (CC) at para 25 "Firstly, the scheme insures road users against the risk of personal injury and their dependents against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying common law fault-based liability. This means that any collision victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent." *Road Accident Fund v Abrahams* [2018] ZASCA 49 at para 13.

<sup>23</sup> *Groenewald v Road Accident Fund* (74920/2014) [2017] ZAGPPHC 879: "...claimant, need to prove only 1% negligence on the part of the insured driver in order to succeed with her claim against the defendant." *MS v RAF* [2019] 3 All SA 626 (GJ) (25 March 2019) at para 8

[19] At the commencement of cross-examination and by agreement between the parties, the police accident report was admitted into evidence and marked exhibit "A" ("the police accident report"). The police accident report contained *inter alia*, the following information:

- a. A section headed "*Accident type*" marked with a handwritten cross indicating: "*Sideswipe opposite directions*";
- b. An "*Accident Sketch*" hand-drawn diagram of the collision ("the *Accident Sketch* diagram") depicting a straight road, with two lanes separated by a broken median line and an arrow in each lane demarcating the path of travel of traffic in opposite directions;
- c. The position of "Motor vehicle A" (the insured driver's articulated truck) is drawn in its correct lane, facing the correct direction of travel for vehicles travelling in that lane. Three additional vertical lines are drawn on the mid-rear right side of "Motor vehicle A";
- d. The position of "Motor vehicle B" (the deceased vehicle) is drawn in its correct lane of travel but facing the opposite direction for vehicles travelling in that lane and slightly below "Motor Vehicle A" (the insured driver's articulated truck);
- e. The description of the collision reads:

"Driver 'A' he was on his way driving towards Meriting. Suddenly he saw other m/vehicle on coming hit his motor vehicle on the tyres. Driver 'B' he was [unclear word] certified dead on the scene."

[20] I note with concern that there was no key to the "*Accident Sketch*" diagram and no indication of the point of impact of the two motor vehicles on the road. Mr Mavumba was presented with the police accident report and confirmed that the "*Accident Sketch*" diagram correctly depicted Bophuthatswana Road and the position of the vehicles after the collision.

[21] During cross-examination, Mr Mavumba refuted the contention advanced by defendant's counsel that the deceased motor vehicle was travelling in the lane of the insured driver's articulated truck and that the deceased caused a head-on collision.

Mr Mavumba was adamant that the deceased motor vehicle was travelling in its correct lane and remained steadfast that the side of the insured driver's articulated truck collided with the front of the deceased motor vehicle.

[22] Mr Mavumba explained that although he had remained on the scene, he did not give a statement to the police as he feared being implicated in the collision. In response to how he came to testify for the plaintiff, Mr Mavumba stated that he had discussed the collision with numerous people as he was traumatised seeing the deceased trapped inside the crushed vehicle and it was relatively easy for the plaintiff's attorneys to trace him when they conducted investigations regarding the collision. Mr Mavumba confirmed that both the insured driver and the deceased were unknown to him.

### *Liability Assessment*

[23] Section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides that judgment may be given on the evidence of a single, competent, and credible witness. It does not, however, follow that because the evidence is uncontradicted, it is unassailable. The onus can be discharged by means of adducing credible evidence, which on a preponderance of probabilities, is true and accurate.<sup>24</sup> The test involves weighing the evidence against the general probabilities in order to assess its veracity. As such, I must satisfy myself that Mr Mavumba was telling the truth and that his version aligns with the general probabilities,<sup>25</sup>

[24] No evidence whatsoever was presented to this court to give credence to the defendant's contention that the deceased drove in the incorrect lane and caused a head-on collision with the insured driver's articulated truck. The police accident report does not support the defendant's allegations that the deceased caused a head-on collision as it clearly indicates "*Accident Type*" as being "*sideswipe opposite directions*." A hypothesis is of no value if it is based on unproven assumptions.<sup>26</sup> I

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<sup>24</sup> *National Employers General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E) at p.624

<sup>25</sup> *Van Ryn v RAF* [2018] JOL 40091 (FB) at p.6

<sup>26</sup> *De Wet & another v President Versekeringsmaatskapy Beperk* 1978 (3 SA 495 (C) at p.500E-G citing *Caswell v Powell Duffryn Associated Collieries Ltd* (1939) 3 All ER 722 at p.733.



have also not lost sight of the adverse inference which arises from the fact that the defendant failed to call the insured driver who could have told the court how the collision occurred and what steps he took to avoid the collision.<sup>27</sup> The inescapable conclusion is that the defendant's version is more conjecture rather than fact, and must be rejected.

[25] Assessing the general probabilities, Mr Mavumba's evidence is corroborated by the police accident report "*Accident Sketch*" diagram which depicts a single carriageway with two lanes, carrying traffic in opposite directions, the position of the vehicles after the collision and the "*Accident Type*" description which indicates "*sideswipe opposite directions.*" To the limited extent that the three additional scratch-type vertical lines drawn on the mid-rear right side of "Motor vehicle A" (the articulated truck) in the "*Accident Sketch*" diagram can be interpreted as indicating the damage to the insured driver's articulated truck, this provides additional corroboration regarding the nature of the collision.

[26] Mr Mavumba was an impressive witness. I have no reason to doubt the veracity of Mr Mavumba's testimony. It is possible to deduce from Mr Mavumba's evidence together with the depiction of the position of the articulated truck after the collision in the police accident report "*Accident Sketch*" diagram, that the headlights of the articulated truck moving from the middle of the road towards its correct lane would not have been clearly visible to oncoming traffic at night, on a road which does not have streetlights.<sup>28</sup> I am satisfied that Mr Mavumba was truthful and honest in his recollection of how the collision occurred. He was candid, credible, and appeared visibly distressed by his recollection of the collision. I am also cognisant that both the deceased and the insured driver were unknown to Mr Mavumba.

[27] From the evidence and accepting the testimony of Mr Mavumba, it is possible to attribute on a preponderance of probabilities, that the insured driver, driving in the middle of the road and moving the articulated truck in the manner described, created a danger to other road users. The probabilities are substantially in the plaintiff's

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<sup>27</sup> *Mokone v RAF* [2022] JOL 56505 (MM) at para 15 citing *Sampson v Pim* 1918 AD 657 at p.662 and *Galante v Dickinson* 1950 (2) SAA 460(A)

<sup>28</sup> An articulated truck consists of two sections connected by a pivot joint which allows the front portion to mobilise independently from the back portion.

favour that the motor vehicle collision resulting in the death of the deceased was caused by or arose as a result of the insured driver's negligence or wrongful driving of the articulated truck.<sup>29</sup> The plaintiff has thus succeeded in discharging the onus that the deceased was not the sole cause of the collision, and the insured driver was at least 1% negligent.

[28] Both elements of liability namely: a legally enforceable duty of support and evidence of negligence on the part of the insured driver have thus been satisfied. In terms of section 17(1) of the RAF Act, the defendant is therefore 100% liable to compensate the plaintiff and the minor child, for the proven loss of support,<sup>30</sup> reasonably anticipated, that the deceased would have supplied had he remained alive.<sup>31</sup>

### *Quantum*

[29] To establish quantum, the plaintiff bears the onus to demonstrate actual financial loss.<sup>32</sup> The parties agreed to the correctness of the actuarial report compiled by the plaintiff's actuary, Wim Loots Actuarial Consultancy, dated 1 December 2019 ("the WL actuarial report") subject to the *proviso* that contingency deductions were to be determined by this court.

[30] The WL actuarial expert report is based on the following information:

- a. The deceased was born on 2 March 1958;
- b. The deceased was gainfully employed and had identifiable earnings;
- c. The deceased was the sole breadwinner;
- d. The plaintiff would get two shares of the deceased's income and the minor child one share;
- e. Minor child: two broad scenarios- dependent until 18 years of age or 21 years of age;

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<sup>29</sup> *Blyth v Van den Heever* 1980 (1) SA 191 (A) at p.220A

<sup>30</sup> *Ongevallekommissaris v Santam Bpk* 1999 (1) S 251 (SCA) at p.511 citing with approval *Union Government v Warneke* 1911 AD 657 at p.672.

<sup>31</sup> Voet 9.2.11; *Ongevallekommissaris v Santam Bpk* 1999 (1) S 251 (SCA) at p.512 citing with approval *Jameson's Minors v CSAR* 1908 TS 575 at p.602.

<sup>32</sup> *Macdonald and Others v Road Accident Fund* [2012] ZASCA 69 (SCA) at para 15

f. Plaintiff: assumption that she would remain wholly dependent on the deceased's income.

[31] In determining the amount of the compensation to be awarded, the task of the court is to quantify in pecuniary terms, the support which the deceased would probably have rendered and then to balance this lump sum amount, taking into consideration the uncertainties, hazards, and general vicissitudes of life by means of contingency deductions.<sup>33</sup> Since it is inherently speculative to make provision for unpredictable future events which could occur but are impossible to predict with certainty, contingency deductions are a judicial discretion.<sup>34</sup>

[32] The quantum assessment concerns two aspects:

- a. Whether the deceased had a duty to support the minor child to the age of 18 or 21 years and the appropriate contingency deduction to be applied; and
- b. Whether the plaintiff's claim, in addition to the general contingency deduction, should include an additional contingency deduction based on prospects of remarriage or re-partnering. This aspect was particularly contentious.
  - a. Duty of support: 18 or 21 years

[33] The plaintiff submitted that loss of support for the minor child should be based on the assumption of dependency until the age of 21 years. As far as contingency deductions were concerned, the plaintiff deferred to the judicial discretion of the court.

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<sup>33</sup> *Lambrakis v Santam* 2002 (3) SA 710 paras 12 and 13: "The measures of damages for loss of support is, usually, the difference between the position of the defendant 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: Joubert (ed) *The Law of South Africa* (1st re-issue) Vol 7 para 89, citing *Jameson's Minors v Central South African Railways* 1908 TS 575 at 603; *Hulley v Cox* 1923 AD 234; and *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A). The particular equities of the case must also be taken into account and an adjustment made if appropriate: Botes above at 614 F-H, where Holmes JA said that the trial Judge 'has a discretion to award what under the circumstances he thinks right'. Thus, any addition to a dependant's income, arising from the death of the deceased, must be deducted from the total amount of the loss. In assessing the value of the benefit-and indeed the loss-the court may be guided but is certainly not tied down by inexorable actuarial calculations' (Holmes JA in *Botes* (supra at 614F-G)

<sup>34</sup> *Southern Insurance Association Ltd v Bailey N.O* 1984(1) SA 98 (A) at 113F the enquiry is speculative in nature "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 make an estimate, which is often a very rough estimate, of the present value of the loss."

[34] The defendant was of the view that loss of support for the minor child should be based on the assumption of dependency until 18 years. The defendant submitted that a contingency deduction of 7% for past loss and 15% for future loss was appropriate.

[35] In terms of section 17 of the Children's Act, a child becomes a major upon reaching the age of 18 years but as the court in *Mfomadi and Another v Road Accident Fund*<sup>35</sup> pointed out:

“A parent's duty to support a child does not cease when the child reaches a particular age but it usually does so when the child becomes self-supporting. Majority is not the determining factor (see *Smith v Smith*).”<sup>36</sup>

[36] Bearing this in mind, all the facts of the matter must play a role in reaching a just and equitable decision.<sup>37</sup> Measuring compensation for loss of support is an exercise of judicial discretion in the interest of justice, taking into account the difference between the current position and the position that the minor child would have been in, had the deceased not died.<sup>38</sup>

[37] On the undisputed evidence, the deceased was 59 years old at the date of the collision and the minor child was 10 months old. Applying the progression of time, the deceased would have been 76 years old when the minor child attains the age of 18 years. The deceased would have been 80 years old when the minor child attains the age of 21 years.

[38] In light of the aforesaid, I agree with the defendant that loss of support for the minor child until 18 years is sufficient and a contingency deduction of 7% for past loss and 15% for future loss is appropriate.

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<sup>35</sup> *Mfomadi and Another v Road Accident Fund* (34221/06) [2012] ZAGPPHC 152 (3 August 2012) at para 30

<sup>36</sup> *Mfomadi and Another v Road Accident Fund* (34221/06) [2012] ZAGPPHC 152 (3 August 2012) at para 30.

<sup>37</sup> *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at p.535.

<sup>38</sup> *RAF v Monani* 2009 (4) SA 327 (SCA) at paras 2-6

b. Duty of support: Remarriage/Re-partnering contingency

[39] The issue of the applicability of an additional remarriage or re-partnering contingency deduction to the plaintiff's claim for loss of support was controversial. The plaintiff was not called to give evidence, both parties relying on the information contained in the WL actuarial report subject to the *proviso* that this court determine whether an additional contingency deduction regarding the possibility of remarriage or re-partnering should be applied.

[40] It was not in dispute that the plaintiff was born on 1 May 1991 and at the date of the collision, the plaintiff was 26 years old, the deceased was 59 years old, and the minor child was 10 months old.

[41] Plaintiff's counsel submitted that the additional remarriage or re-partnering contingency deduction was not applicable. Defendant's counsel submitted having regard to the plaintiff's relatively young age, significant weight should be given to the possibility of remarriage or re-partnering. Defendant's counsel initially submitted that a contingency deduction of 10% for the past loss and 21% for future loss of support was appropriate.

[42] After the hearing, the defendant's counsel provided the court with the authorities to which the court was referred during the argument, namely, *Hulley v Cox*,<sup>39</sup> *YK v Road Accident Fund*,<sup>40</sup> and *MV and Others v Road Accident Fund*.<sup>41</sup> The defendant's counsel submitted further that "*when one considers the above-mentioned cases, I am of the submission that the 21% that I submitted is more fairer and I should have argued for 25%.*"

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<sup>39</sup> *Hulley v Cox* 1923 AD 234 at 244 "the Dependents are entitled to be compensated for pecuniary loss involved in a reduced income and a restricted provision for the supply of what allowance must be made for such as the possibility of remarriage."

<sup>40</sup> *YK v Road Accident Fund* [2020] JOL 46847 (FB) alternative citation *Kriek v Road Accident Fund* (529/2019) [2020] ZAFSHC 42 (5 March 2020) "The Bloemfontein High Court held that 5% for past and 15 for future should be applied and a further 40% contingency deduction for remarriage should be applied."

<sup>41</sup> *MV & MZN.O obo LH v Road Accident Fund* (1705/2017) [2019] ZAFSHC 131 (25 July 2019). "Bloemfontein High Court at paragraph 14 said that in considering the aspect of remarriage, I am of the view that there are no special circumstances to warrant a further deduction. Remarriage is part of the vicissitudes of life and should not be considered separately in this case."

[43] Per *audi alteram partem*, the plaintiff's counsel was afforded the opportunity to respond. The plaintiff's counsel relied on *MS v Road Accident Fund*<sup>42</sup> and submitted further that "*it is not an act of law that "Every female person under a certain age group contingency reduction should apply due to the fact that she might be re-married and the husband will definitely take care of her."*"

[44] When assessing the remarriage or re-partnering contingency deduction, the common law is entangled with judicial precedent.<sup>43</sup> Examining our jurisprudence, it became apparent that it is generally accepted by our courts to consider an additional contingency deduction for the possibility of remarriage or re-partnering.<sup>44</sup>

[45] The earliest reference can be found in 1886 in *Kennedy v. Port Elizabeth Harbour Board*,<sup>45</sup> where Barry JP included "*may possibly remarry*" as a consideration in determining the contingency deduction:

"Bearing in mind, however, that the plaintiff may possibly marry, and is not incapable of earning a livelihood for herself, and that the only child dependent upon her can scarcely be a burden..."<sup>46</sup>

[46] However, in 1904, Innes CJ held in *Waring & Gillow, Ltd. v. Sherborne*,<sup>47</sup> that it was "*impossible to calculate*" the chances of the plaintiff's remarriage:

"...and lastly, it is impossible to calculate what the chances are of the plaintiff's remarriage. In view of these considerations any allowance for contingencies must be mere guesswork."<sup>48</sup>

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<sup>42</sup> *MS v Road Accident Fund* 10133/2018) 2019 ZAGPJHC 84

<sup>43</sup> *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34 at para 38

<sup>44</sup> *Members of the Executive Council Responsible, for the Department of Road and Public Works, North West Province v Oosthuizen* A671/07) (2009) ZAGPPHC 16 (2 April 2009) at para 45.

<sup>45</sup> *Kennedy v. Port Elizabeth Harbour Board*, 5 EDC (1886) 311 at p.318

<sup>46</sup> *Kennedy v. Port Elizabeth Harbour Board* 5 EDC (1886) 311 at p.318

<sup>47</sup> *Waring & Gillow, Ltd. v. Sherborne* 1904 T.S. 340 at p.350

<sup>48</sup> *Waring & Gillow, Ltd. v. Sherborne* 1904 T.S. 340 at p.350

[47] In 1908, Innes CJ held in *Jameson's Minors v Central South African Railways*<sup>49</sup> that it is the remarriage potential of the *deceased* which is considered in order to calculate the material loss:<sup>50</sup>

“Not only is there the deceased’s expectation of life to be considered, but the question of how much his income would have been in the future; how long he would have been able to work at his full power; how much he would have spent on his children, and the contingency of his remarriage- all these, and other matters have to be taken into consideration.”

[48] In 1911, De Villiers JP explained in *Union Government v Warneke*,<sup>51</sup> that the nature of the right was not confined to “*maintenance*”:

“It remains to consider whether the husband has an action for damages for the death of his wife through the culpa of another and whether the action should be confined to maintenance. It is quite true that the authorities speak of victus, alimentatio, and so forth, but I can see no reason in principle why the right should be confined to that.”<sup>52</sup>

[49] In 1923, *Hulley v Cox*<sup>53</sup> the court held that “*allowance must be made for such factors as the possibility of re-marriage*”:

“But the object being to compensate them for material loss, not to improve their material prospects, it follows that allowance must be made for such factors as the possibility of re-marriage. Account must also be taken of eventualities which would have operated in any case. A father for instance would cease to maintain a son who became self supporting, or a daughter who married; and allowance would have to be made for those contingencies in assessing compensation.”<sup>54</sup>

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<sup>49</sup> *Jameson's Minors v Central South African Railways* 1908 TS 575

<sup>50</sup> *Jameson's Minors v Central South African Railways* 1908 TS 575 at p.603

<sup>51</sup> *Union Government v Warneke* 1911 AD 657

<sup>52</sup> *Union Government v Warneke* 1911 AD 657 at p.672-673

<sup>53</sup> *Hulley v Cox* 1923 AD 234 at p.243

<sup>54</sup> *Hulley v Cox* 1923 AD 234 at p.244

[50] In 1949, in *Millward v Glaser*,<sup>55</sup> Van den Heever JA clarified that:

“While the husband lived he was bound to support plaintiff. Her claim does not sound in anything so elastic and facultative as maintenance and expectations but in damages flowing from defendants wrongful conduct.”

[51] In 1963, in *Legal Insurance Company Ltd v Botes*<sup>56</sup> Holmes JA explained that since the right is based on a legally enforceable claim for the loss of “*maintenance*”<sup>57</sup> as such “*marriage prospects are relevant because marriage would reinstate her right of support.*”<sup>58</sup>

[52] In 1965, Vieyra J concluded in *Ongevallekommissaris v Santam Versekeringsmaatskapy Bpk*<sup>59</sup> that:

“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 his wife had he not been killed (cf. *Hulley v Cox*, supra at pp 213-214. It derives from the marital relationship.”<sup>60</sup>

[53] Later in 1965 Holmes JA in *Peri-Urban Areas Health Board v Munarin*<sup>61</sup> agreed that “*Marriage prospects are relevant because marriage would reinstate her right of support.*” Holmes JA held:

“The propriety of such a deduction was left open by this Court in *Legal Insurance Co. Ltd. v. Botes*, 1963 (1) S.A. 608 (A.D.) at pp. 618E to 619A. Thereafter the point fell to be decided in *Ongevallekommissaris v. Santam Versekeringsmaatskappy Bpk.*, 1965 (2) S.A. 193 (T) at pp. 200 et seq. VIEYRA, J., came to the conclusion that the defendant was not entitled to seek

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<sup>55</sup> *Millward v Glaser* 1949 (4) SA 931 (A)

<sup>56</sup> *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (AD) at p.614

<sup>57</sup> *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at 618-619

<sup>58</sup> *Peri Urban Areas Health Board v Munarin* 1965 (3) SA 367(A) at 376D

<sup>59</sup> *Ongevallekommissaris v Santam Versekeringsmaatskapy Bpk* 1965 (2) SA 193 (T)

<sup>60</sup> *Ongevallekommissaris v Santam Versekeringsmaatskapy Bpk* 1965 (2) SA 193 (T) at p.205H

<sup>61</sup> *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at p.376B-D



a reduction of the damages by subtracting the capitalised value of the earnings and potential earnings of the widow. I agree with the reasoning and conclusion of VIEYRA, J., on the point. One does not find in the Roman Dutch books any reference to deductions for the widow's earnings or earning capacity; see for example, Voet, 9.2.11, Van Leeuwen, 4.34.14, Grotius (Maasdorp's translation) p. 318; van der Linden (Juta's translation) p. 151. No doubt, however, in those days the avenues of employment open to a woman were limited: household activities such as spinning, baking, and brewing come more readily to mind, save possibly where she was a public trader; compare Arntzenius *Institutiones* (van den Heever's translation) p. 186. The emancipation of women in business is a modern development. The Courts can of course adapt the remedy to the conditions of modern life, but only "so far as that can be done without doing violence to its principles" per INNES, J.A., in *Union Government v. Warneke*, 1911 A.D. 657 at p. 665. The general principle of the remedy in question "aims at placing them (the dependants) in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed" *Botes's case*, supra at p. 614 (E). A widow is therefore entitled to compensation for loss of maintenance consequent upon the death of her husband, but any pecuniary benefits, similarly consequent, must be taken into account. To suggest that she is obliged to mitigate her damages by finding employment is to mistake the nature of her loss. What she has lost is a right the right of support. She cannot be required to mitigate that loss by incurring the duty of supporting herself. If she does obtain employment, it is more appropriate to regard her earnings as being the product of her own work than as consequent upon her husband's death. Marriage prospects are relevant because marriage would reinstate her right of support. The propriety of taking such prospects into account was recognised by this Court in *Hully v. Cox*, 1923 A.D. 234 at p. 244 and *Botes's case*, supra at pp. 6178." <sup>62</sup>

[54] Accordingly, *Peri-Urban Areas Health Board v Munarin*<sup>63</sup> concluded that applying a contingency deduction for the prospects of remarriage but ignoring capacity to work, is justified on the basis that the latter was always available whereas

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<sup>62</sup> *Peri-Urban Areas Health Board v Munarin* 1965 (3) 367 (A) at p.375G-376D

<sup>63</sup> *Peri-Urban Areas Health Board v Munarin* 1965 (3) 367 (A) at p.376C

the former could properly be classified as “as a consequent upon” the death of the deceased.<sup>64</sup>

[55] In 1986 Rabie CJ in *Constantia Insurance Company Ltd v Victor*<sup>65</sup> was of the view that *Hulley v Cox* was simply a reflection of considerations applicable in 1923.<sup>66</sup> Rabie CJ expressed his doubts regarding the correctness of the approach in *Peri-Urban Areas Health Board v Munarin* that marriage prospects are relevant because marriage would reinstate the right of support.<sup>67</sup> Rabie CJ pointed out that the right to support acquired by remarriage is against the new husband and is a new right, against the new husband for maintenance, and not a reinstatement of any earlier right against the deceased.<sup>68</sup> However, Rabie CJ then concluded that since our courts have taken into account a widow's remarriage or chance of remarriage over a long period of time, this is to be followed where the calculation of the compensation of a widow who has remarried, or who may remarry, is in question.<sup>69</sup>

[56] In 1999, Hefer JA in *Ongevallekommissaris v Santam Bpk*<sup>70</sup> held:

“In South Africa the contingency of remarriage is usually taken into account. If the purpose of an award for damages for loss of support is borne in mind the possibility of the plaintiff remarrying is a very real consideration. The possibility of a young widow remarrying shortly after the death of her husband and receiving damages for loss of support calculated over a period of 40 years is completely unrealistic. Allowing for the contingency is obviously realistic. [Hulley v Cox 1923 AD 234 at 244]”

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<sup>64</sup> *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at p.376

<sup>65</sup> *Constantia Insurance Company Ltd v Victor* 1986 1 SA 601 (A) at p. 614C-D “*Ek het, met groot eerbied gesê, twyfel oor die juistheid van die siening dat 'n weduwee se moontlike hertroue relevant is omdat dit haar reg op onderhoud weer sou instel (“reinstaat”). Die reg op onderhoud wat sy teenoor haar nuwe man verkry, is 'n nuwe reg, teen 'n nuwe onderhoudsplygtige, en nie 'n herinstelling van haar vroeëre reg nie*”

<sup>66</sup> *Constantia Insurance Company Ltd v Victor* 1986 1 SA 601 (A) at p.614C-D “Dit is al wat die geleerde hoofregter oor die saak gesê het. Dit wek die indruk dat dit in daardie tyd (1923) 'n gevestigde benadering was om die moontlikheid van 'n weduwee se hertroue of kans op hertroue in ag te neem

<sup>67</sup> *Constantia Insurance Company Ltd v Victor* 1986 1 SA 601 (A) at p.614C-D

<sup>68</sup> *Constantia Insurance Company Ltd v Victor* 1986 1 SA 601 (A) at p.614C-D

<sup>69</sup> *Constantia Versekeringsmaatskappy Bpk v Victor* 1986 1 SA 601 (A) at p.615.

<sup>70</sup> *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA).

[57] In 2009, the full bench per Southwood J in *Members of the Executive Council Responsible, for the Department of Road and Public Works, North West Province v Oosthuizen* held:<sup>71</sup>:

“In South Africa the contingency of remarriage is usually taken into account. If the purpose of an award for damages for loss of support is borne in mind the possibility of the plaintiff remarrying is a very real consideration.”<sup>72</sup>

[58] Southwood J held that the remarriage or re-partnering contingency did not offend against the equality provisions of the Constitution:<sup>73</sup>

“These judgments do not suggest anything other than that the possibility of remarriage must be taken into account. They do not, in terms, require that a trial court assess the likelihood of the plaintiff remarrying on the strength of her physical appearance. The respondent has not referred to a judgment in South Africa where this has been stated as a requirement in determining the possibility of the plaintiff remarrying. If it is the law that this be done I agree with the respondent that this would be offensive and should not be part of the law. But the respondent has not been so assessed in this case and this court has not seen her. It therefore plays no role in the case. It is a simple actuarial contingency.”<sup>74</sup>

[59] My understanding of the import of this jurisprudence, by which I am bound, is that our courts apply two types of contingencies: a general contingency for the vicissitudes of life<sup>75</sup> and an additional contingency for the possibility of remarriage or re-partnering. This leads to the question how the additional contingency deduction

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<sup>71</sup> *Members of the Executive Council Responsible, for the Department of Road and Public Works, North West Province v Oosthuizen* A671/07) (2009) ZAGPPHC 16 (2 April 2009) at para 45 citing with approval *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA).

<sup>72</sup> *Members of the Executive Council Responsible, for the Department of Road and Public Works, North West Province v Oosthuizen* A671/07) (2009) ZAGPPHC 16 (2 April 2009) at para 45.5.

<sup>73</sup> *Members of the Executive Council Department of Road and Public Works, North West Province v Oosthuizen* at para 45(1)

<sup>74</sup> *Members of the Executive Council Department of Road and Public Works, North West Province v Oosthuizen* at para 45(6) 45 citing with approval *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at p.376B-D

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for the possibility of remarriage or re-partnering is to be applied. Broadly, three divergent approaches emerge. It is necessary to assess each approach.

[60] The earliest approach which I categorise according to its underlying ethos as the “attributes approach” applies both a general contingency for the vicissitudes of life and an additional contingency having regard to the specific attributes of the individual claimant to enter into a possible financially beneficial remarriage or re-partnering relationship.<sup>76</sup>

[61] A recent application of the “attributes approach” is evident in the judgment of *YK v Road Accident Fund*<sup>77</sup> where the court applied general contingencies of 5% and 15% in respect of past and future loss of maintenance *and* a remarriage or re-partnering contingency of 40% on the basis that:

“In my view there can be nothing offensive for a presiding officer to have regard to, inter alia, the attractiveness, social skills and personality of a plaintiff who claims loss of maintenance based on the death of her/his spouse or life partner when considering the probability of remarriage. I firmly believe the probability of entering into a marital relationship or lifelong cohabitation is greater in the case of a well groomed, attractive person with a pleasant personality who has not deliberately elected to remain single and it is irrelevant whether the person is male or female, heterosexual or a member of the LGBT community, to wit lesbian, gay, bisexual or transgender.”<sup>78</sup>

[62] The “attributes approach” is based on two assumptions— the continued financial dependency and the assumption that the death of a breadwinner opens the possibility that such dependant will find another, substitute breadwinner who is equally able to provide financial support equivalent to the deceased.

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<sup>76</sup> *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at p.376; *Constantia Versekeringsmaatskappy Bpk v Victor* NO 1986 (1) SA 601(A) at 615A and *YK v Road Accident Fund* [2020] JOL 46847 (FB) at para 44.

<sup>77</sup> *YK v Road Accident Fund* [2020] JOL 46847 (FB) alternative citation *Kriek v Road Accident Fund* (529/2019) [2020] ZAFSHC 42 (5 March 2020).

<sup>78</sup> *YK v Road Accident Fund* [2020] JOL 46847 (FB) at para 33.

[63] The second approach to the remarriage or re-partnering contingency deduction, vociferously disavows having regard to physical attributes but retains the contingency strictly on actuarial calculations.<sup>79</sup> This “actuarial calculation approach” can be traced to *Ongevallekommisaris v Santam Bpk*<sup>80</sup> cited with approval by the full bench in *Members of the Executive Council Responsible for the Department of Road and Public Works, North West Province v Oosthuizen*.<sup>81</sup>

[64] The application of the “actuarial calculation approach” is best captured in *Esterhuizen and Others v Road Accident Fund*<sup>82</sup> where Tolmay J approved reliance on the actuarial calculation in the following terms:

“In my view the aforementioned approach is both correct and realistic and in accordance with the values of equality and dignity enshrined in our Constitution. It keeps in mind that an award of damages should be fair and to allow for the possibility of remarriage is appropriate, but no reliance should be placed on factors such as appearance.

I am of the view that it must also be borne in mind that a second marriage may not result in financial support. There is the possibility that the second marriage may not last and that the financial support, if gained, may be lost. The second husband may also not be in a financial position to give the necessary financial support. Consequently the possibility that the remarriage may not result in financial support must also be taken into consideration when the remarriage contingency is determined.”<sup>83</sup>

[65] The “actuarial calculation approach” is based on generalised statistical norms to determine the financial implications occasioned by the possible reacquisition of

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<sup>79</sup> *Members of the Executive Council Department of Road and Public Works, North West Province v Oosthuizen* (A671/07) [2009] ZAGPPHC 16 (2 April 2009) at para 45(1-6) *Esterhuizen and Others v Road Accident Fund* (26180/2014) [2016] ZAGPPHC 1221; 2017 (4) SA 461 (GP) (6 December 2016) at paras 11-13 and *Basson v Road Accident Fund* [2022] JOL 53293 (FB) at paras 20-22.

<sup>80</sup> *Ongevallekommisaris v Santam Bpk* 1999 (1) SA 251 (SCA).

<sup>81</sup> *Members of the Executive Council Responsible for the Department of Road and Public Works, North West Province v Oosthuizen* (A671/07) (2009) ZAGPPHC 16 (2 April 2009).

<sup>82</sup> *Esterhuizen and Others v Road Accident Fund* 2017 (4) SA 461 (GP) (6 December 2016).

<sup>83</sup> *Esterhuizen and Others v Road Accident Fund* at para 12 and 13

remarriage or re-partnering. The “actuarial calculation approach” applies both a general contingency for the vicissitudes of life and an additional contingency based on actuarial statistical normative calculations. The actuarial normative standards have been criticised because of outdated data statistics.<sup>84</sup> It is uncertain whether the actuarial normative standards incorporate the full spectrum of dependant claims arising from marriage or relationship “akin to marriage” such as family-like partnerships.<sup>85</sup>

[66] The third approach consigns the “attributes approach” to archaic legal history, criticises the simple “actuarial calculation approach”, and provides for only one general contingency for the vicissitudes of life unless “*the facts of a particular case clearly demonstrate that a higher than normal, and, special contingency for remarriage is to be deducted.*”<sup>86</sup>

[67] The application of the “one general contingency approach” is evident in *LD v Road Accident Fund*<sup>87</sup> where the court held:

“While the determination of a remarriage contingency is a discretionary matter for the trial court, taking into account all the evidence before it, and the court in the exercise of its discretion may have regard to statistics, I do not agree that the matter is one of ‘a simple actuarial contingency’ referred to in *Esterhuizen*. The decision to marry is seldom, if ever, in the first instance a commercial one or one arrived at mathematically.

Having regard to the outdated statistics in Koch, it seems to me that in order to obviate an injustice to a widow or widower and in particular to the plaintiff in the present case, that the approach adopted by the Australian court is the correct approach to follow. Unless the facts of a particular case clearly demonstrate that a higher than normal, and, special contingency for remarriage is to be

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<sup>84</sup> *LD v Road Accident Fund* (14606/2016) [2018] ZAGPPHC 181 (5 February 2018) at paras 33-34.

<sup>85</sup> *YK v Road Accident Fund* [2020] JOL 46847 (FB) at para 46

<sup>86</sup> *LD v Road Accident Fund* (14606/2016) [2018] ZAGPPHC 181 (5 February 2018) at para 37; *MV and Others v Road Accident Fund* (1705/2017) [2019] ZAFSHC 131 (25 July 2019) at para 14

<sup>87</sup> *LD v Road Accident Fund* (14606/2016) [2018] ZAGPPHC 181 (5 February 2018)

deducted, such further contingency ought not to be deducted. The ‘vicissitudes of life’, take account of the prospects of remarriage – no matter the reason therefore and thus, absent special circumstances, incorporate a more just provision for the contingency than the arbitrary statistical deduction of a further contingency.”<sup>88</sup>

[68] Applying the “one general contingency approach”, the court in *MV and Others v Road Accident Fund* concluded:

“In considering the aspect of remarriage, I am of the view that there are no special circumstances to warrant a further deduction. Remarriage is part of the vicissitudes of life and should not be considered separately in this case.”<sup>89</sup>

[69] The “one general contingency approach” applies only one contingency for the general vicissitudes of life except where the facts clearly demonstrate a higher than normal, special contingency for remarriage or re-partnering. The difficulty is that there is no guidance as to what factors constitute special circumstances.

[70] At this juncture, it is apposite to mention my concerns. The RAF Act only requires dependants to provide evidence of a legally enforceable duty of support. This aligns with the nature of the right captured in *Jameson's Minors v Central South African Railways* where Innes CJ stated:

*“Our law, while recognising no right of action on behalf of the deceased's estate, gives to those dependent on him a direct claim, enforceable in their own names, against the wrongdoer. This is a right not derived from the deceased man or his estate, but independently conferred upon members of his family.”*<sup>90</sup>

[71] A legally enforceable right of support includes all dependant claims arising from any legally recognised source, such as legal marriages, civil unions, blood relations,

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<sup>88</sup> *LD v Road Accident Fund* (14606/2016) [2018] ZAGPPHC 181 (5 February 2018) at para 29 and 37

<sup>89</sup> *MV and Others v Road Accident Fund* (1705/2017) [2019] ZAFSHC 131 (25 July 2019) at para 14.

<sup>90</sup> *Jameson's Minors v Central South African Railways* 1908 TS 575 at 583-4

adoption, court order as well as wider *de facto* relationships.<sup>91</sup> Wider *de facto* relationships include a duty of support between an aunt and nephew as the supreme court of appeal recognised in *Road Accident Fund v Mohohlo*.<sup>92</sup> Wider *de facto* relationships also include recognition of a right of support arising from a court order entitling a divorced spouse to maintenance.<sup>93</sup> The right to claim loss of support vests equally amongst all dependants who have a legally enforceable right to claim financial support from the deceased. The RAF Act does not distinguish between dependants.

[72] In *Ongevallekommissaris v Santam Bpk* the Supreme Court of Appeal held that since the remarriage contingency applied equally to all “*weduwee*” (widow) claims, no inequality arose when applying the remarriage contingency to widows already remarried and those widows who have not yet remarried.<sup>94</sup> I accept that the remarriage or re-partnering contingency when applied to all dependant claims arising from marriage or relationship “akin to marriage” does not give rise to inequality. However, this equal application only makes sense when comparing dependant claims arising from marriage or relationship “akin to marriage.” When regard is had to the broad spectrum of dependant claims, it is evident that the application of the additional contingency for the possibility of remarriage or re-partnering, is not equally applied between all dependants who have a legally enforceable right of support.

[73] Our courts have consistently relied on the “danger of overcompensation” to justify the application of the additional contingency to dependant claims arising from marriage or relationship “akin to marriage.”<sup>95</sup> This creates an anomaly. For example, the aunt’s claim in *Road Accident Fund v Mohohlo*<sup>96</sup> is not automatically subject to a remarriage or re-partnering contingency deduction yet if such aunt were to claim as a widow or unmarried cohabitating dependant, then the possibility of remarriage or re-partnering contingency deduction is a consideration. Given that the spectrum of all

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<sup>91</sup> *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 320i-321d

<sup>92</sup> *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA)

<sup>93</sup> *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 430G-431A

<sup>94</sup> *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) at 262F-J to 263A-B citing *Hulley v Cox* with approval.

<sup>95</sup> *YK v Road Accident Fund* [2020] JOL 46847 (FB) at para 51 citing *Hulley v Cox* at p.244 “object of the award to be made is to compensate the plaintiff for her material loss and not to improve her material prospects.”

<sup>96</sup> *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA)



dependant claims includes minor child dependants, it is obvious that the remarriage or re-partnering contingency cannot be applied to claims by minor child dependants. I point out that *Hulley v Cox* makes reference to the possibility of a dependant becoming “self-supporting.”<sup>97</sup> The possible danger of a minor child dependant becoming “self-supporting” also gives rise to the possibility of overcompensation yet no additional contingency deduction is made for the possibility of “self-support.”<sup>98</sup> By parity of reasoning, all dependants have an equal possibility of being overcompensated.

[74] Since the remarriage or re-partnering contingency is not generally required as an additional contingency deduction across the wider *de facto* relationships in the spectrum of all dependants’ claims, the danger of overcompensation in dependants’ claims arising from marriage or relationship “akin to marriage” is insufficient justification for the application of an additional contingency deduction.

[75] Furthermore, if I am to accept that the application of the remarriage contingency is justified on the basis that the reciprocal duty of support between partners arises as a result of the marriage or partnership and terminates on remarriage then this conflicts with the continuing duty of support despite dissolution of such relationship.<sup>99</sup>

[76] The Supreme Court of Appeal in *CB and Another v HB*<sup>100</sup> held that cohabitation (albeit in the context of a divorce settlement agreement), did not automatically terminate a legally enforceable right of support unless there was evidence that such cohabitation was “with a person who *de facto* contributes to her maintenance.”<sup>101</sup> It is therefore clear that a reciprocal duty of support only terminates when another person becomes legally obliged to maintain such dependant. As such, there must be evidence of the *actual* termination of the legally enforceable duty of support between

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<sup>97</sup> *Hulley v Cox* 1923 AD 234 at p.244 “A father for instance would cease to maintain a son who became self supporting, or a daughter who married; and allowance would have to be made for those contingencies in assessing compensation.”

<sup>98</sup> *Hulley v Cox* 1923 AD 234 at p.244 “A father for instance would cease to maintain a son who became self supporting, or a daughter who married; and allowance would have to be made for those contingencies in assessing compensation.”

<sup>99</sup> *Santam Versekeringsmaatskapy Bpk v Henery* [1999] 3 SA 421 (SCA)

<sup>100</sup> *CB and Another v HB* [2020] ZASCA 178 (SCA) at para 14

<sup>101</sup> *CB and Another v HB* [2020] ZASCA 178 (SCA) at para 15

the deceased and the plaintiff, not simply a *possibility* of acquiring another legally enforceable duty of support.

[77] I am of the view that the application of the possibility of remarriage or re-partnering contingency unfairly discriminates between dependants' claims arising from marriage or relationships akin to marriage and all other dependants who have a legally enforceable right of support. The potential danger of overcompensation applies equally to all dependant claims for loss of support. Herein lies the inequality. The remarriage or re-partnering contingency must be applied equally to all dependant claims for loss of support or it should not be applied, at all.

[78] One of the hallmarks of our Constitution, is equality.<sup>102</sup> The additional remarriage or re-partnering contingency deduction is in effect a mechanism for direct or indirect discrimination of dependant claims arising from marriage or relationships akin to marriage. I am not convinced that overcompensation is a reasonable and justifiable limitation in terms of section 36(1) of the Bill of Rights. Section 39(2) of the Constitution enjoins courts to develop the common law to align with the normative grid of the Constitution to suit the demands of our evolving society and give effect to the Bill of Rights.<sup>103</sup> I highlight the application of the remarriage or re-partnering contingency to dependants' claims arising from marriage or relationship "akin to marriage" in the hope of bringing about its demise as offending the equality clause contained in section 9(3) of the Bill of Rights in our Constitution.

[79] In alignment with both the spirit of the RAF Act and Constitution, I am of the view that only one general contingency for the vicissitudes of life should be applied to all dependants claims which arise from a legally enforceable right of support.<sup>104</sup>

[80] Turning to the facts, the deceased was 59 years old and considering his imminent retirement, the sustainability of the plaintiff's financial support is

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<sup>102</sup> *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34 at para 38

<sup>103</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 at para 70.

<sup>104</sup> *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34 at para 38

circumscribed. Applying one general contingency deduction, 10% for past loss and 21% for future loss is therefore appropriate.

### *Quantum Assessment*

[81] The WL actuarial calculations were revisited at my request as the actuarial report was outdated having been compiled on 1 December 2019.<sup>105</sup> The update of the initial WL actuarial report may, in the discretion of this court and in the interests of justice, be admitted<sup>106</sup> at any time up to judgment.<sup>107</sup> As the matter involves the best interests of a minor child, I took the view that this would be a proper case to invoke this discretion.<sup>108</sup>

[82] The WL actuarial report recalculation at 1 April 2023, after the application of the contingencies set out in this judgment (minor child: loss of support until 18 years with a contingency deduction of 7% for past loss and 15% for future loss and plaintiff<sup>109</sup> general contingency deduction of 10% for past loss and 21% for future loss) produced the following result:

### *Order*

[83] In the result I make the following order:

- a. The defendant is ordered to pay the plaintiff the total amount of R650 075.00 in full and final settlement as follows:
  - i. R450 202.00 in respect of the plaintiff's personal claim for loss of support; and

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<sup>105</sup> *BB v Road Accident Fund* (11676/2017) [2020] ZAWCHC 15 (28 February 2020) at para 23.

<sup>106</sup> *Du Plessis v Ackermann* 1932 EDL 139 at 143144; *Hladhla v President Insurance Co Ltd* 1965 (1) SA 614 (A) at p.621B622A.

<sup>107</sup> *Mlombo v Fourie* 1964 (3) SA 350 (T) at 357C

<sup>108</sup> *Mqolomba v RAF* [2002] 4 All SA 214 (Tk) at para 41

<sup>109</sup> Note: "Ms T Kekana" referred to in actuarial "Table 1" calculation is the Plaintiff.

ii. R199 873.00 in respect of the plaintiff's claim in her representative capacity as guardian of the minor child, born 16 August 2016, in respect of the minor child's claim for loss of support.

b. The defendant is to pay the plaintiff's attorney's taxed or agreed party-and-party costs, on a High Court scale including the trial and until the date of this order which shall include the reasonable qualifying, of the following expert witness:

i. Wim Loots (Actuary) in respect of the compilation of the initial and updated actuarial report.

c. The plaintiff shall, in the event that the costs are not agreed upon, serve the notice of taxation on the defendant.

d. Any and all costs payable in terms of this order shall bear statutory interest at the prescribed statutory rate from the date of affixing of the taxing master's allocator (whichever is applicable), to the date of payment.

e. In the event of default on the above payment, interest shall accrue on such outstanding amount on the date of this order, as per Prescribed Rate of Interest Act 55 of 1975 (as amended) per annum calculated from the due date, as per the RAF Act, until the date of payment.

N MAYET  
ACTING JUDGE OF THE HIGH COURT  
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 16 May 2023.

Date of Hearing: 31 January 2023

Date of Judgment: 16 May 2023

For the Plaintiff: Adv. C Mopedi instructed by Mopedi CS Attorneys

For the Defendant: Adv E M Ndlovu instructed by State Attorney