

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 74727/15  
74728/15

- (1) REPORTABLE: ~~YES~~/NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO  
(3) REVISED: YES/~~NO~~

3 September 2018

In the matter between:

JEANNE PIENAAR

Plaintiff

(Case number 74727/15)

OTHILE PIENAAR obo MINORS

Plaintiff

(Case number 74728/15)

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

STRIJDOM, AJStated Case

The following stated case was put before me by the parties.

[1] Background

- 1.1 Both cases arise from the death of Mr. Pienaar in a motor vehicle accident that occurred on the 3<sup>rd</sup> of December 2014.
- 1.2 Mrs. Othile Pienaar (“the widow”) was married in community of property to the deceased. She is currently 53 years old and is claiming in her personal and representative capacity for loss of support as well as past medical expenses incurred whilst the deceased was in hospital.
- 1.3 The deceased was liable to support three children (“the children”)
  - 1.3.1 Jeanne Pienaar (“Jeanne”) born on 18 February 1994. She is currently 23 years old and is claiming in her own name as she was 21 when her father died;
  - 1.3.2 Christelle Pienaar born on 9 October 2001. She is currently 15 years old and was 13 when her father died. She is the daughter of Othile Pienaar and the deceased and her mother (Othile) claims on her behalf.
  - 1.3.3 Christiaan Pienaar – Christelle and he are twins. Othile Pienaar accordingly claims on his behalf as well.

[2] Previous court orders

2.1 The matters were previously on the roll on the 24<sup>th</sup> of August 2017.

2.2 At that stage an interim payment of R1 744 622.00 was agreed upon.

[3] Issues for determination

3.1 Quantum of the loss of support for both plaintiff's.

With regards to the claim of Jeanne Pienaar the defendant will abide by the decision of the court on the widows claim and subsequent calculation.

3.2 Past medical expenses.

The court will not be called to decide on this issue and the attorneys for both parties will endeavour to settle this issue.

[4] Mrs. T Talmud

Industrial Psychologist (report dated 20 November 2016)

4.1 Mrs. Othile Pienaar is employed as a Town Planner by City of Tshwane. She earns a total of R46 167.00 per month and no promotional opportunities are foreseen and the expert opinion is that she will continue earning as she does presently, receiving only notch increases until she retires at 65.

4.2 The deceased was employed as a HR Manager for MMC from 2001 until he was retrenched during April 2014.

4.2.1 In this position he earned a total income of R99 400.00 per month;

4.2.2 He then opted for a severance package from MMC and started his own business called CPHR Consultants;

4.2.3 She further opines that the deceased would have remained self-employed until retiring at 70.

[5] Agreed assumptions relating to the calculation of loss support

5.1 The deceased would have retired at the age of 70.

5.2 The widow will earn as per her current salary with only inflationary increases to be applied until retirement.

5.3 The widow would have retired at age 65.

5.4 The children would have been dependant until age 21.5.

5.5 The contingencies to be applied to the claims of the children to be 5% on past loss of support and 10% on future loss of support.

5.6 The attached reports of the Actuaries Jacobson (Annexure A) and Rosewood (Annexure B) will be used by each party respectively in their arguments.

B. Issues for determination

[6] The deceased's income

6.1 Plaintiff concedes that the deceased's earnings as per the report of Rosewood Technologies (his salary earnings) to be used as a basis to determine is earning capacity had he not died; defendant holds a different view.

[7] The widow's income

7.1 Should the portion of the widow's salary that gets deducted for pension contributions (Employer 22% and widow 7% of her basic

salary) be included when calculating her loss of support; if not, must it be ignored?

7.2 Ancillary to this, until what date should the calculation be done? Should it be until retirement of the deceased (February 2028) or until retirement of the widow (August 2030) or for life?

[8] Contingencies

8.1 What contingencies should be applied with regards to the widow's claim?

[9] The following actuarial reports were submitted by the parties

9.1 Plaintiff's expert - Gerald Jacobson

9.2 Defendants expert - Rosewood Technologies

[10] The report of the plaintiff's expert is done on the basis of the following assumptions

10.1 Deceased's retirement age is assumed at 70 and his earnings are assumed on same level as his salaried earnings (as per defendant's earnings).

10.2 Plaintiff's income:



Her retirement contributions will only accrue to her on retirement (instead of being treated as part of her earnings being received continuously from date of accident until her retirement.

- [11] An actuarial report was prepared by the defendant's actuary Rosewood Technologies using the same assumptions as the plaintiff's actuary, but using the methodology that her retirement contributions are treated as part of her earnings being received continuously from date of accident until retirement.
- [12] The parties agreed that no oral evidence was to be led and that issues in dispute were to be determined by the court solely on the evidence contained in the stated case and the expert's reports filed by the parties.

#### Income of the deceased

- [13] It was submitted by counsel for the defendant that the deceased's income should have been taken to be R96 325.00 per month, which translates to R1 155 900.00 per annum. The actuaries used higher than the amounts stated.
- [14] Plaintiff conceded that the earnings used by the defendant's in their calculations was correct. The report of the plaintiff's actuary is based on the figures used by the defendant. The defendant submitted in his heads of argument that the figure in their calculations is incorrect and now seeks a recalculation. This argument never formed part of the stated case, questions for decision or oral argument. As to the assertion that the deceased earned on a lower level, the defendant's reliance on the report of

the forensic auditor is in my view inadmissible given the fact that this matter was argued as a stated case. The plaintiff abandoned this report and the parties agreed to proceed on the reports of the Industrial Psychologist as well as the actuaries to the extent as contained in the stated case.

#### Income of the deceased

- [15] The plaintiff's contention is that her retirement contributions will only accrue to her on retirement and therefore should not be taken into account in the assessment of her loss.
- [16] It was submitted by counsel for the defendant that on retirement those contributions would have been used to maintain the common household had the deceased not died and therefore they should be taken into account much as the deceased's income has been taken into account in its entirety. Put differently, if the deceased had not been killed and lived out his expectation of life, the widow upon her retrenchment would have used the pension to maintain the common household.
- [17] The plaintiff's claim is one similar to a maintenance claim. The relevance of the plaintiff's income in a loss of support matter is only to determine the level of maintenance she was provided with. Regard must therefore be had to the actual monies available to the plaintiff to support herself on a daily basis both pre and post-accident. The enquiry is not one to determine her capacity to earn or the gross value of her estate. Her pension fund (and contributions she has made thereto thus far) are not a benefit that she received due to the death of her husband.



[18] The deceased's pension cannot be considered for purpose of calculation in a loss of support claim. It is by virtue of statute that the deceased's pension must be ignored for purpose of calculation.

[19] Section 1 (1) of the Assessment of Damages Act 9 of 1969 provided as follows:

“(1) when in any action, the cause of which arose after the commencement of this Act, damage are assessed for loss of support as a result of a person's death. No insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.”

The statute makes no similar provision regarding the surviving spouses' pension.

[20] It was held in *Legal Insurance Co v Botes*<sup>1</sup> that:-

“the remedy relates to material loss caused to the dependants ... it aims at placing them in as good a position as regards maintenance as they would have been in if the deceased had not been killed, to this end, material losses as well as benefits and prospects must be considered”

#### Cut-off date of calculations

[21] It was submitted by counsel for the defendant that the calculations should be made for life as the duty of support between spouses does not cease for as long as they are alive.

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<sup>1</sup> 1968 (1) AD at 614 E

- [22] Both the actuaries calculated the period of the loss of support of the plaintiff up until retirement of the deceased. It is common cause that this would have been at age 70.
- [23] The first stage in the process of determining the plaintiff's actual pecuniary loss in both her capacities is to determine the amount, which the deceased had he lived, would in all probability have earned during the balance of the period of his anticipated working life.
- [24] It is Mrs. Talmud's uncontested expert opinion that the deceased would have retired at age 70.

### Contingencies

- [25] General contingencies of 5% to the past loss and 10% to the future loss of support were applied for each of the dependant's.
- [26] It was submitted by the defendant that a deduction must be made for plaintiff's remarriage contingency.
- [27] In LD V Road Accident Fund<sup>2</sup> it was stated that:-

“Having regard to the outdated statistics in Koch, it seems to me that in order to alleviate 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 demonstrated that a higher than normal and special contingency for

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<sup>2</sup> (14606/2016 [2018] ZAG PPHC 181 (5.02.2018))

remarriage is to be 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”.

- [28] In my view, the issue of remarriage in this matter is one that falls under general contingencies and should not be dealt with in addition thereto.

#### General contingencies

- [29] It was submitted by the defendant that 15% is a starting point for a future loss of earnings and that a higher than normal contingency deduction of 25% is appropriate in the circumstances of this case. It was further submitted that the court should accept the defendant’s basis and methodology and the contingencies applied as embodied in the defendant’s actuarial calculations. The total loss will therefore be R1 868 995.00 less – interim payment of R1 744 622.00 resulting in the grand total of R124 373.00.
- [30] The factors on which the defendant relies in his heads of argument in support of a higher contingency deduction relate to an accountants report, is not before this court. In any event, contingencies are deducted before the application of the so-called cap and cannot be deducted from the capped amounts. The plaintiff’s actuary doubled the general contingency to 10%. In my view this adequately take additional variables into account.

[31] Having considered the material placed before me and the submissions made by both counsels, I am of the view that the claim as quantified by the plaintiff is the correct and justifiable representation of the loss of support suffered by both the plaintiff's.

[32] In the result the following awards would be a fair compensation for both plaintiff's:-

1. The plaintiff's (Jeanne Pienaar) in case number 74727/15 is awarded R52 464.00 for loss of support.
2. The plaintiff (Othile Pienaar) in case number 74728/15 is awarded R833 971.00 (R2 578 593.00 less the interim payment of R1 744 622.00) for loss of support in her personal and representative capacity.
3. Past medical expenses as per the draft order.
4. The draft orders marked "X" are made orders of this court.

  
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 STRIDOM AJ  
 ACTING JUDGE OF THE HIGH COURT  
 GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:

Adv Karin Strydom

Instructed by:

Counsel for the Defendant:

Instructed by:

Ehlers Attorneys

Adv R M Phiri

Rambevha Morabane Attorneys

Date of Judgment:

3 September 2018