REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

(NORTH GAUTENG, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2012 08 03
DATE

SIGNATURE

3/8/2012

CASE NO: 34221/06

In the matter between

MA MFOMADI First Plaintiff

SCINTIA SEDIELA MFOMADI Second Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKGOKA, J

[1] This is a claim for loss of support in terms of the Road Accident Fund in Act 56 of 1996 (the Act) following the death of the first plaintiff's husband on 20 October 2001 as a result of injuries he sustained during or motor vehicle collision. Initially the plaintiff sued both in her personality capacity, as well as her capacity as mother and 'natural guardian' of the second plaintiff. The second plaintiff had

reached majority when the action was instituted in 2006, but was still a minor when the claim was lodged with the defendant in June 2003.

[2] At the commencement of the trial counsel for the plaintiff applied in terms of rule 15 (2) of the Uniform Rules of Court for an order in terms of which the erstwhile minor child was to be joined in these proceedings as the second plaintiff. There was no objection to the proposed joinder. Accordingly I made an order joining Scintia Sediela Mfomadi as the second plaintiff. Counsel further moved for amendment to the plaintiff's particulars of claim. Similarly, there was no objection and I granted the proposed amendment in the following respects (which obviously affects the prayers): (i) by deletion of the amount of 2.5 x R 144 on page 9 and replacing it with R4141 385; (ii) by substituting paragraph 10 with the following:

> 'For greater particularity, reference is made to the actuarial report of Human and Morries dated 24 February 2012 in the amount of R 273 838.'

[3] The following issues are common cause or not in dispute. The plaintiff was born on 9 December 1950. On 9 November 1983 she married her late husband (the deceased) in community of property. The deceased was born on 11 January 1947. He was, during his lifetime, a taxi owner and driver. Four children were born from the marriage, two of whom were self- supporting at the time of his death. The second plaintiff was born on 7 November 1986. Her immediate elder sister was born in 1982. No claim has been instituted on her behalf. On 20 October 2001 the deceased was killed in a motor vehicle collision. The defendant has conceded liability for the collision. Counsel informed me that the parties had further agreed that the plaintiffs' damages, if any, should be 'apportioned' in the ratio 60/40. I shall deal with this aspect later. The trial proceeded therefore only on the issue of the amount of damages.

[4] The issues in dispute and for determination are the following: (i) the income of the deceased; (ii) whether the first plaintiff has suffered any loss for loss of support and if so, the *quantum* of such claim; (iii) the *quantum* of the second plaintiff's damages and (iv) the age of dependency of the second plaintiff.

[5] Three witnesses testified, namely the two plaintiffs and Mr Matome Marcus Rakimane, who testified on behalf of their behalf. The defendant closed its case without calling any witnesses on its behalf. What follows is a brief exposition of each witness' evidence.

The first plaintiff

[6] She testified that during the deceased's lifetime he managed the taxi business. She was employed at an electric plugs-manufacturing firm since 1975, but was retrenched on 15 February 2012. After the deceased's death she inherited the deceased's only vehicle, which he had used as a taxi. The deceased had bought the vehicle second-hand. She continued to operate the taxi. The driver she employed used to bring daily takings of R150 and R200. She encountered numerous problems with the driver, whom she suspected of embezzling the daily takings and short-changing her. As a result, the taxi business deteriorated and was no longer profitable. She received approximately R5000 per month from the taxi business, which she used for her daughter's education. According to her, the deceased, during his life-time derived more money from the taxi business than she did when she managed the business, after his death.

[7] By the time she was retrenched, she had already surrendered the vehicle in terms of the government's taxi recapitalization programme, in respect of which she received R50 00 for the scrap. She used that money as a deposit on a new vehicle. She was unable to maintain regular repayments on the new vehicle, which she also used as a taxi. It broke down frequently and caused more money to

repair. The situation was exacerbated by the continuing embezzlement of daily takings by the drivers she had employed. She currently receives old-age pension of R1 140 a month, since January 2011.

The second plaintiff

[9] She was 15 years old at the time of the deceased's death and still a pupil. She failed matric in 2007 and did a 're-examination' in June 2008. Thereafter she remained at home and obtained a post matric certificate in 2009. She only became gainfully employed in 2010.

Mr Rakimane

[10] He is taxi owner and a member of a taxi association to which the deceased also belonged. He is currently the deputy chairperson of the association. At the time of the deceased death he was a 'rank master'. He had to, among others, ensure that commuters were transported safely and monitoring of fare fees charged by the drivers. By virtue of his position, the records of the trips made by the taxis whose members belonged to his association, he was able to ascertain the member of loads made by each taxi He testified that during the relevant period a single trip from Brits to Maboloka was R6. The deceased's vehicle carried 15 passengers. One taxi would make 5 return loads per day during the week, and over the weekends it could be up to 7 loads per day. Using a particular formula, he estimated the deceased's gross income per month to be R5 665, and R3 150 net. (Assuming the deceased has loaded 7 days a week). During cross-examination he was unable to explain how he arrived at the gross profit of R5 665. He further conceded that the amount of R3 150 did not take into consideration the normal wear and tear, maintenance, service, rank fees, driver wages, tyre change.

[11] I must immediately remark that the evidence of the deceased's earnings is not the best there could be. The evidence of Mr Rakimane is based largely on suppositions. However, the fact remains that the deceased owned and drove a taxi. He earned some income from that business. Mr. Rakimane's evidence, imperfect as it might be, provides some basis from which an award may be

made. The fact that the evidence is open to criticism is no reason for a court to adopt 'a *non possumus* attitude' and make no award. See *Hersman v Shapiro & Co*[1] where Stratford J said:

> 'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damages have been suffered, the Court is bound to award damages.'

(See also *Southern Association v Bailey*[2] and *Anthony and Another v Cape Town Municipality*[3])

[12] In his work, *The Quantum Year Book* (2012) Robert Koch at p108 provides a useful list of suggested earnings assumptions for non-corporate workers, where a taxi-owner –driver's earnings are assumed at R44 000 – R260 000 per year. I am therefore satisfied that there is a sufficient basis on which an award can be made for damages.

[13] I now consider the plaintiffs' individual claims. With regard to the first plaintiff's claim, it is in contention whether she is entitled to any award. Counsel for the defendant, Mr. *Nel*, argued that since the first plaintiff derived income from the deceased's taxi business after his death, she suffered no loss at all. Accordingly, so was the submission, absolution from the instance should be granted. On the other hand, Mr *De Beer*, for the plaintiff, urged me to find that the first plaintiff indeed suffered a loss.

[14] Before I consider the parties' contentions, I deem it prudent to set out the general principles governing the payment for loss of support. Those were conveniently summarized by Lewis AJA (as she then was) in *Lambrakis v Santam*[4].

> '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

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[1] 1926 TPD 367 at 379
[2] 1984(1) SA 98 (A) at 114A
[3] 1967 (4) SA 445 (A) at 451B-C.
[4] 2002 (3) SA 710 paras 12 and 13.

234; and *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A). The particular equities of the case must alos 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)...

Where property is inherited by a dependant, in determining the extent of his or her loss the court should take into account not the value of the property but that of the accelerated accrual (cf *Groenewald v Snyders* 1966 (3) SA 248C-F). This entails assessing the probabilities of the dependant having inherited the property should the deceased not have been killed through the wrongdoing of the defendant, but dying from a different cause at a later stage.'

[15] The basis of liability to compensate for loss of support is therefore to compensate a widow or a child for the value of the support lost as a result of the death of the spouse or parent. The fact that income accrues from other sources which compensate for the loss is not a ground for reducing the amount payable by the wrongdoers unless such income is a direct consequence of the death of the deceased. (See *Santam Insurance* v *Meredith*[5] at 267H-J). At least since the decision in *Jameson's Minors*, it has been settled law that income generated by an asset in a deceased estate constitutes an accelerated benefit to dependent heirs. In *Indrani and Another v African Guarantee & Indemnity Co Ltd*[6] the following was stated at 607 F-H:

'The general principle applied by the South African Court is that a dependant plaintiff when entitled to damages for loss of support, should be awarded damages only for the "material loss caused... by his death" (See *Hulley v Cox 1923 AD 234 at 243)*. It seems implicit in what was said by Innes CJ in *Hulley v Cox*, that the material loss can only be ascertained " by balancing, on the one hand , the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him *by reason of the death*" (my emphasis).

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[5] 1990 (4) SA 265 (Tk A)
[6] 1968 (4) SA 606 (D)

[16] In the present case, the first plaintiff was married in community of property to the deceased. In addition to her compensation for loss of support she also acquired an additional source of income from the proceeds of her half-share of the estate which she could use for her own benefit. It admits of no debate that the income derived from the taxi business constitutes a benefit which accrues as a consequence of the death the deceased. It is therefore deductible as an accelerated benefit. In *Santam Insurance Ltd v Meredith*[7] Goldin JA articulated the position thus:

> 'Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.'(See Hahlo *The South African Law of Husband and Wife*, 5th ed at 157-8.)In addition to her compensation for loss of support she also acquires an additional source of income from the proceeds of her half of the estate which she can use for her own benefit. In my view such income can constitute a benefit which accrues as a consequence of the death of the deceased. The division of the joint estate is not itself a benefit but the proceeds from her exercise of ownership of her half can depending on all the facts, constitute, as does accelerated succession, a deductible benefit. (See *De Wet NO v Furgens* 1970 (3) SA 38 (A) at 46-51.) In deciding whether or to what extent income does in fact constitute a deductible benefit it is necessary to consider and give effect to the situation as a whole.(See *Marine and Trade Insurance Co Ltd v Mariamah and Another* 1978 (3) SA 480 (A) at 488-9.)

[17] For the calculation of the deduction for acceleration, one must have regard to the three separate components mentioned in *Groenewald* at 248E-F, namely:

(a) The inheritance (the value of assets which have accrued as a result of the death,

(b) The use value (the value of use of the assets by the family had there been no death)

(c) The chance of later inheritance (the present value of the chance of inheriting at a later date had the death not occurred prematurely).

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[7] Above at 269B-D

[18] In the present case, (c) finds no application. With regard to (a) the only two assets accruing are the immovable property and the taxi (jointly valued at R100 00). Regarding (b), it is highly likely (subject of course to the general contingencies of life) that the deceased would have continued the taxi business, but for his death.

[19] The question is therefore, whether, on a conspectus of all the factors, the first plaintiff derived benefit from the division of the joint estate, and if so, to what extent. As stated elsewhere in this judgment, the proper approach is that indicated in *Botes* above, namely, that the remedy for loss of support aims at putting the defendants in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed; and that, to this end, material losses as well as benefits and prospects must be considered (See also *Groenewald v Snyders*, above at 256 C-D).

[20] In this regard it should be taken into account that although the first plaintiff continued to manage the business, it is clear that she did not possess the necessary skill and experience that the deceased had. She lacked the insight and "street-wise" skills, for example, to manage possible embezzlement of daily takings by drivers. My impression of her overall evidence is that the hazards of managing or business as competitive and complex such as a taxi, were just too much for her. She was clearly out of her depth. Indeed, what the deceased had managed for many years, collapsed shortly after his death.

[21] In argument, the parties' counsel relied on the actuarial calculations contained in the reports prepared for the parties, respectively. In the actuarial report dated 24 February 2012 prepared for the plaintiffs by Human & Morris Consulting Actuaries, the approach adopted in the calculation is the following. The net income of the deceased was determined at R144 000 before tax, with the assumption that there would have been an increase of 6% per year from date of the accident to assumed retirement age of 65, from which period the deceased would have been entitled to a State Old Age pension.

[22] The income of the first plaintiff at the time of the accident was also taken into account, namely R42 328 per year, backdated at 6% per year to date of the accident. It is assumed that the first plaintiff, after being retrenched in February 2007, had not received any income until she commenced receipt of State Old Age pension in January 2011. With regard to apportionment of family income, it is assumed that the pre-accident net family income would have been apportioned two parts to each parent, and one part to the second plaintiff. The first plaintiff is deemed to apply her own full net income to offset her loss of support. It was assumed that the second plaintiff would have needed support up to 31 October 2010 (apparently as she became employed only in November 2010). The net estate of the deceased is assumed at R100 000, being a house and assumed value for the taxi business, thus R50 000 was calculated for accelerated benefits purposes. On the basis of these and other assumptions, the plaintiffs' losses were calculated at R414 385 and R273 878, respectively

[23] Counsel for the defendant, in submitting that the first plaintiff had suffered no loss, since she inherited the deceased's taxi and continued to derive income from it, was apparently influenced by, and relied on, an actuarial calculation prepared for the defendant by Mr. George Schwalb of GRS Actuarial Consulting dated 19 July 2011. Based also on certain assumptions, it is concluded in the calculation that the first plaintiff had suffered no loss at all. The basis of this conclusion is as follows:

> 'According to a letter dated 27 August 2010 by Road Accident & Insurance Assessors:
>
> - Maboloka Jericho Taxi association supplied them with an 'estimated (sic) of what a taxi owner in this instance would have earned'. The widow is earning a similar thumb suck income as taxi owner.
> - Clipsal Manufacturing employed Ms Ntsane[6] until the branch where she worked closed down.

[6] Reference to the first plaintiff by her maiden surname. It is not clear why, as she had attached her marriage certificate to her claim.

> According to a rough estimate by Maboloka Jericho taxi operators in August 2010, "Mrs Mfomadi" earns about R3 150 per week profit from the taxi business (note that their estimate excluded depreciation and maintenance).
>
> From the above information it seems clear that the value of Ms Ntsane's inheritance of the taxi business exceeded any financial support that she would have received from Mr Mfomadi from the same taxi business and, therefore, she has not suffered any net loss of earnings. We thus only estimated the children's loss of earnings."

[24] With regard to the second plaintiff, it was assumed that the income from the taxi business would be apportioned among others, to the second plaintiff's sister, who was 19 at the time of the accident. On the assumption that both children would have needed support until the ages of 21 respectively, the second plaintiff's loss is calculated at R124 097.

[25] The actuarial calculation prepared for the defendant, and its premise with regard to the first plaintiff, is in my view, not very helpful, and to the extent I point out here, flawed. It is flawed in one simple respect. It is assumed that since the first plaintiff inherited the deceased's taxi, she was able to generate the same income as the deceased did. This is simplistic, and obviously ignores the undisputed evidence, which I accept, that the first plaintiff was not possessed of the necessary skills that the deceased had to sustain the business. This is largely why the business collapsed. Of course, her driver would have loaded the same number of passengers as did the deceased, and even perhaps collected the same daily takings, but that is only part of the overall management, in respect of which she was found lagging. As a result, the first plaintiff's income from her inheritance of the deceased's taxi business, and the value thereof, resulted in a financial loss and therefore no benefit accrued when the totality of the situation is considered. (Compare the facts to those in *Santam Insurance v Meredith*, above). I am therefore satisfied that the first plaintiff did suffer a loss as a result of the deceased's death.

[26] With regard to the second plaintiff, the calculation is obviously distorted by the inclusion of the second plaintiff's sister, who is not part of this action, and apparently did not assert a need for support. It appears from the first plaintiff's evidence that she was had been in receipt of a social grant since 2006. I therefore prefer the plaintiffs' actuarial calculation over that of the defendant. It is not to suggest that the plaintiffs' calculation does not have its flaws. For example, I have already commented on the inadequacy of evidence with regard to the deceased's income, on which evidence, the actuarial report is premised. However, that can be balanced with a suitable contingency deduction, which is an aspect I now to.

[27] Both plaintiffs' awards should be adjusted to make provision for the general contingencies. Had he not been killed, the deceased's future life and, in particular, his taxi business and earning capacity would have been subject to a variety of normal vicissitudes and hazards of life, the more so that he was self-employed in a volatile taxi industry. He would have been, for example, affected by the recapitalization programme. It is likely therefore that he would have struggled financially, maybe even to the extent of collapse. Obviously, not all these ponderables would have been adverse. He may have continued to work beyond the retirement age of 65.

[28] On the other hand, he and his businesses may have fallen on hard times. Ill-health or injury may have dogged him; he may have been killed in a taxi-related violence (which is not far-fetched, given the notoriety of the industry in this regard). All these would cause loss of income or forced retirement. Therefore, a deduction should be made from the plaintiffs' claim to allow for general contingencies, some of which I have alluded to above. All these factors, in my view, point to a higher contingency deduction, especially in respect of the first plaintiff. Having regard to all the factors, I conclude that a deduction of 40% from the first plaintiff's claim in respect of her loss would, in the circumstances, be fair and adequate to allow for general contingencies. It takes into account all of the above contingencies,

and the fact that she received some income from an inherited asset, though on a very limited basis. It also balances out the inadequacy of the evidence with regard to the deceased's income.

[29] I turn now to the second plaintiff's claim. In this regard compensation is for the loss of support from a parent who did infact support, or was under an obligation to do so. (See *Groenewald v Snyders*, above at 247A-C. The principles governing the award of damages to the second plaintiff are not contested. It is common cause that the second plaintiff is entitled to damages only insofar as she has suffered actual pecuniary loss as a result of the wrongdoing of the insured driver (see *Evins v Shield Insurance Co. Ltd*[9]). On a conspectus of all the facts, I am satisfied that the second plaintiff suffered actual pecuniary loss as result of the death of her father, and for that she is entitled to adequate and fair compensation.

[30] In the actuarial calculation, it was assumed that she would have been in need of maintenance up to the time she became employed. This is the correct assumption. 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*[10]). The deceased in the present case, would have been obliged to continue supporting the second plaintiff up to self-sufficiency. Similarly, the second plaintiff's claim should be adjusted to factor in the general contingencies. I also take into account all the factors considered in arriving at the contingency deduction from the first plaintiff's claim. Of course, the factor relating to the inheritance is not applicable to her. In her case, I deem a deduction of 20% to be appropriate.

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[9] 1980 (2) SA 814 (A) at 838A.
[10] 1980 (3) SA 1010 (O) at 1017G-H

[31] The plaintiffs' combined damages are in the amount of R467 733.34, calculated as follows:

(a) First plaintiff

R414 385 - 40% = R165 754

Net R248 631

(b) Second plaintiff

R273 878 - 20% - R54 775.66

Net R219 102.34

[32] Finally, I deal with an aspect I alluded to in the introduction. It is to be recalled that I mentioned that counsel conveyed to me that the parties had agreed that the plaintiffs' damages be apportioned on a 60/40 ratio. It occurred to me when preparing this judgment that I did not query this aspect with counsel when it was raised. This being a dependants' claim, apportionment does not come into reckoning. The negligence of the deceased in an action by dependants is irrelevant (see for example *Potgieter v Rondalia Assurance Corp. of SA Ltd*[1]). All the dependants have to establish is the proverbial 1 % in order to succeed with their full damages. The agreement of the parties with regard to the apportionment is therefore at odds with the general legal policy and is not binding on this court. I was of the mind to request counsel to address me on this aspect before delivery of this judgment. On second thought I decided against that, as the legal principle is trite, and counsel would be constrained to agree with the established principle. The plaintiffs are, as a result, entitled to their full damages, without any apportionment.

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[1] 1970 (1) SA 705 (N) at 715A-C

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

1. The defendant is ordered to pay the plaintiff an amount of R467 733.34 on or before 3 September 2012;

2. The said amount shall be paid directly into the Trust Account of the plaintiff's attorneys, the particulars of which shall be furnished to the defendant's attorneys forthwith;

3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, which costs shall include the reasonable taxable costs of obtaining the actuarial reports from Human & Morris (actuaries);

4. The capital amount will not bear interest unless the defendant fails to effect payment on the due date, in which event the capital amount will bear interest at the rate of 15.5% *per annum* from and including the fifteenth calendar day after the date of this order, to date of payment.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 1 MARCH 2012**
JUDGMENT DELIVERED	**: 3 AUGUST 2012**
FOR THE PLAINTIFF	**: ADV RJ DE BEER**
INSTRUCTED BY	**: LOURENS ATTORNEYS, BRITS**
FOR THE DEFENDANT	**: ADV JP NEL**
INSTRUCTED BY	**: MOTLHE JOOMA SABDIA INC., PRETORIA**