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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

DATE

SIGNATURE

CASE NO: 19993/2013

DATE: 12/12/2014

IN THE MATTER BETWEEN:

S[...], F[...] A[...] S[...]

FIRST PLAINTIFF

S[...], J[...] M[...]

SECOND PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KOLLAPEN J:

1. In this action the plaintiff sues the defendant for damages for loss of support in both her personal capacity as well as in her capacity as mother and guardian of her two minor children.
2. The husband of the plaintiff and father of the minor children, M[...] J[...] S[...] ('the deceased') died in a motor collision on the 15th of February 2012 and the defendant has accepted liability for the loss arising out of his death.

3. The parties were able to settle all other outstanding issues relating to the plaintiff's claim except for the following two issues which remain in dispute and which require determination:
 - a. The plaintiff's loss of support and in particular the limited question of whether the plaintiff's career trajectory would have led to him becoming entitled to a payment of five million Rand which would have occurred in the event of the sale of the business he was employed in at the time of his death; and
 - b. Whether the plaintiff's claim in her personal capacity must be subject to what has been termed a 'remarriage contingency'.
4. No evidence was led in the trial and the parties were in agreement that the various medico-legal and other reports which had been commissioned at the instance of the plaintiff would stand as evidence in respect of the correctness of their contents.
5. The plaintiff also sought at the commencement of the hearing an amendment to its particulars of claim amending the amounts claimed. The amendment was allowed as there was no objection to the proposed amendment and the Court was satisfied that a proper case had been made out for the application to amend.

THE FIRST ISSUE IN DISPUTE – THE PROSPECTIVE SALE OF THE BUSINESS

6. By way of background, at the time of his death the deceased was employed as the Managing Director of Valley Lodge in Magaliesburg, described as an upmarket hotel and conference venue. He commenced employment there in 2003. His previous employers were the Mount Grace Hotel and the Sabi Sabi Game Reserve and it was not in dispute that by all accounts he had distinguished himself as a leader in the industry he worked in.

7. His employer at Valley Lodge was the Mazzoni Group of Companies, headed by Mr and Mrs Mazzoni. During 2012 the Mazzonis and the deceased arrived at an agreement with regard to the deceased's future employment by them and the agreement covered areas such as his salary, incentive bonus and accrued leave and none of these are in issue.
8. The agreement also reflected a desire on the part of the Mazzonis that the business conducted at Valley Lodge would be sold within a period of five years from February 2012. In the event of such a sale materialising within three years, the deceased would receive the sum of five million Rand from the proceeds of the sale and if the sale materialised after the three year period, he would receive five per cent of the proceeds subject to the proviso that the provisional minimum selling price would be one hundred and fifty million Rand.
9. The plaintiff's stance is that the lump sum payment of five million Rand (three million Rand after taxation) should be included in the deceased's projected future income, while the stance of the defendant is that no provision should be made for any lump sum payment given the uncertainty of the sale being concluded.
10. It is common cause that the Valley Lodge has to date not been sold.
11. In the report of the industrial psychologists, Schoombee, Wessels and Associates they deal with this aspect of the deceased's projected future income and the following from the report may be useful to record:
 - a. In dealing with the sale of Valley Lodge, they conclude that it would be difficult to indicate with certainty when such a sale would materialise given that the economy was still under pressure;

- b. They indicate that it is more probable that the Valley Lodge would have been sold given the intention of the owners to sell.
12. When considering whether the sale was a probable scenario, counsel for the plaintiff took the view that as the defendant had accepted the correctness of the report of Wessels and Schoombee, it was bound by the opinion that the sale was probable and further that the Court was bound by such a conclusion given the admission by the defendant.
13. I have some difficulty with this submission to the extent that it suggests that the Court is bound by the opinion of an expert and cannot interrogate the opinion and test the basis on which it is made simply because the parties agree on the correctness of the report of the expert. In my view such a stance would constitute a serious dereliction of the judicial function and in the context of this matter even more so as what is in contention is not a factual conclusion by the expert but rather his opinion on the probabilities of a future scenario.
14. When I have regard to the basis of the expert's conclusion that a sale would have been more probable, I find it is based only on a single underlying fact, namely that the Mazzoni's had the intention to sell. An intention to sell can hardly on its own render a sale more probable than not. There are a host of other factors that would require consideration including the state of the economy, the particular industry, the appetite for acquisitions, and the purchase consideration sought. None of these are canvassed in any meaningful way and I must accordingly conclude that I cannot without further evidence agree with the conclusion that the sale was a probable scenario.
15. In ***COOPERS (SOUTH AFRICA) (PTY) LTD v DEUTSCHE GESELLSCHAFT FÜR SCHÄDLINGSBEKÄMPFUNG MBH*** 1976 (3) SA 543 (A) the Appellate Division said the following:

‘An expert’s opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’ (at 371F-H)

16. Accordingly and for the reasons I have given, it falls to be excluded from being considered in the calculation of the deceased’s future income.

THE SECOND ISSUE – THE ‘REMARRIAGE CONTINGENCY’

17. The plaintiff argued that a remarriage contingency violates the guarantee of equality in Section 9 of the Constitution both in its conception as well as in the manner in which it has been traditionally applied. In particular it was contended that to the extent that the remarriage contingency was mainly applied to women, it differentiates against them on a basis that is not fair, justified or rational.
18. Before dealing with these arguments, it may become necessary to examine the rationale for the existence of such a contingency and given the developments in our law, whether its nomenclature is appropriate.
19. As I understand it, the contingency was intended to provide for the future benefit a claimant may receive in the event of re-marriage. It is of course not the act of re-marriage that is meant to constitute the benefit but rather the mutual and reciprocal duty of support that arises out of a marriage. If the duty of support is indeed the operative principle and factor, then for the contingency

to continue to have a place it must accord with developments in our law where such a duty of support may arise even outside the context of marriage.

20. Our Courts have expressly recognised the creation and existence of such a duty outside of the institution of marriage (see ***PAIXÃO v ROAD ACCIDENT FUND 2012 (6) SA 377 (SCA)*** where the Court developed the common law to extend the dependant's action to unmarried persons in heterosexual relationships who have established a contractual reciprocal duty of support and see also ***BUTTERS v MNCORA 2012 (4) SA 1 (WCC)*** where the Court in dealing with the concept of a universal partnership expressed the view that such a partnership may extend beyond commercial undertakings to the contribution a party makes to the common home and raising the children of the parties.
21. Simply put the underlying rationale for the duty of support does not lie exclusively in the institution of marriage. The *boni mores* of the community have developed to recognise its existence, and for good cause one may add, in other forms of relationships albeit under specific and defined circumstances, where the dominant feature is the nature of the partnership between the parties rather than purely the legal form of their relationship.
22. That being the case and if the contingency is to have continued relevance, it may be more fitting and appropriate to refer to it as either a re-partnering contingency or a prospective duty of support contingency as that is what I understand is precisely what the nature of the contingency is intended to capture and consider.
23. Under such circumstances and given the reciprocal nature of the duty of support that arises between spouses and that may arise between parties in other relationships, it cannot be said that if the contingency is applied then in its conception it unfairly discriminates against women. The duty of support rests with both parties and is gender-neutral in that sense. I accept that in practice a

re-partnering contingency may be applied more often to women than to men, but there should be no reason why a Court in appropriate instances should not also apply it to men.

24. Finally I proceed to deal with the question of whether such a contingency in the broader sense that I have described, has a place and relevance in the calculation of damages for loss of support. In principle the answer must be in the affirmative as every relevant factor that impacts on the loss including the future loss a litigant would suffer would come into consideration. Thus if a future duty of support is likely to arise that will impact on the loss a party suffers, that remains relevant and a valid criteria in the difficult exercise of determining contingencies.
25. My view however is that if a re-partnering contingency is to be applied, then it cannot be done as a matter of course but rather it has to find support in the factual matrix of the matter the Court is called upon to adjudicate. Re-marriage or re-partnering does not necessarily result in a benefit to a party.
26. In ***ONGEVALLEKOMMISSARIS v SANTAM BPK 1999 (1) SA 251 (SCA)***, the Court expressly recognised that a second marriage does not necessarily restore a widow's previous financial position. The new partner may have a smaller income than the first, may have more extensive obligations and in fact a person may be in a weaker financial position after a re-marriage than before it.
27. Thus while the principle of a re-partnering contingency continues to have relevance and applicability, one must be careful in how it is to be applied. If there is evidence that supports its inclusion then a Court would be justified in favourably considering it, but if there is no such evidence, then it may offend the principles of fairness and justice simply to include it on the broad assertion that the possibility of re-partnering must always exist. Under such circumstances I am not satisfied that there is any evidence before me that

would justify the consideration of such a contingency given the facts of this matter.

28. In the circumstances and in conclusion I would exclude both the prospective earnings of the deceased that is related to the proposed sale of Valley Lodge as well as the proposed contingency deduction, termed a 'remarriage deduction' in the actuarial calculation prepared by Algorithm Consultants and Actuaries.
29. I have considered the alternate actuarial calculations which take into account the conclusions I have arrived at and conclude that the amount of damages to be awarded to the plaintiff in both her personal and representative capacity is the total sum of R 4 234 677-00 .

ORDER

30. A draft order has been prepared which deals with the rest of the relief claimed. It is made an order of court.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

19993/2013

HEARD ON: 19 NOVEMBER 2014

FOR THE PLAINTIFF:

INSTRUCTED BY: ADAMS & ADAMS (ref: DBS/sjh/P360)

FOR THE DEFENDANT:

INSTRUCTED BY: SEKATI MONYANE INC (ref: Ms Monyane/PM RC0434)

