

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 72700/2013

Date: 15 December 2014

Not reportable

Not of interest to other judges

In the matter between:

M[...] T[...] C[...]

Plaintiff

AND

ROAD ACCIDENT FUND

Defendant

DATE OF HEARING: 26 NOVEMBER 2014

DATE OF JUDGMENT: 15 DECEMBER 2014

JUDGMENT

MANAMELA AJ

Introduction

[1] Ms T[...] C[...] M[...] was married to Mr L[...] T[...] M[...] until their separation through a decree of divorce granted by this division on 07 June 2007. Their son, T[...] K[...] M[...] was born from this marriage on [...] 2005. His custody was awarded to his mother and his father retained rights of reasonable access. His

father was ordered to contribute towards his maintenance in an amount of R1 500.00 per month. This amount was to increase annually at the rate of 10%, until K[...] became self-sufficient.

[2] Just over 9 months later,¹ on 30 March 2008, Mr M[...] died in a motor vehicle accident on the Siyabuswa and Roedian road. He was the driver of a motor vehicle which collided with another, driven by one Mr Samuel Chauke. Mr M[...] died at the scene of the accident. His surviving minor son K[...], was over 2 years old. With the sad demise of his father, K[...] had suffered a loss of support, generally represented by the amount in the divorce order stated above.

[3] His mother, the plaintiff herein, instituted legal proceedings against the Road Accident Fund, the defendant herein, for his loss of support due to the death of his father. It was claimed in the summons that the accident was caused by the negligence of either the driver of the other vehicle or both the other driver and his late father, and therefore the defendant was statutorily² liable for the loss.

[4] The plaintiff claimed for past and future loss of support in an amount of R4 000 000.00.³ Notably, the claim exceeded the court-ordered amount of R1 500.00 per month referred to above. The defendant disputed the claims and the matter proceeded to trial.

[5] The matter was allocated to me for trial on 26 November 2014 for a determination on both merits and *quantum*. Mr NJ Potgieter and Ms MM Kgwale appeared for the plaintiff and defendant, respectively. They advised me that, although no settlement has been reached at the time, same was expected. They have since confirmed that merits have been fully conceded by the defendant and therefore only the *quantum* of the plaintiff's [child's] loss of support remains for determination. At the end of the trial, I requested counsel to file heads of argument on the oral submissions made in court. I am indebted to them for their valuable efforts and assistance in this regard. Other than, the oral and written submissions, the court listened to *viva voce* evidence of the plaintiff. I will deal later with the pertinent aspects of her evidence.

Issues to be determined

[6] As stated above, this claim is essentially a loss of support or maintenance of the minor child by his deceased father, due to the latter's death in a vehicle accident. It is common cause that, what has to be determined here is firstly, the basis on which the calculation is to be made and secondly, the contribution [if any] by the plaintiff, as the mother and biological parent of the minor child. There may be other issues ancillary or peripheral to the aforesaid issues. I start the discussion by stating a brief relevant background to the matter and therefore the claims. Some of this has already been alluded to above.

Brief Relevant Background

[7] The plaintiff was born on 26 September 1979 whereas the deceased was born on 08 December 1980. It is not clear when they got married, but as stated above, they divorced on 07 June 2007. ⁴ Also, as stated above, their divorce order incorporated, among others, the following:

That the defendant pays maintenance in respect of the minor child in the amount of R1 500.00 per month with 10% increase every year until the minor child becomes self-sufficient. ⁵

[8] As stated above, the deceased sadly met his accidental death on 30 March 2008, which was almost 10 months after the divorce from the plaintiff. The deceased was self-employed and conducting business through an entity called Molepo Properties CC. ⁶

[9] Further background information was provided by the testimony of the plaintiff at the trial. I briefly deal with this next. Naturally, the effect of her evidence will extend beyond just background material.

Plaintiff's oral evidence

[10] The plaintiff took the witness stand and testified that, she is employed on a temporary or casual basis with Edcon or Edgars. She has been with this company since 2007 and her employment status has over the years changed from permanent to casual, due to restructuring processes in the company. Although, she wasn't fully certain of this, it appears to her that another restructuring process is looming. She earns an amount of not less than R8 500.00. However, she did not produce any documentary evidence in this regard. Counsel for the defendant would later hand up ⁷ what is submitted to be plaintiff's payslip, indicating her monthly salary to be higher and therefore contradictory to what she testified before this court. This was after the plaintiff had retired from the witness stand and actually being excused by the court. The alleged contradiction was therefore not raised for her comment or tested in cross-examination. I will revert to this later.

[11] It was further stated by the plaintiff that, although the deceased was only bound in terms of the court order referred to above to only pay an amount of R1 500.00, he voluntarily paid more to meet other expenses of the minor child. This was done due to the love the deceased had for his minor child, she explained. A letter or document from the minor child's crèche was tendered in and accepted as part of the evidence. ⁸

[12] The contents of this document related to the years 2007 and 2008. The document is very sketchy in details, I must say. However, it states that, the deceased paid amounts of R1 250.00 for crèche fees; R350.00 for after-care; R170.00 for crèche outings and R220.00 for extra-mural activities. It is not stated thereon whether these were monthly payments or not, but from the plaintiff's evidence these were monthly expenses. Therefore, this formed part of the deceased support towards the minor child.

Loss of Support: Submissions

(a) Plaintiff's Submissions

[13] The plaintiff claims that the minor child is entitled to more than the amount of R1 500.00 that his deceased father was ordered to pay in June 2007. She testified that the deceased paid more than the aforesaid amount, including the amounts stated in Exhibit 鄭 • referred to above.⁹ The total of the amounts in this document is R1 990.00. Therefore, it is plaintiff's submissions that, the deceased paid an amount of R3 490.00 per month towards the support of his child. The plaintiff also testified that, because the deceased voluntarily paid the additional amount, there was no need to vary the court order to reflect a higher amount. I deal with this further below.

[14] Mr N.J. Potgieter appearing for the plaintiff, argued in reaction to the defendant's submissions on the papers that, the plaintiff's income is irrelevant to the determination to be made here. He also submitted, in what I consider to be an alternative argument that, it is futile to consider plaintiff's salary when her employment situation wasn't stable. I will also return to deal with this below.

[15] His view was that, a fair and reasonable determination of the minor child's loss of support was by dividing the deceased average income at the time of death and dividing it into three and allocating a third towards the support of the minor child.

(b) Defendant's Submissions

[16] Ms M.M. Kgwale appeared for the defendant. Her argument was in the main, twofold. Firstly, that the minor child was limited to the court order monthly amount of R1 500.00, together with the associated annual increments. Secondly, that the plaintiff, as a mother, also has a duty to maintain the minor child and therefore the size of her monthly income was critical in this regard.

[17] The defendant's contention is that, the mother should bear the additional amounts as she has a duty to do so and has the means to can afford this. It wasn't clear to me, although I enquired as to why counsel for the defendant allowed the plaintiff to descend from the witness box without challenging her evidence on the basis of the alleged salary advice.¹⁰ Instead, I was saddled with the responsibility to order that the plaintiff be recalled, even when it was clear that she has left the court premises. Be that as it may, nothing really turns on this for current purposes, as will become clearer below.

[18] The above contentions by the plaintiff and the defendant were accommodated in actuarial calculations. In fact, counsel based their arguments on these calculations.

Actuarial Calculations

[19] The plaintiff acquired and filed actuarial reports dated 26 March 2014 and 13 May 2014. Both these reports are by Mr G.A. Whittaker of Algorithm Consultants and Actuaries. I will refer to the first report (of 26 March 2014) as the *Court Order Basis Report* and the second report (of 13 May 2014) as the *One Third Basis Report*. I am not aware of the reason why the plaintiff decided to get more than one report, but this has coincidental benefit for this court. I will also explain this below.

Court Order Basis Report

[20] The *Court Order Basis Report* suggests two bases regarding the loss of support of the minor child. The first basis is assuming the minor child becoming self-supporting at **18 years** of age on **31 December 2023**. The second basis assumed self-supporting age of **21 years** (i.e. **31 December 2026**). Contingencies of **5% for past loss** and **10% for future loss** are effected.

[21] The result for this calculation is an amount of **R138 859.00** and **R283 051.00** for past and future losses, respectively on 18 years independency. The total for the two figures is an amount of **R421 910.00**.

[22] The amounts for 21 years independency are **R138 859.00** (no difference with the other basis) and **R368 934.00** for past and future losses, respectively. The total amount for this basis is **R507 793.00**.

One Third Basis Report

[23] As stated above, the same actuaries were employed by the plaintiff to calculate the loss of support on another basis.

[24] The basis used here was a calculation of the deposits made into the deceased personal bank account over a period of some 16 months from December 2006 to March 2008, totalling an amount of **R351 790.00**. The monthly average of that period is **R21 986.88** and the actuaries assumed a deduction of 30% of the income as expenses.^{[11](#)} The net result is an amount of **R15 390.00** per month. The latter amount is then rationed on the basis of **two-thirds to the deceased** and **one-third to the minor child**. There is also no explanation given for this basis, but the issue deserves further attention. I will deal with this below.

[25] Under this basis, the actuaries again postulated two scenarios (or bases) as Basis I (at 18 years) and Basis II (at 21 years). Contingency deductions applied are at **5% for past loss** and **15% for future loss**. The result of this calculation is an amount of **R377 638.00** and **R551 938.00** for past and future losses, respectively on 18 years independency. The total for the two figures is an amount of **R929 575.00**.

[26] At 21 years independency, the amounts are **R377 638.00** (no difference with the other Basis I above) and **R696 160.00** for past and future losses, respectively. The total amount for Basis II is **R1 073 797.00**.

[27] As stated above, the plaintiff prefers the basis of calculation adopted in the *One Third Basis Report*, whereas the defendant prefers the other basis reflected in the *Court Order Basis Report*. Although, the reasons therefor are obvious, the task of this court is therefore not made any easier by this, I must add.

Determination of an appropriate method of calculation

[28] I am of the view that the amount of R1 500.00 per month escalating at 10% annually was arrived at after fair and reasonable process under the watchful eye of the presiding judge as the personification of the court: the upper guardian of the minor child. There is no evidence to suggest that any of the parties were unhappy with this amount. In fact, in my view, if anyone would have been unhappy, it would have been the deceased, considering the effect of the other outcomes of the court order.¹² Not the plaintiff. But, the process and the outcome evinced by the court order appear to have had the support of the plaintiff and the deceased. The order was for the maintenance of the minor child until self-sufficiency, which may equate to around 21 years of age, take into consideration tertiary education of the minor child. The court order forms the basis used in the *Court Order Basis Report* referred to above.

[29] However, the evidence of the plaintiff that the deceased voluntarily paid more and met the crèche fees of the minor child cannot be simply ignored. It survived the rigours of cross-examination, although the defendant's counsel felt that it could have been controverted on the basis of later revealed pay slip. I say this with optimum deference to counsel. On the basis of the order I will be making later herein, I find that the extent of the plaintiff's salary is not that material.

[30] On her evidence, the deceased paid an amount of R1 990.00 more than the court-ordered R1 500.00 per month. I accept that the deceased voluntarily met these expenses and may have continued to meet them. However, there is no evidence that he would have considered himself legally bound to pay the additional amounts, let alone as part of the court-ordered amount of R1 500.00. Further, no evidence is available to me regarding reasonableness and necessity of the expenses making up the R1 990.00. This, in my view, would have supported the contention that, there was a basis to vary the effect of the maintenance part of court order, although the parties chose not to do so. The deceased simply paid because he loved his child. "*He loved his son and took care of him*", the plaintiff told this court at the trial.

[31] That may have been so, but I do not accept that a father who a few months before only bound himself to pay R1 500.00 per month would have agreed to a legal duty of paying R3 490.00 per month. Further, what material change to the minor child's needs would there have been in a period of less than 10 months from the

divorce order. There is no evidence available to sustaining this.

[32] I therefore will only allow 50% of the expenses as what the deceased could have been legally bound to pay. The plaintiff as the other parent should meet the other 50% of the additional expenses. On her evidence she has the earning capacity to do this. Her speculations regarding her employment situation is immaterial to this duty. I have rounded the undivided figure of R1 990.00 to an amount of R2 000.00 and then divided it equally into two. Therefore, only an amount of R1 000.00 will be allowed as an additional monthly maintenance or towards support of the minor child.

[33] As stated above, I find Basis II (being the scenario of payment of the amount of R1 500.00 with 10% annual increases until the minor child reaches the age of 21) to be fair and reasonable. In my view, it accommodates the reality of the court order and what existed in terms of the duty of support of the deceased to his minor child. The total amount for this basis is **R507 793.00**.

[34] My calculations of the R1 000.00, I have found appropriate to be added as part of the minor child's support come to a figure of **R271 039.22**. I adopted method of calculation in the *Court Order Basis Report*¹³ calculated from 30 March 2008 (being the date of the accident and death) to 01 July 2014 (calculation date) in respect of the past loss of support of **R104 833.86 - 5% contingency of R5 241.69** amounting to **R99 592.17**. For future loss of support on the R1 000.00 scenario, my calculations are from 01 July 2014 to 01 July 2026¹⁴ (being around the time the minor child turns 21 years of age). The total amount of the future loss of support of **R201 702.41 - 15% contingency of R30 255.36** amounts to **R171 447.05**. Therefore, the total net loss of support based on the R1 000.00 additional amount is **R271 039.22** (being R99 592.17 + R171 447.05). I must emphasize that I obviously do not have any skill in actuarial science and therefore have not usurped this role from the relevant experts, but just exercised my discretion. There may be some minor errors in the calculation, especially regarding the 10% annual increases in the monthly amounts of R1 000.00, I allowed. In my view, this is a better approach than the court granting a lump-sum amount with no explanation of the method of calculation, adopted. However, the result may as well be considered to be my lumpsum award regarding what I deem to be fair and reasonable in this regard.

[35] The purpose of actuarial expertise in the court's determination of damages claims should never be overrated. The learned authors of *Visser & Potgieter Law of Damages*, **Potgieter, JM; Steynberg, L and Floyd, T.B** (3 ed) (2012) explain the role of actuaries authoritatively (on page 467) as follows:

“An actuary is an expert witness whose opinion is merely part of all of the other evidence before this court, to be given greater or lesser weight according to the circumstances of the case. The calculations and evidence of an actuary often plays an important role.”

[Footnotes omitted]

[36] Professor Klopper adds the following from his seminal book, the *Law of Third-Party Compensation* (3 ed) (2012) (on page 177):

“Of course, the actuarial report is only used as a base and does not in any way bind, the court’s inherent discretion to assess such damages.”

[Footnotes omitted]

Conclusion

[37] Therefore, the total amount I consider appropriate for the support of the minor child is **R778 832.22**, made up of the amount of R507 793.00 in respect of the previously court ordered maintenance of R1 500.00 as calculated in the plaintiff’s first actuarial report (*Court Order Basis Report*) and R271 039.22, which I found to be a fair amount based on the additional expenses I allowed in an amount of R1 000.00 per month.

[38] I consider the above result to constitute substantial success and therefore costs should also be in favour of the plaintiff.

Order

[39] I make the following order:

(a) that, the defendant is ordered to pay the plaintiff damages in respect of loss of support of the minor child T[...] K[...] M[...] in an amount of **R778 832.22**;

(b) that, the defendant is ordered to pay interest of the amount of **R778 832.22** at the rate of 9% per annum from after 14 days from the date of this order to date of payment;

(c) that, defendant is ordered to pay costs on a party and party scale, including the costs of senior/junior counsel, wherever employed, either as agreed or taxed.

K.L.A.M. MANAMELA

Acting Judge of the High Court of

SA: Gauteng Division, Pretoria

APPEARANCES

For the Plaintiff : Adv. NJ Potgieter

Instructed by : Gihana Kennedy Attorneys

Pretoria

For the Defendant : Adv. MM Kgwale

Instructed by : AP Ledwaba Incorporated

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¹From the date of divorce on 07 June 2007.

²In terms of the Road Accident Fund Act 56 of 1996.

³The summons stated that the claim was also for loss of income.

⁴See page 15 of the merits bundle.

⁵Ibid at paragraph or part 4.

⁶See paragraph 2.2.1 on indexed page 2 of the Experts bundle.

⁷As Exhibit "B" although the evidential status of the document remained *in limbo* for reasons not material for current purposes.

⁸The document is from Siyakhula Crèche and is dated 10 November 2014. It was marked "Exhibit A".

⁹Ibid.

¹⁰See paragraph [10] above.

¹¹See paragraph 2.2.1 of the report on pages 2- 3 of the experts bundle.

¹²Like the orders dealing with custody of the minor child and forfeiture of the benefits of the joint estate by the deceased.

¹³See paragraph 2.2.1 on page 9 of the experts bundle.

¹⁴I did not emulate the 31 December ending as in both the actuarial reports.