

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case No: 20179/2013

Date: 15 December 2014

Not reportable

Not of interest to other judges

In the matter between:

**R[...] B[...] E[...]**

Plaintiff

**AND**

**ROAD ACCIDENT FUND**

Defendant

**DATE OF HEARING: 28 NOVEMBER 2014**

**DATE OF JUDGMENT: 15 DECEMBER 2014**

**JUDGMENT**

**MANAMELA AJ**

***Introduction***

[1] Ms B[...] E[...] R[...] is the mother of M[...] J[...] R[...]. She is the plaintiff in this matter in her own and representative capacities. The latter claim is on behalf of M[...], as he is still legally a minor. He was born on 30 October 2006, M[...]'s father, the late Mr R[...] O[...] R[...] died a motor vehicle accident on 04 January

2011. The late Mr R[...] died on the accident scene due to sustaining severe bodily injuries. Mr R[...] was a driver of the vehicle which collided with another vehicle driven by Mr Edward Mulingo in Pretoria Street, Benoni.

[2] The plaintiff sued the defendant, as the entity which is statutorily liable for the negligent driving of its insured driver, Mr Mulingo, for her loss of support and M[...]’s due to the death of Mr R[...]. She was married to him out of community of property on 25 September 2004. The defendant denied any liability until at the trial on 28 November 2014, whereat, it conceded that its insured driver was the sole cause of the accident. The dispute persisted in respect of the claim for loss of support. The defendant had also acknowledged liability in respect of the expenses for the funeral of the late Mr R[...] in an amount of R23 063, 00.

[3] It is contended that the late Mr R[...] had a legal duty, during his lifetime, to contribute to the minor child’s support in respect of his education, well-being and maintenance until he becomes self-supporting around the age of 21. With regard to the plaintiff, the submission is that he would have supported and maintained the plaintiff until his retirement at the age of 65. He was 33 years old when he died and the plaintiff was 34 years old. He worked at Business Connexion and earned an amount of R900 464.00 annually at the time of his death<sup>1</sup> and she is not working.<sup>2</sup>

[4] The plaintiff claimed an amount of R2 340 569.60 for her past and future loss of support and an amount of R585 142.40 for Mathew’s and therefore a combined claim of R2 925 712.00. It is conceded that, her personal claim is statutorily capped.

[5] Therefore, the crux of the dispute at the trial for this matter and subsequently of the determination to be made by this court, is in respect of the determination of the appropriate amount for the plaintiff’s and the minor’s loss of support. The actuarial evidence will be significantly decisive in this regard.

[6] At the end of the trial, at which only, oral arguments were made, I requested Mr CH van Bergen appearing for the plaintiff and Mr MH van Twisk appearing for the defendant, to file heads of argument to assist the court in a determination to be made herein, I am indebted to both counsel for their assistance in this regard.

[7] Although there are five actuarial reports filed in this matter, being three from the plaintiff and two from the defendants, both parties agree that, there are two issues to be determined in this matter. Firstly, which of the report is to be accepted by this court and secondly, which percentage of contingencies for remarriage of the plaintiff is to be used. The actuarial reports filed and handed in at trial set these contingencies from 17% to 36% as will be dealt with further below.

## *Actuarial Calculations*

### Mr Kramer's first report (for the plaintiff)

[8] Mr IB Kramer compiled a report dated 05 March 2014, which was initially filed by the plaintiff. However, at the trial, a revised or amended report dated 26 November 2014 was handed in by agreement as "Exhibit A".

[9] In the first report, Mr Kramer applied the inflationary and other assumptions regarding the projected future income the late Mr Robinson would have earned until his retirement at the age of 65. He also assumed Mr Robinson was of good health and did not consider the minor's mortality to be an issue. He arrived to amounts of **R826 680.00** in respect of the plaintiff and **R413 339.00**, in respect of the minor child for their past loss of support, after applying a contingency deduction of **5%**. The aforesaid amounts totalled to an amount of **R1 240 019.00** before applying a statutory limit and to a total of **R644 948.00** after applying the statutory limit.

[10] Regarding future loss of support, Mr Kramer applied contingencies of **15%** and **12.5%** in respect of the amounts for the loss of the plaintiff and the minor child, respectively. He came to (non-statutorily capped) balances of **R4 234 870.00** and **R1 474 935.00** for the plaintiff and minor child, respectively. The statutorily capped amounts are **R3 731 503.00** in respect of the plaintiff and **R1 155 209.00** for the minor. Both the plaintiff's amounts are balances of amounts appropriated for future loss less a further **18%** contingency in respect of the plaintiff's changes of remarriage. The latter has been determined taking into consideration her age; being a widow with a child and census data.<sup>3</sup> This would become a serious bone of contention between the parties.

[11] The totals statutorily uncapped amounts are **R5 061 550.00** in respect of the plaintiff and **R1 888 274.00** for the minor child and therefore a grand uncapped total of **R6 949 824.00**. The grand capped total is **R5 531 660.00**.

[12] It is common cause that the both claims for loss of support are capped.

### Mr Kramer's second report (for the plaintiff)

[13] In his report dated 26 November 2014 ("Exhibit A"), Mr Kramer revised the remarriage contingency to **17%**. He did not proffer any reason for this except for reporting that the plaintiff received an amount of R85 886.00 as inheritance from his deceased's husband estate. This amount has to be deducted from the amount claimed for loss of support.

[14] He arrived at totals of **R5 337 982.00** in respect of the plaintiff and **R1 979 395.00**, in respect of the minor child for their past loss of support, before applying a statutory limit. Those amounts are reduced to totals of **R4 378 124** and **R1 437 772.00** for the plaintiff and minor child, respectively. The total uncapped claim is therefore **R5 815 896.00** which is R284 236.00 more than **R5 531 660.00** stated in Mr Kramer's first report, despite the deduction of the inheritance.<sup>4</sup>

#### Another plaintiff's actuarial report

[15] Other than Mr Kramer's reports discussed above, the plaintiff also obtained an actuarial report compiled by Munro Forensic Actuaries dated 06 November 2014. This was before the second Kramer report. The Munro report gained access to the evidential material herein as "Exhibit C".

[16] The Munro report applied different contingencies to the future losses (being 10% for the plaintiff and 5% for the minor. However, it applied the same remarriage contingency of **18%** as in the first Kramer report. It would appear that the plaintiff was not satisfied with the contents of this report, hence the second Kramer report which evidently restored the other contingencies (15% and 12.5%) in respect of future loss and, as stated above, revised the remarriage one to **17%**. This report has two scenarios or methods of calculations which leads to total amounts of **R5 126 380.00** and **R5 194 280.00**. Interestingly, it is submitted in the heads of argument filed on behalf of the plaintiff that, the Munro report is not relied upon<sup>5</sup>, but there are no reasons furnished in this regard.

[17] The submissions made by counsel at the trial and in their written heads are to the effect that, the critical determination is regarding the percentage of the contingency to be applied to remarriage prospects of the plaintiff.

#### Defendant's Actuarial Report

[18] The defendant's first actuarial report set the actuarial contingency at **36%** and the total loss of support at **R4 921 035.25**, This amount is less than the second (**R5 815 896.00**) and the first (**R5 531 660.00**) Kramer reports by amounts of R894 860.75 and R610 624.75.

[19] The defendant acquired another report handed in at trial as 摘 xhibit B"<sup>6</sup> prepared by Deloitte Consulting. The prominent feature of the Deloitte report is the 20% applied as contingency in respect of the plaintiff's remarriage prospects. It further applied the common cause 5% contingency to past loss and a 15% contingency to future loss. Further, this report calculated the minor's loss of support at dependency until the age of 18 and dependency until the age 21. I hasten to point out that, there is nothing to suggest that the minor child would not access tertiary education. Therefore, the material calculations will be those assuming

the minor's independence to be upon reaching 21 years of age.

[20] The total capped calculations are as follows: **R3 950 785.65** for the plaintiff herself and **R1 241 884 52** for the minor. The grand total of the two amounts is **R5 192 670.17**. Notably this calculation is less than those in both the second (**R5 815 896.00**) and the first (**R5 531 660.00**) Kramer reports. Is less than the first Kramer report by an amount of R338 989.83 and the second report by an amount of R623 225.29.

*Further analysis and conclusions of Actuarial Reports*

[21] It is contended by the plaintiff that, other than the differences in the contingencies applied by the actuarial experts employed by the parties, the plaintiff's experts adopted the approach in the unreported decision of *Sweatman v Road Accident Fund* (WCC) (case number: 17258/2011 of 03 December 2013) by Griesel J regarding statutory cap.

[22] Counsel for the defendant argues that this court should accept the figures in the Munro report (for the plaintiff, which states amounts of **R5 126 380.00** and **R5 194 280.00**) and the Deloitte report (for the defendant, which states an amount of **R5 192 670.17**) as they are most similar. Thereafter, the court should accept the difference in an amount of **R5 113 475.09** as the appropriate award to be made herein in respect of the plaintiff's and the minor's loss of support. This proposition is very tempting as it asserts to the court the simple role of balancing or averaging the contentious figures and awarding the result as a fair and reasonable award for the damages claimed. However, it appears to be more like the proverbial rubber stamp and misplaces the role played by experts' reports in damages trials.

[23] The learned authors of *Visser & Potgieter Law of Damages*, Potgieter, JM; Steynberg, L and Floyd, T.B (3 ed) (2012) authoritatively deal with the role played by expert opinion on page 467 of their aforesaid seminal work 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]

[24] Professor H.B. Klopper in his authoritative *Law of Third-Party Compensation* (3 ed) (2012) at page 177 says:

“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.”

[25] Therefore playing a very important role, opinions of experts are non-binding and serve as a guide to the trier of fact whose inherent discretion is the catalyst in the assessment of the damages and the appropriation of a fair and reasonable award.

[26] Further, this court cannot just almost routinely reject the other evidence before it, including the two Kramer reports, in preference of the Munro and Deloitte reports. The question becomes, what affects the discretion of a court when determining an appropriate damages award.

### ***Appropriate remarriage contingency***

[27] The plaintiff submits that the remarriage contingency is contrary to the new constitutional dispensation in this country as it offends against the equality provisions.<sup>7</sup> It is further contended that it is based on antiquated and racially exclusive data.<sup>8</sup> The plaintiff finds reliance on factors accepted in previous decisions as being relevant to determining the probability of remarriage, a useful guide. This is an approach accepted by our courts.<sup>9</sup>

[28] In ***Legal Insurance Company Ltd v Botes*** 1963 (1) SA 608 (A) the court found, among others, the following relevant: age of the widow; her character and appearance; the length of her [oddly stated, happy] marriage to the deceased; whether she is already intimately involved; her point of view on marriage. Further reliance is placed on Steynberg's opinion that *the possibility of re-partnering will only increase the general adjustment if evidence is presented that increases the possibility of re-partnering occurring above the possibility of any other general contingencies occurring*.<sup>10</sup>

[29] There is no fixed basis for assessing the prospects of remarriage, but the only constant principle or element is that the court has to assess same based on fairness and reasonableness.<sup>11</sup> The plaintiff contends that the 17% stated in the second Kramer report should be accepted and refers to other contingencies applied in comparable decisions of this division<sup>12</sup> and in the Eastern Cape.<sup>13</sup>

[30] The following was submitted by Mr Van Bergen on behalf of the plaintiff: She does not go out; she is an introvert and she actually met the deceased when she was 18 years and had then never had a relationship. The plaintiff has not entered into a new relationship, although she is not opposed to the idea. Her view is that if a marriage to someone will happen, it would happen. It was also contended that as a 37 year old widow with an 8 year old son her chances may be significantly diminished.

[31] Mr Van Twisk on behalf of the defendant did not appear to challenge the probative value of the submissions by plaintiff's counsel regarding personal traits or attributes of the plaintiff, when they were

made at the trial. However, it appears as if he is now undecided about their veracity. He contends that although Mr Van Bergen submitted that it was agreed that plaintiff need not testify, the correct situation is that ~~the~~ *the parties agreed that it is not desirable for her to testify* •.<sup>14</sup> I consider this to be a matter of semantics. Mr Van Twisk to his full credit, did state that the defendant accepts the submitted facts as being correct.<sup>15</sup>

[32] It is difficult for this court to make a decision on an aspect like marriage which in its very nature is very personal. Much emphasis was placed on the contending views by the actuaries and cursory submissions on the plaintiff as a person. Professor Klopper states the following in support of his view that a court and not actuarial opinion should prevail:

"...because a court is in more favourable position to make an assessment than is an actuary. The court would have seen the plaintiff while an actuary seldom does."<sup>16</sup>

[33] Therefore, the court has to rely on the submissions by Mr Van Bergen regarding the personal convictions of the plaintiff towards her marriage. There is also a statement by Mr Kramer that the plaintiff reported to be of good health. I am actually relieved that the plaintiff did not testify at the trial lest I was expected to include my assessment of her appearance as an indicator of her prospects of marriage, although this division held in, that this has always not been necessary.<sup>17</sup> Perhaps a time has come to jettison these patently sexist, insensitive and baseless criteria. We may have to develop some new forms of assessment, which are not gender based and would be alive to our constitutional and human rights reality.

[34] In the *MEC for Roads and Public Works, Northwest v Oosthuizen* referred to above, the respondent's personal attributes were as follows: she was about 37 years old; a qualified attorney and director in a law firm and had 6 year old child. The court allowed a contingency of 17.5% in respect of the surviving spouse's prospects of marriage. In the matter of *Ferreira v RAF*<sup>18</sup> also referred to above, the plaintiff was about 37 years old, had two minor children from her marriage with the deceased; was a qualified teacher and owner of children's schools; did not socialise; was not romantically involved; devoted her time to her daughters and considered her departed husband ~~the~~ *the love of my life*".<sup>19</sup>

[35] Apart from what is stated above regarding the plaintiff, I could glean from the papers that, the plaintiff has some tertiary qualifications, including a national diploma in graphic design from Vaal Triangle Technikon.<sup>20</sup> However, she is described in her particulars of claim as housewife although she has some employment history spanning from January 1997 to September 2006.<sup>21</sup>

[36] In my opinion the plaintiff in this matter has a blend of the attributes of the above two matters. Her attitude towards remarrying appears similar to that in *Ferreira v RAF* who considered her deceased husband

as the love of her life. Mr Van Bergen submitted that the plaintiff *in casu* met the late Mr Robinson when she was only 18 years old and has never been with any other person. Both widows are also stated not to be outgoing but in *Ferreira v RAF* her time appears to be devoted to her two minor children, whereas herein there is only one child. It is true that there will never be two very similar matters.

[37] Against the background of the above, I find that the applicable contingency deduction that should be allowed in this matter is 20%. This is the same contingency stated in the actuarial report compiled by Deloitte on behalf of the defendant.

### ***Conclusion***

[38] Having concluded on the issue of the applicable remarriage contingency, I have to determine the rest of the contingencies to be allowed.

[39] In the *MEC for Roads and Public Works, Northwest v Oosthuizen* the court applied a contingency of 7.5% for past loss of support and 17.5% for future loss of support in respect of the widow. In *Ferreira v RAF* the court applied a contingency of 20% for past loss of support and 15% for future loss of support in respect of the minor children.<sup>22</sup> This is similar to what is stated in the Deloitte actuarial report. I find this to be fair and reasonable percentages to apply to this matter. Therefore, despite the plaintiff's challenges to the application of the statutory cap, which I do not think would materially alter the situation, this or the other way, I accept the figures as stated in the Deloitte report. As already stated above, I accept that the minor child will remain dependent until the age of 21.

[40] Therefore the plaintiff will be awarded an amount of R3 950 785.65 and the minor child an amount of R1 241 884.52, in respect of their individual claim for loss of support. The funeral expenses amount of R23 063,00 will be added to the aforesaid amounts. The total award will therefore be in an amount of **R5 215 733.17**. The costs will follow this result.

### ***Order***

[41] Therefore I make an order in the following terms:

(a) The defendant shall pay the sum of **R5 215 733.17** (five million two hundred and fifteen thousand seven hundred and thirty three rand and seventeen cents) to the plaintiff's attorneys in settlement of the plaintiff's claims, which amount shall be payable by direct transfer into their trust account.

(b) The defendant shall pay for interest of the sum of **R5 215 733.17** (five million two hundred and fifteen thousand seven hundred and thirty three rand and seventeen cents) at the rate of 9% per annum



after 14 (fourteen) court days from date of this order to date of payment

(c) The defendant shall make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following -

- the reasonable fees of senior junior counsel on the High Court Scale;
- the reasonable taxable costs (excluding preparation and reservation fees) of the plaintiff's expert actuaries Messrs Ivan Kramer and Munro Forensic actuaries, inclusive of the cost of obtaining only one actuarial report;

which costs will all be paid into the aforementioned trust account.

(d) The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs -

- the plaintiff shall serve the notice of taxation on the defendant's attorneys of record;
- the plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs from the date of settlement or taxation thereof

should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 9% per annum after 14 (fourteen) court days from date of this order to date of payment on the taxed or agreed costs from date of allocator to date of final payment.

**K.L.A.M. MANAMELA**

**Acting Judge of the High Court of**

**SA: Gauteng Division, Pretoria**

## **APPEARANCES**

For the Plaintiff: Adv. CH van Bergen

Instructed by: Munro Flowers & Vermaak Attorneys

Johannesburg

For the Defendant: Adv. MH van Twisk

- 
- 1 See page 55 of the indexed pleadings.
  - 2 See page 4 of the indexed pleadings.
  - 3 Based on the 1970 and 1980 census data for graduated whites by Thomson.
  - 4 See paragraph 14 above.
  - 5 See paragraph 4.8 on page 10 of the plaintiffs heads of argument.
  - 6 Dated 28 November 2014 by Deloitte Consulting.
  - 7 See paragraph 5.1.4 on pages 11 to 12 of the plaintiff's heads of argument.
  - 8 ***Ibid* at paragraphs 5.1.5-6 on page 12.**
  - 9 ***Snyders v Groenewald* 1966 (3) SA 785 (C).**
  - 10 Page 20 of ***Steynberg, L Re-partnering as a Contingency deduction in Claims for Loss of Support -Comparing South African and Australian Law***, UN ISA, 2007 (Vol 3).
  - 11 ***Klopper's Law of Third-Party Compensation* (3 ed)** on page 202. Although the principles expressed in this book are against the assumption that the trial court will have observed or seen the plaintiff whereas an actuary will have not.
  - 12 ***Lize Marie Oosthuizen v The Member of the Executive responsible for the Department of Roads and Public Works: Northwest Province and Another*** {unreported case number 33736/2003 dated 17 August 2006, TPD by Patel J} in which a 17.5% deduction was applied and confirmed on appeal in ***The Member of the Executive responsible for the Department of Roads and Public Works: Northwest Province and Another v Lize Marie Oosthuizen*** (unreported case number A671/2007 on 17 August 2006 by the full bench of Southwood J, Mavundla J and Mabuse J).
  - 13 ***Mandey Lee Ferreira v Road Accident Fund*** (unreported case number 1710/2011 on 11 July 2013, ECG by Roberson J) in which a 20% remarriage contingency deduction was applied.
  - 14 See paragraph 15 on page 8 of the defendant's heads of argument.
  - 15 ***Ibid*.**
  - 16 On page 202 of ***Klopper's Law of Third-Party Compensation* (3 ed).**
  - 17 ***The Member of the Executive responsible for the Department of Roads and Public Works: Northwest Province and Another v Lize Marie Oosthuizen*** on page 45.
  - 18 ***Mandey Lee Ferreira v Road Accident Fund*** (unreported case number 1710/2011 on 11 July 2013, ECG by Roberson J)
  - 19 See paragraphs [30] of ***Ferreira v RAF***.

---

20 From the plaintiffs curriculum vitae.

21 *Ibid.*

22 See paragraph [26] on page 14 of *Ferreira v RAF*.