



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

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED✓

DATE 23.3.2016

SIGNATURE

CASE NO: 55880/2011

DATE: 23/3/2016

IN THE MATTER BETWEEN

NOELINE CHRISTINA ZAAYMAN

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MSIMEKI, J

[1] Plaintiff instituted an action against defendant for damages that she suffered after her husband ("the deceased") died on 7 May 2009 as a direct result of the injuries that he sustained in an accident which involved two motor vehicles. Deceased was a

passenger in the motor vehicle bearing registration number DDS [...] ("the Toyota") which, at the time, was driven by T J Bieldt. The insured driver, E M Mlombo, at the time, drove a motor vehicle bearing registration number DHW [...] ("the truck"). The deceased died at the scene of the accident.

[2] On 24 March 2014, the issue of liability was resolved on the basis of 100% in favour of plaintiff. In other words the accident was caused solely by the negligence of the insured driver.

[3] This is a claim for loss of support. Adv Geach SC and Adv L J Visser (Mr Visser") represented plaintiff while Adv M Olivier ("Ms Olivier") represented defendant when the matter was argued.

[4] The following facts are common cause:

1. deceased and plaintiff were husband and wife;
2. deceased had a duty to support and maintain plaintiff;
3. deceased died as a direct result of the accident which occurred on 7 May 2009;
4. plaintiff, as a result of deceased's death, suffered damages which the court has to determine;
5. deceased supported plaintiff;
6. deceased's income, during his lifetime, consisted of:
 - 6.1 income from his job;
 - 6.2 income from his pension;
 - 6.3 income from policies.

- [5] The issue to be determined is whether money derived from pension and policies should be regarded as part of deceased's income. Ms Olivier's view is that pension money and money from policies should not be regarded as part of the income. Adv Geach SC and Mr Visser, on the contrary, regard pension money and money derived from policies as part of deceased's income when loss of support is computed.
- [6] Noeline Christina Zaayman (plaintiff) and Charl Gerhardus du Plessis testified in support of plaintiff's case. Defendant called no witnesses. Plaintiff and defendant's cases were then closed.
- [7] Plaintiff's case is briefly that she was married to deceased who died on 7 May 2009. She told the court that deceased's income while he lived consisted of money from his job, policies and pension. Plaintiff and deceased worked for the Department of Correctional Services. Deceased started in approximately 1970 while she started in 1973. Deceased, by reason of his employment, was a member of the Government Employees Pension Fund ("GEPF"). As a retired government employee, deceased received pension in the sum of R8 594,00 per month. He also received R6 000,00 per month which was meant to supplement his pension from employment. She told the court that deceased was working for Sterling Construction at the time of his death. Plaintiff testified that she received a lump sum only and not pension from the GEPF when she retired in 1985. Plaintiff, after the death of deceased, received 50% of his pension. She confirmed that deceased supported her from his pension, policies and salary. Deceased had policies with Sanlam.

[8] When cross-examined, plaintiff testified and confirmed her evidence in chief. She conceded that she earned more than deceased. She explained that some salary slips did not correctly reflect her salary as they included her bonus and payment relating to her overtime that she worked. She further conceded that she was earning more than deceased at the time of his death. Deceased, according to her, would have worked until he reached age 65. She was to retire at age 65 but this, because of circumstances, did not eventuate. She was not given a lump sum when deceased died. Plaintiff became the beneficiary under the policies after deceased's death.

[9] The expertise of Charl G du Plessis was never placed in dispute. He is a fellow of the Institute of Actuaries and a fellow of the Actuarial Society of South Africa. He is a qualified actuary. He is part of Munro Forensic Actuaries. Their report sets out succinctly how the amount, which Adv Geach SC submitted was fair and reasonable and needed to be regarded as a reasonable claim which plaintiff is entitled to, which she lost in respect of support upon the death of deceased was computed.

[10] The witness was provided with deceased's earnings, plaintiff's earnings, life assurance and annuities and accelerated benefits. A contingency of 5% was applied on past and future losses.

[11] Plaintiff's past loss was calculated as follows:

PAST LOSS (N C Zaayman)	R237 300,00
less 5% contingency	R225 435,00
FUTURE LOSS	R391 100,00
less 5% contingency	R371 545,00
Total loss	R596 980,00
less accelerated benefits	R 58 359,00
	R538 621,00

TOTAL LOSS OF SUPPORT R538 621,00

[12] Adv Geach SC submitted that defendant had its own actuary but decided not to call her. One can only assume that the actuary was in no way going to assist defendant.

[13] Going back to the issue to be determined, it will be remembered that it is Ms Olivier's view that pension money and money derived from policies should be deducted when an amount in respect of loss of support is computed. Adv Geach SC, on the other hand, holds a contrary view.

[14] In support of the position that Ms Olivier took, reference was made to the following cases:

1. *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A).

This case, in my view, does not assist defendant. The court in that case held that an injured driver was entitled to money paid to him on compassionate grounds at the time when he could do nothing. The injured driver was found to be entitled to include such amount.

2. *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 915A-D.

What is said at 915A-D, in my view, does not assist defendant either.

3. *Du Toit v General Accident Insurance Co of South Africa Ltd* 1988 3 SA 75 (D&CLD) at 82C-J. There the court found that –

"The provisions of Act 9 of 1969 are applicable to this matter and therefore the pension payable to plaintiff is not to be taken into account in the computation of her damages."

This, again, does not assist defendant.

4. *Commissioner for Inland Revenue v Nolan's Estate* 1962 1 SA 785 (A).

This case dealt with annuity payable to an employee on retirement for sixty months and what was to happen if death occurred prior to such payments being made balance to wife married in community of property. This case, obviously, has nothing to do with the present case.

THE LAW

[15] The resolution of the issue lies in what the law says. First I shall have regard to what the statute provides and second I shall refer to case law.

[16] The Assessment of Damages Act 9 of 1969 is key in the resolution of the issue. The aim of the Act is "to amend the law relating to the assessment of damages for loss of support as a result of a person's death". The Act, in section 1(1), provides as follows:

"(1) When in any action, the cause of which arose after the commencement of this Act, damages 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."

[17] Section 1(2) defines "benefit", "insurance money" and "pension" as follows:

"(2) For the purposes of subsection (1) –

'benefit' means any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

'insurance money' includes a refund of premiums and any payment of interest on such premiums;

'pension' includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment."

[18] Lewis AJA in *Lambrakis v Santam Ltd* 2002 3 SA 710 at 715B said:

"It is to be noted that in terms of s 1(1) of the Assessment of Damages Act 9 of 1969, insurance money (which includes a refund of premiums and payment of interest on premiums) and pensions do not fall to be deducted."

(See also *Erasmus Ferreira and Ackermann and Others v Francis* 2010 2 SA 228 (SCA) at [19] and *Du Toit v General Accident Insurance Co of South Africa Ltd* 1988 3 SA 75 (D&CLD).

THE MEASURE OF DAMAGES

[19] "The measure of damages for loss of support is usually the difference between the position of the dependant as a result of the loss of support and the position he or she could reasonably have expected to be in had the deceased not died."

(See *Lambrakis v Santam Ltd* (*supra*) paragraph [12] at 714; *Road Accident Fund v Monani and Another* 2009 4 SA 327 (SCA); *Legal Insurance Company Ltd v Botes* 1963 1 SA 608 (A) at 614E; *Wigham v British Traders Insurance Company Ltd* 1963 3 SA 151 (W) at 154; *Nochomowitz v Santam Insurance Co Ltd* 1972 1 SA 718 (T) at 725 and *Hulley v Cox* 1923 AD 234 at 243-244.)

[20] The position regarding the issue to be determined is by now clear. Ms Olivier's submission cannot be correct. Section 1(1) of the Assessment of Damages Act 9 of 1969 as well as the case law have clearly demonstrated that Adv Geach's submission on the subject has strong foundation and merit.

[21] The damages suffered by plaintiff remain to be determined and computed. As alluded to above, defendant had an actuary but decided against using her. As I also have shown this can only lead to an inference, namely that that actuary could not advance their case.

[22] Adv Geach SC submitted, and correctly in my view, that the actuarial report of Munro Forensic Actuaries marked exhibit "D2" is noteworthy. This is the only report before me. The report therefore is uncontroverted.

[23] Plaintiff, in her personal capacity, prayed for the following relief against the defendant:

- "1. Payment of the amount of R788 088,00, alternatively payment of such amount of damage (*sic*) as the honourable court on the evidence to be presented to it holds the plaintiff suffers;
2. Interest on the judgment amount in terms of prayer 1 above at the rate of 15.5% per annum *a tempore morae*;
3. Costs of the suit;
4. Further and/or alternative relief."

[24] Adv Geach SC provided the court with a draft order which, according to him, properly reflects a fair and proper quantification of plaintiff's loss of support. Ms Olivier, on the other hand, holds the view that awarding the damages as presently formulated would have the effect of placing plaintiff in a better position which would amount to unfair advantage. Plaintiff, according to her, has to prove actual loss. This submission is not supported by the Assessment of Damages Act 9 of 1969 as well as the case law.

[25] Having regard to the fact that plaintiff had prayed for payment of R788 088,00 which, according to her, represents her loss of support and the fact that Munro Forensic Actuaries have made their calculations based on the deceased's income, the amount of R538 621,00, which represents plaintiff's loss of support, in my view, is indeed proper, fair and reasonable in the circumstances of plaintiff's case. The contingencies of 5% in respect of past loss of support and 5% in respect of future loss of support are, in my view, very reasonable.

[26] I have been provided with a draft order by counsel for the plaintiff, Adv Geach SC. I have perused the draft order as amended and am in agreement therewith. I have merely inserted the amount of R538 621,00.

[27] In the result the following order is made:

1. The draft order as amended marked "X", signed and dated, is made an order of the court.

M W MSIMEKI

JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 12 NOVEMBER 2015

FOR THE PLAINTIFF: ADV GEACH SC AND ADV L J VISSER

INSTRUCTED BY: PHILIP MEYER ATTORNEYS

FOR THE DEFENDANT: ADV M OLIVIER

INSTRUCTED BY: MOTHLE JOOMA SABDIA INCORPORATED