IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. 14606/2016

Not reportable

Not of interest to other judges

Revised.

5/2/2018

In the matter between:

L D **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MILLAR AJ

1. The Plaintiff brought an action for damages for loss of support arising out of the death of her late husband J B ("the deceased"), as a result of injuries

sustained by him in a motor vehicle collision on 5 March 2013. The action is brought against the Defendant, the party responsible to pay such claims in terms of the Road Accident Fund Act 56 of 1996.

2. On 15 June 2017, the parties settled the issue of liability. The parties agreed that the issues to be determined by this court are:
    2.1 Whether or not the plaintiff's minor child is entitled to claim a loss of support; and
    2.2 The quantum of damages in respect of such claims for which the Defendant is liable.

3. The plaintiff called two witnesses. She testified herself and also called a Mr. Christian Petrus De Witt. These were the only witnesses called. After the plaintiff closed her case, the parties reached an agreement as to the basis upon which the actuarial calculations for loss of support were to be premised. This was in accordance with the evidence of the plaintiff and Mr. De Witt. The evidence of both the in respect of income was corroborated by income tax documentation and correspondence which was put to them variously during their evidence and confirmed. A report was prepared by the actuary Mr. Johan Sauer and handed into evidence.

4. This resulted in a narrowing of issues by limiting the quantum aspect referred to in paragraph 2.2 above. On this aspect I need only decide the so called "remarriage contingency" to be deducted from what has been calculated by the actuary.

5. On the two issues to be decided, the plaintiffs evidence was that she was born on 2 August 1975 and had matriculated in Lichtenburg in 1993. After leaving school she had commenced studying graphic design at a Technicon but had given up those studies during the first year. She worked at various jobs and had then gone to London in the United Kingdom in 1999 on a two-year working visa. She had worked initially at an estate agency as an administrator and thereafter doing fund raising. She had extended her stay beyond the two years and while doing so had studied graphic design and also

enrolled to study business management through UNISA. While in London she had met J F ("F") who had also been studying graphic design there. They had a relationship as a result of which their daughter L B ("L") was born on 15 May 2005.

6. Although F proposed marriage, she declined and three months after her daughter's birth she had returned to South Africa. Although F also returned to South Africa, the relationship did not continue.

7. Due to her own family background, she had been reluctant to enter into a marriage, even if she was going to have a child and hence the refusal of the proposal made by F. She was adamant that she would not marry just for the sake of it.

8. She started her own business in 2009 and had met the deceased in July of the following year. The deceased was 5 years younger than her. The deceased had courted her for just over 2 years and they were married on 6 October 2012.

9. During her evidence, the plaintiff was emotional and had become tearful on more than one occasion when testifying about her relationship with the deceased and the family that she and L had with him. She testified that he had regarded L as his own and had, as an indication of this, during the marriage ceremony and just before they had exchanged vows, called L to join them. He had picked her up and held her in his arms between them and had pledged to look after her as his own in front of the assembled congregation.

10. She testified that the relationship with the deceased had been good and that at the time of his death she had still felt that she was on "honeymoon". Her evidence was further that while they had lived together they had shared all expenses jointly. Even though F had contributed to L's school fees only, due to his own circumstances, the deceased had contributed to all the other costs associated with raising L. This was the situation that prevailed at the time of his death, only 5 months after the marriage. The deceased had left no estate

to speak of and no will. She conceded that there was a possibility she may remarry but pointed to the fact that she had taken 17 years to find the deceased and that she was not now, 5 years after his death, in a relationship nor did she want one with anyone.

11. The plaintiff gave her evidence in a clear and unequivocal manner. Her evidence was neither seriously challenged nor disturbed in cross examination. The plaintiff impressed me as a truthful witness and I have no hesitation in accepting her evidence.

12. Firstly, in regard to whether or not the defendant is liable to compensate L for loss of support, the undisputed evidence was that although L was not the biological child of the deceased, he had undertaken to and had in fact supported her as though she was his own.

13. In *Paixao and Another v Road Accident Fund*[1] it was held that:

> *"[18] First it must be decided whether there was any agreement creating* a *binding legal obligation between the appellants and the deceased. An agreement may be made expressly or tacitly. An express agreement may be made orally or in writing. A tacit agreement is inferred from the surrounding circumstances and conduct of the parties. In either case it is for the court to decide whether* a *contract probably came into existence*[2]
>
> and
>
> *"I therefore hold that the dependents' action is to be extended to unmarried persons in heterosexual relationships who have established* a *contractual reciprocal duty of support"*[3]
>
> and
>
> *"But once it is established that the deceased had undertaken to support Mrs. Paixao and her children, including Michelle, and did so, I cannot see any reason why Michelle's claim should fail. Her claim, like*

[1] 2012 (6) SA 377 (SCA)
[2] Paixao supra at 383 D-E
[3] Paixao supra at 391 F

her mother's, arose from the same 'family relationship'".”[4]

14. The facts of the present case are not dissimilar to those in Paixao, save that in the present case the plaintiff and the deceased had in fact been legally married, albeit for a short period of time before his death. The marriage, together with the deceased's promise to L at the time of the marriage, to my mind only serves to strengthen my **view** that the obligation to support her was indeed undertaken by the deceased.

15. There is no limitation on the number of different persons who may contribute to the maintenance and support of another The fact that a biological parent has a duty, to support a child, which arises *ex lege,* does not preclude or exclude support of the child by others. It is self-evident that such a situation which will necessarily result in a child's needs being better met, is in the bests interests of the child[5].

16. Accordingly, I hold that the deceased had undertaken a duty to and in fact did support L. The Defendant is liable to compensate L. The right to claim support is not however open ended and in the circumstances tempered by a limitation to claim only that loss which has actually been suffered.[6]

17. Counsel for the defendant initially argued, should the defendant be found liable, that there should be an adjustment to the apportionment of the income in respect of L to be half of the usual single share allocated for children or that a notional further child yet to be born be provided for in the calculation[7]. During argument, the latter two propositions were abandoned, and the defendant argued that a more appropriate way to account for a possible increase in support being paid by F was by the deduction of a further contingency. Counsel for the plaintiff argued that there should be no deduction at all.

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[4] Paixao supra at 391 G-H
[5] s 28 (2) of The Constitution of The Republic of South Africa 1996; s 9 of The Children's Act 38 of 2005.
[6] Lambrak is v Santam Ltd 2002 (3) SA 710 (SCA)
[7] Road Accident Fund v Monani and Another 2009 (4) SA 327 (SCA)

18. The support received by L from F is separate and in addition to that received from the deceased. Any increase in the support paid by F would not have led to a reduction in support from the deceased. The evidence was to the contrary, that the deceased would have supported L irrespective of the contribution towards her support by F.[8]

19. Accordingly, there is to be no further contingency deduction from the loss of support suffered by L simply because she also receives some support from F.

20. Secondly, and as to the remarriage contingency to be deducted in respect of the plaintiff herself, in respect of the deduction of contingencies generally, the principle to be applied is that set out in *Southern Insurance Association Ltd v Bailey NO*[9] -

> *"Even where method of actuarial calculations is adopted the trial Judge still has* a *discretion to award what he considers right - Can make* a *discount for contingencies - Nature of contingencies that can be taken into account – Such contingencies not always adverse* "

21. It is generally accepted in our courts that for claims for loss of support a remarriage contingency may be deducted over and above the normal contingencies for the hazards and vicissitudes of life.

22. The current position in our law with regard to remarriage contingencies and the factors to be taken into account in the determination of such contingencies is set out *Esterhuizen v Road Accident Fund*[10] in which the court stated:

> *"[10] To take appearance and nature in consideration is not in accordance with the constitutional values of dignity and equality*

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[8] see Lambrakis supra at paragraph 10 where the court stated "The principles governing the award of damages to dependents for loss of support were not in contention in this appeal. It was conceded by the plaintiff that the children were entitled to damages only insofar as they had suffered actual pecuniary loss as a result of the wrongdoing of the insured driver (see Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838A, where Corbett JA described this proposition as trite)".see also Constantia Versekeringsmaatskappy Bpk v Victor NO 1986 (1) SA 601 (A)

[9] 1984 (1) SA 98 (A) at 98 E-F

[10] An unreported judgment of Tolmay J delivered in this division under case no. 26180/2014 on 6 December 2014.

enshrined in our Constitution. In the Members of the Executive Council Responsible for the Department of Road and Public Works, North West Province v Oosthuizen[11] *it was stated that reliance on appearance is offensive and should not be part of our law. In that case it was argued that* a *remarriage contingency should be struck down as unconstitutional because it offends against the equality provisions of the Constitution. The Court however pointed out that no reference was made to the respondent's appearance, and found that to provide for* a *remarriage contingency is not unconstitutional.*

[11] The Court stated as follows:

> *(5) "In South Africa, the contingency of remarriage is usually taken into account. If the purpose of an award for damages for loss of support is borne in mind the possibility of the plaintiff remarrying is* a *very real consideration, the possibility of* a *young widow remarrying shortly after the death of her husband and receiving damages for loss of support calculated over* a *period of 40 years is completely unrealistic, allowing for the contingency is obviously realistic. In Hulley v Cox 1923 AD 234 at 244 the court said:*
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> *"The dependants are entitled to be compensated for the pecuniary loss involved in a reduced income and a restricted provision for the supply of what they had been accustomed to. But the object being to compensate them for material loss, not to improve their material prospects, it follows that allowance must be made for such factors as the possibility of remarriage.*

In Peri-Urban Areas Health Board v Munarin 1965(3) SA 367 (A) at 3768-0 *the court summarised the position as follows:*

> *'A widow is therefore entitled to compensation for loss of maintenance consequent upon the death of her husband, but any pecuniary benefits, similarly consequent, must be*

[11] (A671/07) (2009) ZAGPPHC 16 (2 April 2009).

taken into account. To suggest that she is obliged to mitigate her damages by finding employment is to mistake the nature of her loss. What she has lost is a right - the right of support. She cannot be required to mitigate that loss by incurring the duty of supporting herself. If she does obtain employment, it is more appropriate to regard her earnings as being the product of her own work than as a consequent upon her husband's death. Marriage prospects are relevant because marriage would reinstate her right of support. The propriety of taking such prospects into account was recognised by this Court in Hulley v Cox, 1923 AD 234 at 244 and Botha's case, supra, at pp616-8'

These, and other judgments, reflect the approach of South African courts to the question of damages; that they should be fairly assessed in the light of the realities of the case.

(6) These judgments do not suggest anything other than that the possibility of remarriage must be taken into account. They do not, in terms, require that a *trial court* assess *the likelihood of the plaintiff remarrying on the strength of her physical appearance. The respondent has not referred to judgments in South Africa where this has been stated* as a *requirement in determining the possibility of the plaintiff remarrying. If it is the Jaw that this be done I agree with the respondent that this would be offensive and should not be part of the law. But the respondent has not been* so *assessed in this* case *and this court has not seen her. It therefore plays no role in the* case. ***It is a simple actuarial contingency*** (my emphasis)."

[12] In my view the aforementioned approach is both correct and realistic and in accordance with the values of equality and dignity enshrined in our Constitution. It keeps in mind that an award of damages should be fair and to allow for the possibility of remarriage is appropriate, but no reliance should be placed on factors such as *appearance.*

[13] I am of the view that it must also be borne in mind that a *second marriage may not result in financial support. There is the possibility that the second marriage may not last and that the financial support, if gained may be lost. The second husband may also not be in* a *financial position to give the necessary financial support. Consequently, the possibility that the remarriage may not result in financial support must* a*lso be taken into consideration when the remarriage contingency is determined*

[14] To determine the Plaintiffs prospects of remarriage and the possibility of financial support is to gaze into the proverbial crystal ball."

29. While the determination of a remarriage contingency is a discretionary matter for the trial court, taking into account all the evidence before it, and the court in the exercise of its discretion may have regard to statistics, I do not agree that the matter is one of "a simple actuarial contingency" referred to in *Esterhuizen*[12]*.* The decision to marry is seldom, if ever, in the first instance a commercial one or one arrived at mathematically

30. In Paixao[13], the court observed that:

"[31] Our courts have emphasised the importance of marriage and the nuclear family as important social institutions of society, which give rise to important legal obligations, particularly the reciprocal duty of support placed upon spouses. The fact is, however, that the nuclear family has, for a *long time, not been the norm in South Africa. South Africans have lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries."*

31. Marriage is a social institution. The decision to marry is not one taken lightly having regard to the social, cultural and religious obligations that the parties undertake to each other. In the present case, the plaintiff did not end her marriage through the exercise of any choice by her or the deceased. The marriage was brought to an end suddenly and unexpectedly in consequence of the actions of a negligent driver.

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[12] Esterhuizen supra paragraph 11

32. Proper statistics relating to remarriage may well be useful in assessing an appropriate contingency, but statistics are only assistive if they are derived from a sufficiently large and representative sample. Furthermore, the statistics should at least be derived from data collected within a reasonable frame of time relative to when the contingency is to be applied, so as to provide some validity to the specific social and other circumstances which would influence marriage and remarriage trends prevailing at the time.

33. A number of cases and writers have cited the work of the actuary Mr. Koch as providing a reference in this regard. Indeed, in the present matter, counsel also referred me to this work. In latest edition of The Quantum Yearbook[14] the following is stated in respect to the application of remarriage contingencies

"NOTES TO REMARRIAGE DEDUCTIONS

This table is based on the 1970 and 1980 census data in South Africa graduated by Thomson and used as the basis for his article published in 1988 De Rebus 70. This reflects the latest statistical information on the subject. The percentages reflect the deduction to be made from the actuarial present value of the future loss of support for a *widow. It usual that these percentages are adjusted upwards or downwards depending on perceptions of the likely financial status of* a *second notional husband. In the event of remarriage, regard will be had to the earnings of the new husband (Ongevallekommisaris v Santam 1999 1* SA *251 (SCA)). For black widows subject to the influence of customary law it is appropriate to use something less than the rate for coloured widows, perhaps one half, to allow for cultural and financial impedances to remarriage. For urbanised higher- income blacks the coloured rate would seem to be appropriate. Very high remarriage rates are* a *peculiarly white phenomenon.*

It is [un]common (sic) that the main breadwinner is the wife. In the event of a

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[13] Paixao supra at 389 B-C

claim for loss of support by a *surviving husband it is appropriate to make* a *deduction for his prospects of remarriage. It is usual to use the female table to select* a *remarriage deduction.*

A comprehensive discussion of remarriage rates and their application to damages awards has been published in 1988 De Rebus 67-80.

The percentages reflect the chances of remarriage and in no way provide a *guide as to the period until remarriage. Most widows will either marry within* a *few years of the death or not at all. This is evident from the table in that the number of marriages reduces substantially with advancing age.*

For purposes of claims for maintenance against deceased estates and divorce settlements the remarriage rates are much lower due to the propensity of widows to avoid a *financially prejudicial marriage. For such claims it would be appropriate for whites to use about 60% of the remarriage rates published here, this being* a *compromise between the full rate and the reduced rate*[15]*."*

33. Counsel for both parties relied on the statistics in this work and argued for deductions of between 20 percent and 30 percent.

34. My primary difficulty with the basis proposed by Mr. Koch is that the statistics are derived from data that is at worst 48 and at best 38 years old. The data was gathered at a time when the very fabric of our society was different. The period concerned, 1970 to 1980 represented the height of apartheid and a time when the majority of the population andwomen specifically were subjected to legal disability, not least being the marital power and the legislative prohibition to choose a marriage partner freely[16]. Furthermore, the census periods, exclude a significantly large percentage of the population[17] so

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[14] Van Zyl, Rudd & Associates2018
[15] At page 113, there is also at page 112 a table setting out percentages for the remarriage contingency extracted from the statistics.
[16] For example, The Prohibition of Mixed Marriages Act 55 of 1949 which was only repealed in 1985
[17] Ten self-governing territories for different black ethnic groups were established as part of the policy

as to render them all but statistically valueless in our presently multicultural society[18]. There can be no doubt that since the 1980 census, our society and our law have developed sufficiently, in my mind to render any reliance on those statistics and the racially based expression of them[19], of no value whatsoever.

35. There is a second difficulty, and this is the practical prejudicial effect of a special contingency for remarriage. This is best demonstrated when one has regard to the fact that each 8.3 percent of such contingency represents 1 month of the year. A 16.6 percent contingency is two months and 25 percent is 3 months or put differently a quarter of the year.

36. The deduction of such a contingency, for example 25 percent, means that the support awarded, although intended to replace that which would have been lost for each full year of 12 months, only replaces 9 months of the year and the plaintiff would in that case have to either seek and find a replacement marriage partner or face **a substantial** drop in standard of living[20]. The effect is compounded and more prejudicial the younger the widow or widower.

37. In the present case, the parties agreed to the deduction of a 5 and15 percent contingency for the general hazards of life in respect of the past and future loss respectively. For the plaintiff[21] these translate to a total deduction of R336 693,00 and for L[22] a deduction of R187 715,00.

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of apartheid. Four of which were granted "independence· by South Africa (recognized only by South Africa and each other). These former South African Homelands or bantustans ceased to exist 27 Apr 1994 and were re-incorporated into South Africa, and all absorbed into the new provinces. (www.worldstatesman.org/South_African_Homelands)

[18] The suggested application of the statistics to black people with reference to those relating to coloured people is demeaning and offensive.

[19] The way in which the population groups have been described relative to those statistics is unfortunate, and given the publication of the book in 2018, only serves to reinforce the historical context in which the data was gathered and interpreted.

[20] See S 9(2) and S 10 Of The Constitution, 1996. The consequences of the application of an excessive contingency not properly supported by evidence may result in a breach of rights in the bill of rights.

[21] The past loss of support for the plaintiff was calculated by the actuary as R222 345,00 before contingencies and the future loss of support calculated as R2 170 509,00. Of a total loss, the deduction of the hazards of life contingency reduced the gross amount of the loss from R 2 392 854,00 to R2 056 161,00.

[22] The past loss of support for L was calculated by the actuary as R494 313,00 before contingencies and the future loss of support calculated as R1 086 659,00. Of a total loss, the deduction of the

38. The decision to marry does not seem to me to be any different in principal to the decision to remarry, whether or not the marriage ended through death or divorce. Professor L Steynberg in an article titled "Re-partnering as a Contingency Deduction in Claims for Loss of Support Comparing South Africa and Australian Law[23] states:

"In general, it can be stated that South African courts tend to give serious consideration to the probability of a *widow re-partnering and they are inclined to make substantial accommodation for this. It is nevertheless true that the proven factual circumstances do not always warrant these high adjustments, especially if they are preceded by* a *general contingency adjustment.*

In three Australian jurisdictions the legislature has promulgated legislation forbidding the use of re-partnering as a *contingency deduction in* a *claim for Joss of support. These three jurisdictions are the Northern Territories, Victoria and Queensland.*

Apart from the three mentioned jurisdictions in Australia regulated by statute, the legal position in Australian law on re-partnering as a *possible contingency deduction is to be found in case law, as is the case in South Africa. In* a *recent decision of the Australian*

High Court in De Sales v lngrilli[24] justice Kirby pointed out the changeability of the Australian judicial bench when it comes to the quantification of re-partnering as a *probability or contingency.*

Contingency adjustments for re-partnering in Australian case law vary from two percent to one hundred percent.

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hazards of life contingency reduced the gross amount of the loss from R1 580 972,00 to R 1 393 257,00.

[23] PER/PELJ 2007 10 (3) and to the footnotes referred to therein.

[24] De Sales v lngrilli [2002) 21 2 CLR 338 (HC) 391-392 par 150.

In Dominish v Astill[25] Reynolds AJ declares that a *position of moderation should be taken in terms of re-partnering in order to avoid acting unfairly towards the widow. In the recent decision in the High Court of Australia in De Sales v Ingrilli,[26] this position of moderation was formulated comprehensively. Chief justice Gleeson distinguished between cases where the claimant had already remarried (re-partnered) and cases where remarriage (re- partnering) had not yet occurred. In the instance where remarriage had occurred, or where a marriage with* a *specific person was* a *definite prospect, the court could examine the circumstances of the particular case and make appropriate adjustments. Therefore, the remarriage did not automatically exclude the right to support.*

Where remarriage had not yet occurred, a *double contingency had to be addressed: Firstly, the probability that the claimant would remarry and secondly, the probability that financial advantage would flow from this union. Chief justice Gleeson was of the opinion that the court's subjective adjudication of both these contingencies would be speculative in nature and that even statistics would not sufficiently assist the court. The fact that these contingencies were unpredictable, did not however release the courts from the obligation to take this into account. According to him, the uncertainties involved in the probability of remarriage were not greater or smaller than those apparent in other 'vicissitudes of life' such as unemployment which usually forms part of* a *general contingency adjustment.*

The majority finding of the court by justice Kirby was that in cases where remarriage has not yet occurred, remarriage or re-partnering could no longer be applied as a *specific contingency, which tends to be higher than the general contingency adjustment. However, it was held that the degree to which economic advantages or disadvantages of hypothetical re-partnering remained relevant in the calculation of the loss suffered as a result of the*

[25] Dominish v Astill [1979) 2 NSWLR 368 (CA) 378F-G: "It has come to be accepted and in my opinion correctly, that, although real and not nominal allowance should be made for the revived capacity to marry, such allowance should, in general be moderated for fear of otherwise doing an injustice to the widow.

[26] De Sales v Ingrilli [2002) 21 2 CLR 338 (HC) 352-353 par 27-31.

death of the breadwinner, it should now be taken into consideration as part of the 'standard' adjustment (general contingency adjustment) for uncertain future events. The High Court determined that the general contingency adjustment, which incorporated re-partnering, should only be five percent:

Re-partnering is merely another of the many possible vicissitudes of life, namely that the claimant may enter an economically beneficial or detrimental relationship after the trial. It is therefore to be given no more weight than any of the other vicissitudes that go to make up the general discount. The 'standard' adjustment should not be increased to re- introduce the 'remarriage' discount by the back door."

37. Having regard to the outdated statistics in Koch, it seems to me that in order to obviate an injustice to a widow or widower and in particular to the plaintiff in the present case, that the approach adopted by the Australian court is the correct approach to follow. Unless the facts of a particular case clearly demonstrate that a higher than normal, and, special contingency for remarriage is to be deducted, such further contingency ought not to be deducted. The *'vicissitudes of life',* take account of the prospects of remarriage - no matter the reason therefore and thus, absent special circumstances, incorporate a more just provision for the contingency than the arbitrary statistical deduction of a further contingency.

38. The parties agreed in the present case to the deduction of a 5 and15 percent contingency for the general hazards of life in respect of the past and future loss respectively. This is the usual deduction applied in our courts for this type of contingency. On the established facts of the present case, I am of the view that there are no circumstances that warrant the deduction of any further contingency and am satisfied that the agreed deduction appropriately provides for the possibility of the remarriage of the plaintiff such as it may be.

39. In the premises, I make the following order:

    39.1 The defendant is ordered to pay to the plaintiff in her personal

capacity the sum of R 2 056 161,00 (Two million and fifty-six thousand one hundred and sixty-one Rand)

39.2 The defendant is ordered to pay to the plaintiff in her representative capacity as guardian of L the sum of R 1 393 257,00 (One million three hundred and ninety-three thousand two hundred and fifty-seven Rand)

39.3 The Defendant is ordered to pay the Plaintiffs taxed or agreed costs of suit to date on the scale as between part and party, excluding all costs recovered by order of this court of 15 June 2017. Such costs are to include the costs of Johan Sauer, Actuary for reports prepared pursuant to and during this trial.

39.4 The reasonable travelling and accommodation costs of the Plaintiff, L and Mr De Witt to attend trial on the 31 January and 1 February 2018, which costs will include their return airfare tickets from Cape Town International to Oliver Tambo and their reasonable travel costs to and from court;

39.5 The Defendant is ordered to pay interest at the prescribed rate a *tempore mora* from 14 days after the granting of this order to date of payment.

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A MILLAR

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	31 JANUARY & 1 FEBRUARY 2018
JUDGMENT DELIVERED ON:	5 FEBRUARY 2018
COUNSEL FOR THE APPLICANT:	ADV P VERMEULEN
INSTRUCTED BY:	HAGERMAN &ASSOCIATES

REFERENCE:	MS HAGERMAN
COUNSEL FOR THE RESPONDENT:	ADV L COETZEE
INSTRUCTED BY:	T M CHAUKE INC.
REFERENCE:	MS KHOKHONE