THE REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE HIGH COURT, CAPE TOWN**

**CASE NO: 1687 / 2007**

In the matter between:

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| **JACO DANIEL DE VRIES N.O.** | First Plaintiff |
| **PETRUS GEYSER MACDONALD** | Second Plaintiff |
| **SUMè MACDONALD** | Third Plaintiff |

versus

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| **THE ROAD ACCIDENT FUND** | Defendant |

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**JUDGEMENT : 6 MAY 2011**

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**BOZALEK J:**

[1] The plaintiffs, the three children born of the late Petrus and Myra Mac Donald (the "deceased" and the "deceased's wife" respectively), claim damages from the Road Accident Fund (the defendant) based on the loss of support they allegedly suffered following the death of their parents in 1994 in a motor vehicle accident.

[2] The quantum of the plaintiffs' claim varied from time to time consequent upon the filing of amended actuarial reports. In its final form, however, the claim is for the sum of R932 008.

[3] The claim throws up a number of factual disputes including the projected earnings or earning capacities of the deceased, the value of the deceaseds' estates upon their death and the extent of the loss of support, if any, suffered by the plaintiffs. However, the principal dispute between the parties, one which has both a factual and a legal component, is to what extent any proved claim for loss of support must be reduced by accelerated benefits received by the plaintiffs.

[4] The material portion of the plaintiffs' particulars of claim reads as follows:

> *"7. During the deceaseds' lifetime and at the date of their simultaneous deaths, the deceased were married to each other out of community of property and were the parents and natural guardians of the first as well as the second and third plaintiffs.*
>
> *a. As a result of the simultaneous deaths of the deceased, first as well as the second and third plaintiffs have lost the support, which the deceased provided and were legally bound to provide and which they required."*

## LEGAL PRINCIPLES APPLICABLE

[5] In *Evins v Shield Insurance Co. Ltd*[1] Corbett JA (as he then was) described the dependant's action for damages for loss of the

[1] 1980 (2) SA 814 (A).

support of a breadwinner as a "peculiar remedy" and explained that a claimant (the dependant) derives his right of action not through the deceased or from the estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefor.

> *"Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner."*[2]

[6] Turning to the question of the measure of damages for loss of support, the general rule is that this represents the difference between the position of the dependant as a result of the death of the breadwinner and the position he or she could reasonably have expected to be in had the deceased not died. [3] Maintenance is not restricted merely to the necessities of life:

> *"It must include all the material advantages, conveniences, comfort and support, which the father would have afforded the claimants, but for his death ... The Court must pay regard to what the deceased had been used to supply in the past – that is, to the station in life of the parties, and the comforts, conveniences and advantages to which they had been accustomed. Only actual material loss can be taken into account in an action of this kind."*[4]

In *Hulley v Cox*[5] Innes CJ noted that the object of the remedy was:

> *"... 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. Account must also be taken of eventualities which would have operated in any case."*

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[2] At 873 H – 838 A.
[3] *Lambrakis v Santam Ltd* 2002 (3) SA 710 (SCA) at para 12.
[4] *Jameson's Minor's v Central South African Railways* 1908 TS 575 at 602.
[5] 1923 AD 234.

[7] *Lambrakis v Santam* (supra) involved a claim very similar in many respects to the present one. The Supreme Court of Appeal identified the principal issues in that matter as being the quantification of loss and the determination of whether the income from the deceased's estate amounted to an accelerated benefit such that it should be regarded as negating or reducing that loss. It held that "*any addition to a dependant's income, arising from the death of the deceased, must be deducted from the total amount of the loss*".[6] Pursuant to this principle it held that where a deceased's estate generates sufficient income to support the dependants in full, no financial loss would be suffered as a result of the death of the deceased. In reaching this conclusion it cited with approval the following passage from *Indrani and Another v African Guarantee and Indemnity Co. Ltd* 1968 (4) SA 606 (D) where Fannin J said[7]:

> *"The general principle applied by South African courts is that a dependant plaintiff, when entitled to damages for loss of support, should be awarded damages only for the "material loss caused" ... by his death."*[8]

[8] The Court stated that it seems implicit in what was said by Innes CJ in *Hulley v Cox*, that the material loss can only be ascertained "*by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage*

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[6] At 715 A – B.
[7] At 607 F – H.
[8] See *Hulley v Cox* 1923 AD 234 at 243.

*which from whatever source comes to him by reason of the death*" (my emphasis). On this basis an argument that dependent children had paid for their own support in that maintenance obligations towards them had been paid by the executor of the deceased estate in which the children were the sole beneficiaries, was rejected. Lewis AJA reasoned that the income on the funds in the estate came to the children "*by reason of the death of their father who had owed them the duty of support*" and "*but for his death the children would not have received the income when they did*" with the result that:

> "*(t)he interest generated by the investment of the estate assets, payable to the children only because of their father's death, did therefore constitute an accelerated benefit.*"

[9] The principle upheld in *Lambrakis*, namely, that, when assessing damages for loss of support in claims arising from wrongful death, allowance must be made for any new source of income which the plaintiff has obtained as a result of the death of the deceased, has long been established in our law.[9] In the case of property acquired by a plaintiff by way of inheritance from the deceased, the deduction is calculated with reference to the value of the benefit derived from the accelerated receipt of the property.[10]

## BACKGROUND FACTS

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[9] See *De Wet v Odendaal* 1936 CPD 103 at 106 and *Maasberg v Hunt, Leachers and Hepburn Ltd* 1944 WLD 2.
[10] *Legal Insurance Co. Ltd v Botes* (supra) at 620 – 621 and *Snyders v Groenewald* 1966 (3) SA 237 (A) at 79.

[10] The deceased were married to each other out of community of property and were passengers in a vehicle involved in a motor vehicle collision on 3 March 1994 in which they sustained fatal injuries. The vehicle was caused solely by the negligence of the driver of the other vehicle involved (the "insured driver") and it was common cause between the parties that, to the extent that the plaintiffs suffered any damages, the defendant was liable therefor in its capacity as the insurer of the insured driver.

[11] First plaintiff, Lize-Marie MacDonald ("Lize Marie"), was born on 30 March 1992. She turned 18 during the course of the trial and was then a scholar. Second plaintiff, Petrus Geyser MacDonald ("Petrus"), was born on 15 February 1988 and was thus 22 years old at the time of the trial. He is presently self-employed and self-supporting. The third plaintiff, Sumè MacDonald ("Sumè") was born on 24 July 1984 and was 26 at the time of the trial. She is now married, working as a teacher in the United Kingdom and is self-supporting.

[12] The deceased executed a joint will which provided for the establishment of a testamentary trust which would be dissolved once Lize-Marie turned 21 years of age in March 2013. In terms of the will the plaintiffs, as the children of the deceased, became the sole heirs to their respective estates. The deceased father's sister,

Mrs. Susan Van Rensburg, was appointed as trustee and executor whilst his brother, Mr. Herman MacDonald, and his wife, Marlene ("the MacDonalds"), were appointed as guardians to the minor children and later as trustees. In terms of the will the trustees were clothed with the following powers and obligations:

> *"Om soveel van die inkomste en, indien nodig, van die kapitaal as wat hulle mag na hulle absolute goeddunke nodig mag ag, aan te wend vir die onderhoud, opvoeding en geleerdheid van ons kinders of vir enige ander doel in hulle belang."*

Provision was also made:

> *"(o)m die trust te beeïndig wanneer die jongste van ons kinders, van tyd tot tyd in lewe, die ouderdom van 21 jaar bereik en die trustkapitaal, soos dit dan bestaan, tesame met enige opgelope inkomste aan ons kinders of hulle wettige afstammelinge by plaasvervulling oor te maak of te betaal."*

The original will bore a handwritten amendment making the trust dissolution date when the youngest child reached 25 years of age but this was not accepted by the Master for lack of compliance with the requisite formalities.

[13] Upon the death of their parents the plaintiffs were taken into the home of the MacDonalds and brought up as their children. Some 5 years after the deceaseds' death the MacDonalds moved, together with all the children, to Cape Town where Sumè, Lize-Marie and Petrus were brought up and educated.

[14] When the first executrix and trustee, Mrs. Van Rensburg, was killed in a motor vehicle accident a few years after her appointment, an attorney, Mr. Phillipus De Villiers, was appointed as executor and, together with the MacDonalds, as a trustee of the testamentary trust. Mr. De Villiers proceeded to wind up the estate, a process that was finalised only in May 1998.

[15] Following the death of their parents the plaintiffs commenced receiving maintenance from the trust. Both Mr. De Villiers and Mr. MacDonald testified on behalf of the plaintiffs and from their evidence it appeared that the MacDonalds had received a sum of R700.00 per month per child from the trust ever since the deceaseds' death and still continue to do so. Over and above these sums Mr. MacDonald would from time to time calculate the approximate maintenance expenses relating to the plaintiffs not covered by these payments and obtain reimbursement therefor from the trust which was administered by attorney De Villiers. If additional meaningful expenses were incurred in respect of one or more of the plaintiffs Mr. MacDonald would similarly request and receive such monies from the trust on an ad hoc basis.

[16] Both Messrs. MacDonald and De Villiers testified that the relationship between them was based on trust and that the latter met all such claims made by Mr. MacDonald. Their evidence was further that over the years the plaintiffs were fully maintained by

the trust in the manner described and by the MacDonalds who considered and treated the children as their own. Mr. MacDonald testified that the monies received from the trust were more than sufficient to cater for the needs of the children.

[17] It was common cause that the total maintenance paid in respect of the plaintiffs from the death of their parents until the date of trial was some R1 979 390.00. These monies were used for all of the children's needs including, but not limited to, private school fees, boarding school fees, fees for tertiary education for Sumè and Petrus and expenses relating to vehicles which the trust later provided to Sumè and Petrus.

[18] There was no suggestion that any of the plaintiffs lacked for anything during the period which they were maintained by the Mac Donalds with the financial backing of the trust. Mr. De Villiers' evidence in this regard was that he regarded it as appropriate to meet any request made by Mr. MacDonald relating to the needs of the children. So, for example, when Sumè had married a few years previously, the trust had paid R70 000.00 towards the wedding expenses. Nor, notwithstanding the terms of the trust, did Mr. De Villiers or his fellow trustees regard the duty of the trust to maintain the children as enduring only until they were 21 years of age. They took the view that the trust should maintain the children

until they were self-supporting. When Mr. MacDonald was asked about the trust maintaining Sumè until she turned 23 and had completed her tertiary education, he expressed the view that his late brother would have wanted this to have been done.

**THE PROJECTED EARNINGS OF THE LATE PETRUS AND MYRA MACDONALD**

[19] At the time of his death the deceased farmed outside Upington and also had a small transport business. His wife was not formally employed but may have earned limited income from informal economic activity.

[20] As a first step in establishing the plaintiffs' claim for loss of support, evidence was led of the deceased's income and financial statements for the financial years ending February 1992, 1993 and 1994, i.e. shortly before his death. Evidence was also led of the deceased's wife's financial statements for the year ending February 1994 as well as of the liquidation and distribution accounts in both estates. The deceased's declared income for the financial years ending February 1992, 1993 and 1994 were R90 640.00, R113 358.00 and R218 761.00 respectively, producing an average annual income for these years of R158 415.00. The accountant who handled the deceased's affairs, Mr. Louis Van Zyl, testified that the deceased's average disposable income for

the three years in question was in fact greater in each case but these figures were ultimately not relied upon by the plaintiffs.

[21] The annual increase in the deceased's earnings between 1992 and 1993 was thus approximately 25% whilst the increase from 1993 to 1994 was almost double at 93%. These figures were common cause but a difference emerged between the parties as to how to treat them. The evidence for the plaintiffs was further that the deceased's farming enterprise and transport business were gaining momentum and becoming increasingly profitable. The defendant contended that the proper approach to the deceased's future earnings should be calculated by taking the average of his income over the 3 years prior to his death as a base figure. On behalf of the plaintiffs it was contended that a more realistic approach would be to utilise the deceased's income at the end of the 1994 financial year, which ended a few days prior to his death, as the base figure and, thereafter, to increase this base figure annually by an inflationary factor.

[22] In **Corbett, The Quantum of Damages** Volume 1 (4th edition) Gauntlett the following is said regarding the assessment of a deceased's income:

> *"The deceased's annual net income over the period during which the deceased would have maintained and supported the plaintiff must be estimated by the court upon evidence as to what the deceased was earning at the time of death, what the nature of the work was and*

> *what prospects and capabilities there were. The court must make allowance for the hazards and uncertainties that may beset certain types of work or employment, the conditions obtaining at the time of the deceased's death, the possibility of future increases in earnings had the deceased lived and the shrinkage of income due to diminution of mental vigour which can be expected in some cases."*

[23] All the available evidence indicates that the deceased was a capable, albeit not a long-established farmer, and that his farming activities were growing increasingly profitable by the year. He had, furthermore, the subsidiary transport business and was able to rely on his previous experience in the transport business and his connections to a brother who ran a full-fledged transport business. In these circumstances, and notwithstanding the vicissitudes of farming, it seems to me to be unduly pessimistic, if not unrealistic, to determine the deceased's income on the basis of his average income over the three financial years in question. Regard must be had to the prospects that the deceased's earnings would have continued to increase in real terms above his average earnings over the previous three years. In all the circumstances the projection of the deceased's income on the basis that it would be no less than the inflation adjusted value of his income for the 1994 financial year i.e. R218 000.00 odd, strikes me as realistic and appropriate.

**DECEASED'S WIFE'S INCOME**

[24] It was contended on behalf of the plaintiffs that the deceased's wife earned an income which, with effect from the date of her death, should be estimated at R12 756.00 per annum and should be taken into account as the base figure for the purpose of calculating the plaintiffs' claims for loss of support. On behalf of the defendant it was argued that, to the extent that the deceased's wife earned any income, this could not be separated from the income generated by the deceased's farming activity or, at best, was spending money for her personal use.

[25] The first liquidation and distribution account relating to the deceased's wife indicated that the value of the assets in her estate totalled approximately R334 000.00 with total liabilities being R19 000.00. Of these assets the proceeds of insurance policies amounted to R325 000.00. Evidence was led that the deceased's wife had earned some income by way of selling milk, meat and pottery. Mr. MacDonald testified, however, that he did not think that her activities generated much money and that at best it was in the nature of pocket money which she earned for selling milk and meat from animals kept or slaughtered on the farm. Mr. Van Zyl, the chartered accountant who dealt with the deceaseds' affairs during their lifetime, testified that the deceased's wife had sold the products in question but in his evidence in chief could give no detail of her earnings. In cross-examination he stated that

she had earned R12 700.00 per year but, beyond stating that this was based on documentation he had seen after her death which was no longer available, could again give no detail thereof.

[26] There was thus a paucity of substantiated evidence relating to the deceased's wife's economic activity as well as an apparent overlap with the deceased's income from the farm. Having regard to these factors, I consider that the plaintiffs have failed to establish that she earned an independent income of R12 7000.00 per annum, or any income for that matter which can be brought into account in determining the total projected income on which the plaintiffs' claim for loss of support can be based.

**TILL WHAT AGE WOULD THE PLAINTIFFS HAVE BEEN MAINTAINED?**

[27] A further question to be resolved is whether the quantum of Sumè's claim should be calculated on the basis that she would have been maintained by her parents up to the age of 23, as contended for by the plaintiffs, or merely until the age of 21 as contended for by the defendant. There is no dispute that Sumè was indeed supported by the trust for a period of 5 years after finishing school during which period she completed a primary degree in education and then an honours degree.

[28] Mr. MacDonald, whom of all the witnesses knew the deceased best, testified that the latter would have wanted to have given his daughter the best opportunities in life. Furthermore, the terms of the unsuccessful amendment to the deceaseds' joint will regarding the age of the youngest child when the trust would dissolve, albeit that the amendment was not accepted by the Master, offers support for the view that the deceased would have been more than willing to support their children even beyond the age of 21 years.

[29] On the evidence I find that the deceased would have maintained Sumè, and her siblings, at least until such time as they became self-supporting or completed any tertiary education which they undertook.

## THE VALUE OF THE ESTATES OF THE DECEASED FOR THE PURPOSES OF CALCULATING THE PLAINTIFF'S CLAIMS

[30] As mentioned the bulk of the assets in the estate of the deceased's wife constituted the proceeds of various insurance policies. Similarly, a considerable proportion of the assets in the estate of the deceased were made up of the proceeds of insurance policies. The evidence was that the sum total of the

proceeds from insurance policies payable to the deceased father's estate was R1 683 000.00. It was also not disputed that the insurance policies payable to deceased mother's estate amounted to R325 000.00 making a total of approximately R2 000 008.00. The evidence was further that these and other monies realised in the winding up of the estates were not kept separate by the respective executors and trustees but treated or invested as one fund.

[31] There was a dispute about the value of the non-insurance assets in the deceased's estate. The distinction made between these two classes of assets results from the provisions of s 1(1) of the Assessment of Damages Act 9 of 1969 which provides as follows:

> *"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."*

[32] It was the plaintiffs' case that all proceeds of the insurance policies forming part of the estates of the deceased parents, as well as the fruits thereof i.e. monies earned through their investment, fell to be excluded in the calculation of any accelerated benefits which the plaintiffs may have enjoyed as a result of their parents' death. The value of such non-insurance assets therefore became a crucial issue in the matter.

[33] For the defendant it was contended that the deceased's liquidation and distribution accounts could not be relied upon to provide accurate figures of the actual value of the estate transferred to the trust. Its case was further that the total amount transferred to the trust from both estates, including the insurance policy proceeds, was in the region of R4m and that the income and interest derived from the investments made by the trust were more than sufficient to have covered all the maintenance needs of the plaintiffs over the years. As a result there had been no need ever to utilize the capital of the trust to meet the maintenance needs of the plaintiffs. Further, as I understand the defendant's argument, based on the principle enunciated in *Lambrakis*, namely, that where the premature death of the deceased has provided the plaintiffs with a stream of income which they would not otherwise have enjoyed, such income must be deducted from any loss of support which the plaintiffs may be proved.

[34] It was implicit in the argument of defendant's counsel that any income derived from the investments of the proceeds of insurance policies would constitute accelerated benefits and as such fall to be deducted in any claim for loss of support. However, such an approach would defeat or at least undermine the avowed purpose of s 1 of the Assessment of Damages Act which precludes insurance monies being taken into account in the assessment of

damages for loss of support sustained as a result of a person's death. The clause in question is widely cast and, given its purpose, namely, not to favour a wrongdoer with the benefits of his/her victim's prudence, it must in my view be interpreted as extending to the fruits of such monies.

[35] In the light of the above finding it is important to distinguish between the proceeds of the insurance policies which were brought into the estates of the deceased and his wife and the balance of assets in such estates. It is only when these amounts have been established or estimated that it can be determined what sum falls to be considered as accelerated benefits in any claims which may be established by the plaintiffs for loss of support.

[36] One would have expected that an executor/trustee in such a situation such as the present would have had no difficulty in advising what monies were received into the trust and whether they were the proceeds of insurance policies or monies realised from other assets in the estates of the deceased. However, notwithstanding the fact that hundreds of pages of documents were placed before the court relating to the affairs of the trust, the estates and the deceaseds' financial affairs, the position in this regard is anything but clear.

[37] The reasons for this include the fact that the record-keeping and administration of the initial executor in the estates and trustee, the late Mrs. Van Rensburg, fell short of that to be expected from someone winding up an estate and administering a trust. Upon her death in March 1997 attorney De Villiers was appointed as executor in the estates and as trustee. By this time the trust which came into existence upon the death of the deceased had still not been registered. In this three year period since the deceased's death the assets of the estates had largely been realised and, no doubt, the proceeds invested, but not through the vehicle of the trust. Furthermore, the present action was probably not envisaged by the executors and trustees of the estates and trust in the years immediately after the death of the deceased.

[38] As a result of these and other factors the plaintiffs were able to do no more that attempt to reconstruct what monies had flowed from the estates into the trust. Compounding the problem was a disjuncture between the values attributed to various estate assets in the deceased's liquidation and distribution accounts and their true value. Several valuable assets in the deceased's estate were grossly undervalued in these accounts in order to minimise the estate duty payable.

[39] There was limited common ground between the parties in relation to these figures. The plaintiffs ultimately contended that the initial total capital value of the trust was R2 983 000 of which R1 683 282 represented the proceeds of insurance policies in the deceased's estate plus, presumably, a further R315 000 being the nett proceeds of the deceased's wife's insurance policies. This leaves a non insurance capital of R975 000. The defendant contended that the total capital value of the trust was R4 041 502.00 although the basis for this calculation was never clearly put by or to any witness. It is of some significance, however, that attorney De Villiers conceded in cross-examination that he could not dispute that the total initial capital in the trust was of the order of R4m.

[40] Using a combination of the liquidation and distribution account in the deceaseds' estates and the evidence of the accountant, Van Zyl, the following picture emerges; the deceased's wife's estate amounted to R314 861.87 after her other assets (R9 000) and liabilities (R19 000) were accounted for. Effectively her estate can be regarded as comprised solely of the proceeds of insurance policies. The proceeds of insurance policies comprised R1 683 281.44 of the deceased's estate. Although the nett assets in the deceased's estate were reflected in the second and final liquidation and distribution account as R2 427 667.31 (including the proceeds of insurance policies), the value of approximately R744

000.00 ascribed to non-insurance assets was, as previously stated, based upon inaccurate valuations. The plaintiffs conceded that several of these asset values had to be revised. Most notable amongst these assets was the family farm which, although reflected in the liquidation and distribution account as having a value of R378 000, was sold in 1997 for R1.2m. According to the plaintiffs' actuary, adjusting this last-mentioned figure for inflation, a more realistic value for the farm as at the date of death was R980 985. For similar reasons the value attributed to farming equipment and implements fell to be increased from R94 940 to R200 000 whilst certain Oranje Rivier Wynkelders Bpk shares had to be adjusted from their par value of R8 250 to R70 000.

[41] These three re-valuations alone add R779 795 to the initial value attributed to the non-insurance assets in the deceased's estate. They result in an estimate of the deceased's estate as amounting to some R3 207 000 of which R1 683 000 represented the proceeds of insurance policies and about R1 524 000 the non-insurance proceeds. If to these figures is added the nett proceeds of the deceased's wife's estate (R314 000) one arrives at an approximate initial trust capital value of R3 521 000, with the split between insurance and non-insurance proceeds (R1 997 000 and R1 524 000 respectively) being approximately 56.7% / 43.3%.

[42] Turning to the monies disbursed by the trust on the maintenance of the plaintiffs, the figures for the first three years following the death of the deceased had to be reconstructed by reason of poor record keeping. For the balance of the period until the date of trial, all payments in respect of the plaintiffs were made by cheque issued by the trust. Using such data this element of the plaintiff's claim was presented on the basis that up to 28 February 2010 a total of R1 979 390.46 had been spent by the trust on the plaintiffs. These sums, broken down into their annual components are, save for the final year, accurately set out in schedule "A" to the report of the plaintiffs' actuary, Mr. PW Ennis, dated 9 November 2009.

[43] It is of importance to the determination of the plaintiffs' claim that for the financial years ending from February 1995 to February 1998 these amounts totalled no more than R25 200 per annum. In the following financial year they totalled a little more, R35 200. Thereafter, between the financial years ending February 2000 and February 2002 they averaged some R93 000.00 per year and, for the next three years ending February 2005, approximately R142 000 per year. Over the subsequent five year period ending February 2010 they averaged approximately R222 375 per year. Having regard to the comparatively modest levels of maintenance paid by the trust up until February 2002, it would

seem probable that these would have been easily met out of the income stream produced by the trust's non-insurance assets (which had a value of at least R1.524m).

[44] The trust's investment performance is also relevant to the present claim. Despite having disbursed some R1, 980 000 in maintenance to the plaintiffs since its formation in March 1994, as at February 2010 the trust's liquid assets alone stood at R7 349 000. Mr. De Villiers was constrained to agree that the plaintiffs' maintenance requirements had largely, if not totally, been met out of the interest (and presumably dividends) earned by the trust on the original capital. He agreed furthermore that at no stage was it necessary to utilise any of the trust's capital to meet the children's maintenance requirements. He also agreed in general terms, that the trust's primary investment, placed with Sanlam, which as at February 2010 had a value of R6, 200 000, had been made by Mrs. Van Rensburg shortly after the deceaseds' death.

[45] I bear in mind that proceeds of the non-insurance assets derived *inter alia* from the sale of the farm, shares and other movable assets were progressively realised and then invested. In the case of the farm the sale agreement provided for payment of three instalments of R500 000, the first upon registration of transfer and thereafter a year and two years respectively after this date. On

the other hand, a factor apparently not taken into account by the parties in assessing the value of the two components of the trust is that all estate duties in the deceaseds' estates appear to have been treated as having been borne by the non-insurance proceeds of the estate.

[46] As previously mentioned, there was no direct evidence from Mr. De Villiers as to what sums were ultimately transferred to the trust nor is it possible to value the non-insurance and the insurance portion of such notional sum with precision. Furthermore, in their investment decisions the trustees appeared to draw no distinction between the proceeds of the estates which emanated from insurance payouts and those which did not. All the monies co-mingled and were invested as composite sums.

## ACTUARIAL BASIS OF THE PLAINTIFFS' CLAIM

[47] In terms of the revised actuarial report filed on behalf of the plaintiffs (the version marked "E") their claim for loss of support arising out of the death of their parents amounted to R932 000.00. Of this amount R158 340.00 odd is attributed to a loss of support sustained as a result of the deceased's wife's death. In view of the finding that the plaintiffs failed to prove any income earned or

likely to have been earned by the deceased's wife, this portion of the claim can be disregarded, leaving a claim in respect of losses sustained as a result of the deceased's death in the amount of R773 668.00.

[48] The principal assumptions made on behalf of the plaintiffs in formulating their claim is that the deceased's annual rate of earnings would have been R218 761.00 per year, adjusted for inflation. As indicated, I consider that this assumption is justified. It was further assumed that each parent's income would have been consumed on the basis of two shares to each parent and one share to each child during their period of dependency i.e. to each of the children is attributed one-seventh of the disposable income of the deceased. I shall return to this assumption later. As far as the actuarial treatment of accelerated benefits is concerned, the plaintiffs' actuary, Mr. PW Ennis, distinguishes that portion of the trust capital not derived from the proceeds of life insurances (referred to as the "capital value") from the balance. He makes the further assumption that monies from the trust were and are used exclusively for the maintenance of the children. As will appear later, however, this assumption cannot be extended to at least one major unrealised trust asset. He then accounts for accelerated benefits by deducting from the plaintiffs' one seventh share of the deceased's projected earnings that portion of the

maintenance actually received by the plaintiffs which he notionally attributes to the capital portion of the trust i.e. he assumes that each rand of maintenance received was derived in specified proportions from the capital and non-capital portion of the trust and then reduces each plaintiff's claim by the sum of the maintenance notionally received from the capital portion of the trust.

[49] In his final revised report Mr. Ennis reduces the sum total of the maintenance paid by the trust, R1 979 390, by 54.4% i.e. that portion of the trust capital he assumes was not derived from the proceeds of life insurances. The deduction for the accelerated benefits so calculated for each child was taken as one-third of the remaining 43.6% portion. For the youngest child, Lize-Marie, an estimate is made of the likely amount of future maintenance and these amounts were capitalised. A contingency factor of 5% was applied to the gross claim for loss of support i.e. before accelerated benefits were deducted, and 10% in the case of Lize-Marie's claim for future loss of support, ultimately resulting in the total claim which, after the exclusion of any claim based on a loss of support from the deceased's wife, amounts to R773 668.

[50] The approach adopted by the plaintiffs was challenged on a number of grounds by defendant's counsel but, most

fundamentally, by the submission that the use of the actuarial model relied upon by the plaintiffs was inappropriate and resulted, as was the case in *Lambrakis*, in the untenable conclusion that a large sum of money was alleged to be due to the plaintiffs whereas in fact they had not been deprived of any support.

[51] The defendant's counsel relied upon the confirmation in *Lambrakis* by Lewis AJA (as she then was), that any addition to a dependant's income arising from a wrongful death has to be deducted from any actual pecuniary loss suffered by the dependant asserting a claim for a loss of support. The Court held that in assessing such damages, the measure of which 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, the particular equities of the case must also be taken into account and an adjustment made, if appropriate. Furthermore, it held that any addition to dependants' income arising from the death of the deceased must be deducted from the total amount of the loss. It quoted with approval Holmes JA in *Legal Insurance Co Ltd v Botes*[11] who stated that the trial Judge

> *"has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations."*[12]

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[11] 1963 (1) SA 608 (A).
[12] Cited in *Lambrakis* at 715 A – B para 12.

[52] Of relevance to the present matter is that *Lambrakis* confirmed that where a deceased estate generates sufficient income to support the dependants in full, no financial loss will be suffered as a result of the death of the deceased. Dependants of a deceased should, in such circumstances, only be compensated for financial loss and should not profit from the wrong-doing of the defendant.

[53] It was further held in *Lambrakis* that income from the funds of the estate had come to the children by reason of the death of the deceased. Such death was the cause of the receipt of the income by the children, with the estate being the source thereof. In these circumstances the interest generated by the investment of estate assets, payable to the children only because of their father's death, constituted an accelerated benefit.

[54] In the present matter the plaintiffs, relying on the fact that the proceeds of the insurance policies and, as a I have found, the fruits thereof, may not be taken into account in reducing any claim for loss of support, put up an actuarial model which assumes that approximately 55 cents of every rand spent on their maintenance was derived from the proceeds of insurance policies or their fruits and has not been taken into account in the

determination of the accelerated benefits. They then seek to recover these sums as part of a shortfall between the maintenance which each plaintiff would have received had the deceased not been killed and the maintenance actually received derived from non-insurance assets. What the claim fails to take into account, however, is the possibility, if not the probability, that the trust, through the investment of the capital value of the deceased's estate (i.e non-insurance assets) has earned monies in excess of any nett claim by the plaintiffs. To put it differently, the income earned on the non-insurance assets, realised or non-realised, may well be more than adequate to fund the entire maintenance requirements of the plaintiffs, past and future, and still leave a sizeable surplus for distribution to them when the trust terminates. In that event it is doubtful whether the dependants have any claim for loss of support. At best they might have a claim for a reduced inheritance but no such claim was advanced in these proceedings.

[55] Seen from another perspective, the flaw in the plaintiffs' claims, as they were presented, lies in the fact that, on the evidence, a substantial inheritance will devolve upon the plaintiffs in the near future. However, although that sum appears to comprise both the proceeds and fruits of the insurance and of the non-insurance assets, no proper account has been taken of the latter in

determining what accelerated benefits the plaintiffs have enjoyed and which must be deducted from any proved claim for a loss of maintenance.

[56] The criticism of the formulation of plaintiffs' claims is not simply theoretical or conjectural. Although the liquidation and distribution accounts in the deceased's estate suggest that its value when it was transferred to the trust was approximately R2 850 000, the indications are that considerably more was realised and eventually transferred to the trust. That amount, together with the nett proceeds of the deceased's wife's insurance policies, some R314 000, has grown strongly over the years and currently stands at R7.3m, this notwithstanding the fact that since 1994 some R1.9m has been expended on the maintenance needs of the plaintiffs. Accepting that some R2m of the initial capital transferred to the trust was derived from the proceeds of insurance policies over the lives of the deceased and his wife, there was nonetheless a balance in their estates of at least R1 500 000, and possibly as much as R2m, from non-insurance assets. Prudently invested, as appears to have been the case with all the monies which the trust received, the income derived from the original capital appears to have been more than sufficient to meet the maintenance needs of the plaintiffs over the years and still leave a surplus. These needs to date have totalled R1.9m but of course were only incrementally

incurred and were comparatively modest for at least the first 8 years after the deceased's death thus providing adequate opportunity for the initial capital to grow and produce a stream of income to meet the ongoing maintenance needs of the plaintiffs.

[57] Other criticisms can be levelled against the formulation of the plaintiffs' claims. One such criticism is the assumption that the deceased's projected income would have been consumed on the basis of two shares to each parent and one share to each dependent child. Although such a formulation is commonly used in actuarial calculations in loss of support claims it is no more than a rule of thumb which must, in appropriate circumstances, yield to the facts of the particular case. As Gauntlett notes in **Corbett, the Quantum of Damages** Volume 1, 4th edition at page 68, this method of allocation may prove inappropriate in particular cases, for example where the earnings of the deceased breadwinner were relatively high or where such person was accustomed to save a substantial portion of his or her income.

[58] In the present case the scenario projected for the plaintiffs was that the deceased would have remained as a relatively small farmer in the Upington district and that the family would enjoy a lifestyle commensurate therewith. In the event plaintiffs were brought up by Mr. Herman MacDonald, a businessman turned

teacher, and his wife, Mrs. Marlene MacDonald who, after some years, moved to Cape Town. It would appear that, throughout their upbringing, all of the plaintiffs' maintenance needs were met. They were educated at good schools and enjoyed the benefits of tertiary education and whatever further support this required in the form of the use of a private vehicle, alternative accommodation while undergoing tertiary education etc. No evidence was led that the plaintiffs had lacked for anything within reason. Furthermore, it is clear from the evidence discussed earlier that the trust adopted a generous approach to any claim made on behalf of the children in respect of their maintenance. Indeed, judging by the trust's contribution of R70 000 towards Sumè's wedding expenses at a time when she was self-employed, these needs were liberally interpreted.

[59] In these circumstances I consider the uncritical application of the rule of thumb formula to be questionable. In the absence of any evidence suggesting that the plaintiffs suffered a lower standard of living or that they had to forego necessities, benefits or privileges which they otherwise might have expected to enjoy had their parents lived, I consider that this assumption, which is instrumental in the claim for a shortfall in maintenance, cannot be mechanically applied.

[60] Other anomalies present themselves which cast doubt on the plaintiffs' claim, one being the treatment of an apartment in Upington which was an asset emanating from the deceased's estate. It was retained as an asset by the trust and has a present value of approximately R650 000. The apartment appears to have been leased to the plaintiffs' grandmother over a long term at what is clearly a nominal rental of some R600 per month. This amount covers no more than the rates and taxes which accrue over the property. Were that asset to have been sold or rented at a commercial rental there can be no doubt that it would have materially enhanced the stream of income earned by the trust from non-insurance assets, further offsetting any claim by the plaintiffs for a shortfall in maintenance. Although the trustees may well be entitled, in their discretion, to deal with the asset in this manner, in my view, account must be taken of the accelerated benefits forfeited by the plaintiffs as a result of this decision. This was not done in the formulation of the plaintiffs' claim.

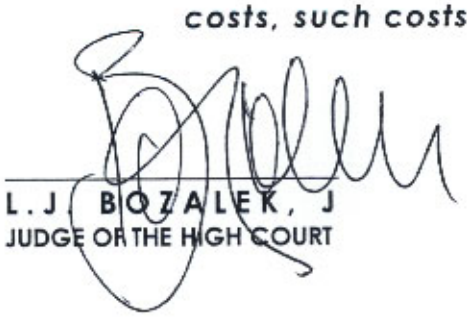
[61] A further anomaly is that all three plaintiffs continue to receive R700 per month per child irrespective of the fact that second and third plaintiffs have been self-supporting for some years. The sums paid in this regard have formed part of the R1.9m paid out by the trust.

## CONCLUSION

[62] Taking all these factors into account I consider that the plaintiffs have failed to establish, as their claims have been formulated and presented, that they have suffered an actual pecuniary loss in the form of a loss of support as a result of the death of their parents. The principal reasons for this finding are twofold; firstly, doubt concerning the applicability, in the present circumstances, of the standard formula for the division of a breadwinner's projected earnings and thus whether a loss of support has in fact been established; secondly, the fact that, regard being had to the sizeable estate, (excluding the proceeds of the insurance policies), left by the deceased and the manner in which this has been invested with the resultant stream of income, I am left unpersuaded that all the plaintiffs' reasonable past and future maintenance needs have not and will not be met by such income or, in other words, that proper account has been taken of the accelerated benefits which the plaintiffs have enjoyed.

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

***There will be absolution from the instance with costs, such costs to include two counsel.***



L. J. BOZALEK, J
JUDGE OF THE HIGH COURT