IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Case number: **RAF 234/16**

In the matter between:

PAMELA LORATO MATSHANE **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Matlapeng AJ

[1] On 7 September 2013 at around 11h30, a motor vehicle collision between two motor vehicles occurred on the Vryburg – Taung Road. As a result of this collision, Mr Otlotleng Matshane (hereinafter referred to as the deceased) lost his life. In life, the deceased was married to the plaintiff. The plaintiff was in the same motor vehicle when the collision occurred and suffered some injuries.

[2] As a result of the collision, the plaintiff instituted a claim against the Road Accident Fund for damages suffered as a result of her injuries as well as for loss of support in respect of the death of the deceased. The defendant conceded merits hundred percent in favour of the plaintiff. Certain heads of quantum were settled between the parties. What remains to be determined is whether the plaintiff has suffered loss of support and if so how much.

[3] The plaintiff called three witnesses to testify on her behalf namely Dr L Fourie, an Industrial Psychologist, Mr Terrence Mathe a registered Auditor and Rian Immermann an Actuary from the Gerard Jacobson Consulting Actuaries. The defendant did not call any witnesses or experts to support its case.

[4] At the conclusion of the plaintiff's case, the defendant also closed its case.

[5] Dr Fourie's evidence may be summarised as follows: He has a PhD in Industrial Psychology. Has been giving testimony in the courts since 1994. He considers himself to be an expert. He compiled a report in this case which was handed in as Exhibit "A". Before he could compile the report, he had a structured interview with the plaintiff and was placed in possession of the information of the business that the deceased ran. The plaintiff informed him that the deceased ran a business called Buddies on the Move CC which was doing projects on behalf of the government and that he drew a salary of R50 000.00 per month from this business. The plaintiff is a former teacher who went on early retirement. She was managing a General Dealer. The deceased contributed towards the running of the General Dealer by paying rental. He also contributed towards household

expenses. From the documents provided, Dr Fourie was able to confirm that Buddies on the Move CC had projects with the government. These were not once off projects as the enterprise has been in business since 2007. He came to the conclusion that the plaintiff suffered a loss as the deceased's contribution towards her support stopped after his death.

[6] Under cross examination he conceded that his report was over two years old but the conclusions were still valid. He conceded further that he is not a financial expert and he deferred to the opinions of financial experts. He had no proof that the deceased drew R50 000.00 per month from the business but obtained the information from the plaintiff.

[7] Mr Terrence Mathe is a chartered accountant who has been practising for 12 years. He prepared a report that was handed in as Exhibit "B". The objective of the report was to outline the factual findings identified on the financial loss suffered by the plaintiff as a result of the death of her husband. He explained how he went about doing that namely, analysis of two bank accounts' statements for the period of 11 August 2011 – 28 February 2013, preparing month to month cash flow statement schedule from the same bank accounts for the periods 28 February 2012 – 28 February 2013. He also prepared a trial balance and annual financial statements. He concluded that the business was a viable going concern which was doing business with the government. The deceased as a sole decision maker and sole signatory of the business's bank accounts decided how and when to spend money of the business. Although in law the business was a

separate entity from the deceased, it was intrinsically linked to him. The entity was owner managed.

[8] Under cross examination he stated that his brief was not to look at the earnings of the deceased. Cash was withdrawn from the business. This fell under the cost of sales which was normally withdrawn as cash and it showed an increase from the previous year's cost. He could not apportion moneys withdrawn to specifically the deceased's salary and he could also not exclude that of the cash withdrawn, none went to the deceased as his salary.

[9] Mr Rian Immermann is an actuary employed at Gerard Jacobson Consulting Actuaries. He has a BSc in actuarial science and has been working for Gerard Jacobson Consulting Actuaries since 2015. When he receives a brief to calculate loss of support, he considers the following: income available to the family, inflation, life expectancy statistics and the interest. The report that was admitted as Exhibit "C" was done by his colleague and he Immermann reviewed it. He arrived at the same conclusion as his colleague that the plaintiff has suffered loss of support. Although the report was done in 2015, it was still valid. It was not necessary to do a recalculation as only 8% interest should be added.

[10] Under cross examination he explained that when compiling a report he would need a death certificate and proof of earnings. In this instance he did not have proof of earnings of the deceased but relied on the Industrial Psychologist's report. He confirmed that the Industrial Psychologist did not have a factual basis for the amount of R50 000.00 allegedly earned by the deceased per month. He

stated that it was not an assumption that the deceased earned R50 000.00 per month but an unverified information.

[11] In her submissions, the plaintiff stated that she was entitled to judgment as the only evidence before the court is from her experts. It cannot be gainsaid that she did not suffer any loss. The only thing placed in issue is the R50 000.00 per month earned by the deceased. There was no evidence that the deceased did not earn this amount.

[12] In its submission, the defendant asked for absolution from the instance. In support of the application, it stated that the plaintiff had to proof her damages and she has failed to do so. In amplification, the defendant stated that: she failed to testify, there is no factual basis for the amount of R50 000.00 used by both the industrial psychologist and the actuary. The chartered accountant also failed to prove that the deceased earned a salary of R50 000.00 per month. As a result absolution from the instance should be granted.

[13] The test in an application such as this one is whether there is evidence upon which a court might reasonably find for the plaintiff. Differently put, the inquiry is whether the plaintiff has made out a prima facie case. In **Gordon Lloyd Page & Associates v Rivera and Another [2000] 4 All SA 241 (A)** at paragraph 2 the court held:

"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

". . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter*, 1917 T.P.D. 170 at p. 173; *Ruto Flour Mills (Pty.) Ltd. v Adelson (2)*, 1958 (4) SA 307 (T))."

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G-38A; Schmidt Bewysreg 4th ed 91-92)".

[14] The defendant has made much about the fact that there is no evidence relating to the R50 000.00 monthly salary allegedly earned by the deceased. Thus the substratum upon which the claim is calculated is absent with a result that the plaintiff has failed to prove her damages or at least their quantification.

[15] As a result, absent the proof of earning, so the argument goes, absent the very proof of loss of support. I disagree. Whilst it may be correct that the plaintiff herself did not testify, this does not necessarily mean that the evidence of Dr Fourie in relation to earning and the actuarial calculations based on Dr Fourie's

report should be rejected. The approach propagated by the defendant is that the plaintiff, in the absence of documentary evidence about the earnings should have testified. This is the best evidence rule.

[16] The best evidence rule is not applied rigidly by our courts. When evidence can be obtained from other reliable sources, such evidence may be used. In **De Klerk v Absa Bank & Others [2003] 1 All SA 651(SCA)** paragraph 37 it was held: "*There have been numerous decisions in which our courts have said that a court will come to a plaintiff's aid in a case of uncertainty and make an estimate in his favour, provided he has led the best evidence available – see for instance Enslin v Meyer* ***1960 (4) SA 520(T)*** *at 523F-524A. Ordinarily the measure of the damage that a car owner has suffered is taken to be the reasonable cost of repairs. But that cost is not necessarily in itself the true measure, merely a frequently encountered way of arriving at it in particular cases. But when a court says, in the case of an old car, where cost may not be the measure, that the plaintiff has not produced the best evidence or that he has not provided evidence of value before and after the collision, the court is really saying that the evidence that the law requires in the particular case has simply not been led. It may be dangerous to extrapolate from cases such as Enslin a general principle as to 'best evidence', that a plaintiff must always personally say what he would have done. Facts may be proved not only by direct evidence but by inference also - a man's intentions may be provable through the observations of others".*

[17] In this instance, the actuarial calculations were based on the evidence obtained by Dr Fourie. Mr Immermann testified that it cannot be said that it is an

assumption that the deceased earned R50 000.00. At best it can be described as unverified information. Mr Mathe, the Chartered accountant also stated that from the cash withdrawals that the deceased made from the bank account of the business, it cannot be excluded that he appropriated R50 000.0 for himself. I accept the evidence of these three witnesses as being satisfactory. Dr Fourie and Mr Mathe testified that the plaintiff suffered a loss. According to Dr Fourie, this is evident in the following: deceased paid the rental of the general dealer that the plaintiff was leasing. After his demise, the plaintiff could no longer pay the rental. The deceased contributed toward the upkeep of the household. This was no longer the case after his demise.

[18] The fact that there is no documentary proof that the deceased earned R50 000.00 should not be a bar to the plaintiff's claim. The evidence before court is that from the huge cash withdrawals that the deceased made, it is probable that it included the R50 000.00. In **Southern Insurance Association v Bailey No 1984 (1) SA 98 (A)** at **113 G-114 D** it was held:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on

the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative".

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award. See Hersman v Shapiro & Co 1926 TPD 367 at 379 per Stradford J:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

And in Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (A) Holmes JA is reported as saying at 451B-C:

"I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (N) at 287 and Turkstra Ltd v Richards 1926 TPD at 282 in fin-283.

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess.''(Cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920)".

[19] I will follow the sentiments expressed above. I have in this case, been provided with actuarial calculations. Such evidence has been attacked as not been based on proven facts. Whilst that may seem to be true, the evidence is alluring to me as it is based not on assumptions but on the information that was not verified although it was verifiable.

[20] The conclusion is ineluctable that the plaintiff has to succeed. The only credible evidence before this court is from the plaintiff's side. The defendant closed its case without adducing any evidence. There is nothing to gainsay the plaintiff's evidence or even more, to impugn the credibility of the experts or their conclusions.

[21] The actuarial calculations by Mr Immermann are as follows: net past loss of support R212 858.00 and net future loss of support R1 237 836-00 past contingency of 5% and future contingency of 10% as well as remarriage

deduction of 2% were already deducted from the above figures. It is trite that the percentages to be deducted as contingency is in the discretion of the trial court. I can find no fault with the percentages used by the actuary and I appropriate them for myself. Furthermore due consideration was taken of the fact that this claim is affected by the provisions of Road Accident Fund Amendment Act 19 of 2005. In his calculations the actuary took into account the limit imposed by the Act.

[22] In the circumstance the following order is made:

1. The plaintiff succeeds in her claim for 100% of her damages.
2. The defendant is ordered to pay the plaintiff an amount of

   R212 858-00 for past loss of support and R1 237 836-00 for future loss of support.
3. The amount stated in paragraph 2 above shall be paid within 28 days hereof into the trust account of the plaintiff's attorneys of record being Mokhehle Incorporated.
4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, which will include but not limited to the following:

   4.1 All fees of Counsel appearing in this matter.

   4.2 The costs of obtaining medical reports of the following experts, including their reservation cost if any and joint minutes;

   Dr L. Fourie – Industrial Psychologist

   Mr T. Mathe – The Chartered Accountant

   Mr R. Immermann – Consulting Actuary

   Dr T.S Bogatsu – Orthopaedic Surgeon

5. In the event that the costs referred to in paragraph 4 above are not agreed upon the plaintiff will serve a notice of taxation on the defendant's attorney of record.
6. Following agreement on or taxation of the party and party costs, the plaintiff shall allow the Defendant 7 (seven) court days after the allocator has been made available to the Defendant to make payment of the taxed or agreed party and party costs.

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D I MATLAPENG
ACTING JUDGE of the High Court
North West Division Court, MAHIKENG

APPEARANCES:

DATE OF HEARING: 27 NOVEMBER 2018

DATE OF JUDGMENT: 22 MARCH 2019

FOR THE APPELLANT: ADV. N GAMA

INSTRUCTED BY: MOKHEHLE INCORPORATED

FOR THE RESPONDENT: ADV. G EDWARDS

INSTRUCTED BY: MAPONYA INCORPORATED