

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



Case number: 26180/2014

Reportable

NOT OF INTEREST TO OTHER JUDGES

REVISED

6/12/2016

In the matter between:

LELANIE ESTERHUIZEN

FIRST PLAINTIFF

LELANIE ESTERHUIZEN obo PIETER SCHALK

SECOND PLAINTIFF

LELANIE ESTERHUIZEN obo MARKO

THIRD PLAINTIFF

LELANIE ESTERHUIZEN obo LINE-LEE LANDMAN

FOURTH PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

TOLMAY. J:

[1] This is a loss of support claim instituted by the First Plaintiff in her personal capacity and her capacity as the mother and guardian of three minor children. At the hearing the

First Plaintiff's claim on behalf of the Fourth Plaintiff was withdrawn as she is not the biological child of Pieter Schalk Esterhuizen (the deceased) and consequently he had no legal duty to support her.

[2] The deceased, the husband of First Plaintiff and the father of the Second and Third Plaintiffs died in a collision that occurred on 5 March 2013. He was a passenger in the vehicle which was driven by the insured driver. He was the sole breadwinner of the family

[3] The merits were conceded by the Defendant and the Defendant is liable for a 100% of the proven damages. All the disputes between the parties were settled, but for the contingency to be applied to allow for the possibility of re-marriage.

[4] The possibility of remarriage is usually taken into account when a claim for loss of support is considered in our law¹.

[5] The actuary applied a 39% deduction as this is the average deduction for a 35 year old white female with two children.² More children will cause a downward adjustment of the applicable contingency. The Plaintiff is of the view that a 20% contingency should be applied, while the Defendant argued that the 39% contingency applied by the actuary, is appropriate under the circumstances of the case.

[6] Ms. Esterhuizen testified that she is 35 years old, has 3 children of 7, 11 and 15 years respectively. She passed grade 11 and she does not have any other qualifications. She got married on 16 April 2005, when she was 24 years old. She worked for 1 year as a receptionist prior to her marriage, after getting married she did not work in the formal sector and was a home-maker. Although she has applied for jobs since the death of her husband, she has been unsuccessful. Her level of education and the fact that she has not been employed for the last 11 years counts against her. After her husband's demise she moved from Bethal to Port Elizabeth to be closer to her family. She stated that she has no desire to remarry and wants to focus on her children.

¹ Koch, Quantum Year book p 79

² Supra p 122

[7] In the past, apart from the number of children and attitude to marriage, factors like the appearance and personality of the widow were taken into account to determine her chances of remarriage. In Legal **Insurance Company Ltd v Botes**³ the deceased was 46 years old and his wife 41 years of age. They had one adopted child, who was aged 12. The Court *a quo* in this matter assessed the widow's prospects for re-marriage at 25% and the Court *a quo* arrived at that by taking *inter alia* the following in consideration:

*"But adjustments must be made according to the appearance, personality, nature and attitude to remarriage of the person concerned, and indeed other factors such as the number and ages of the widow's children. Plaintiff is, in my view, in appearance an average person for her age, and is not unattractive."*⁴

[8] The Court on appeal reduced the Court *a quo*'s finding of a 25% contingency based on the following:

- (a) That census statistics are merely a starting point
- (b) The fact that one can't determine the period which it will take for a widow to remarry, the possibility of recurrence of widowhood and the chances of the second marriage surviving; and
- (c) The fact that the widow was disfigured because of the removal of her right breast.⁵

[9] Some 3 years later in **Snyders v Groenewald**⁶ the Court stated in a similar vein as follows:

"In determining the percentage deduction to be made the Court has regard to such matters as the age, Health, appearance and nature of the widow as well as such other factors as the age and number and financial dependence of her children."

[10] These two cases, as far as it relies on a woman's appearance and nature reveal a

³ 1963 (1) SA 608 AD at 790C-H

⁴ Supra, p 617 D-G

⁵ Supra

⁶ 1966 (3) SA ED 785

rather out-dated and offensive approach towards women. To take appearance and nature in consideration is not in accordance with the constitutional values of dignity and equality 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** 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.⁷

[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:*

"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-D** 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 taken into account. To suggest that she is obliged to mitigate her damages by finding employment is to mistake the

⁷ GNP 2009 JDR 0325

*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 law 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."

[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 also be taken into consideration when the remarriage contingency is determined

[14] To determine the Plaintiff's prospects of remarriage and the possibility of financial support is to gaze into the proverbial crystal ball. I take into consideration all the aspects alluded to in her evidence. I take note of the fact that the care of the children might make it more difficult for her to focus on her own life and will probably impact on her social life. She is relatively young, and I think one can accept that a younger woman might be more inclined to remarry, not based on appearance or desirability but rather based on the fact that one might be more inclined when you are younger to take another chance at marriage.

[15] I am of the view that the 20% contingency proposed by the Plaintiff is too low in the specific circumstances of this case, but the 39% proposed by Defendant is too high. I am of the view that a 27% contingency will be fair under the circumstances.

[16] Consequently I make the following order:

- 16.1 A remarriage contingency of 27% is to be applied and a recalculation of the amount payable to Plaintiff is to be made; and**
- 16.2 The parties may approach this Court once the calculations are made for an order to be made.**

R.G.TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING: 11 NOVEMBER 2016

DATE OF JUDGMENT: 6 DECEMBER 2016

ATTORNEY FOR PLAINTIFF: GELDENHUYS INC

ADVOCATE FOR PLAINTIFF: ADV N C MARITZ

ATTORNEY FOR DEFENDANT: T M CHAUKE INC

ADVOCATE FOR DEFENDANT: ADV M N MATHEBULA