Case No 11395 IN THE SUPREME

COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the

matter between:

SANTAM INSURANCE COMPANY LIMITED Appellant

and

C J FOURIE Respondent

CORAM: E M GROSSKOPF, EKSTEEN, HOWIE, SCOTT,

et ZULMAN JJA

HEARD: 19 September 1996 DELIVERED: 27

September 1996

J U D G M E N T

E M GROSSKOPF. JA

This is an appeal, with leave of the court a quo, against a judgment of Preiss J in the Transvaal Provincial Division. The judgment has been reported as Fourie v Santam Insurance Ltd 1996 (1) SA 63 (T).

The facts, which were set out in an agreed statement, may be summarised as follows. For convenience I shall refer to the parties as they were in the court a quo.

The plaintiff was married out of community to his wife, to whom I shall hereinafter refer as "the deceased". Three children were born of the marriage. At all relevant times they were still minors. The deceased owed a duty of support to the children. Before her death the deceased was employed. She and the plaintiff pooled their incomes,

from which the joint household, the deceased, the plaintiff and the children were supported. The combined income of the family was notionally divided so that husband and wife received two shares each and the children one share each. The deceased's income, which she contributed to the pool, was less than the share which she received from the pool.

The deceased was killed in a road accident caused by the negligence of the driver of a motor vehicle. The defendant is liable as third party insurer for damages arising from the death of the deceased. The question at issue is whether the minor children suffered any patrimonial loss as a result of their mother's death, and, if so, how such loss is to be calculated. The court a quo held that they did suffer such a loss and gave judgment in favour of the plaintiff, in his

capacity as father and natural guardian of the three children, in the

amount of R156 370 with interest and costs. The defendant now appeals against this order.

The court a quo dealt with the action as one "in which conflicting methods of computing the loss of dependent children have to be resolved" (reported judgment at 63J). The two methods, each espoused by an actuary who gave evidence at the trial, are described and illustrated at 64J to 65D of the reported judgment. However, before coming to the computation of loss, one must first ascertain whether any loss at all has in fact been suffered. In Evins v Shield Insurance Ltd 1980 (2) SA 814 (A) at 838A Corbett JA described as "trite" the following principle relating to a claim for damages by a dependant:

"... the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner."

When analysed, the difference between the two actuaries to which the court a quo refers in the passage quoted above really amounts to a different perception of the facts rather than to a difference of computation. The defendant's actuary adopted a simple line which may be summarised as follows. The admitted fact was that, during her lifetime, the deceased received more from the household money pool than she contributed to it. She therefore did not fully pay for her own maintenance. It can accordingly not be said that she made any contribution to the maintenance of the children. It was not suggested in the agreed statement of facts that this situation would have changed in the future. The children accordingly, so this line of

argument concluded, suffered no patrimonial loss, accrued or prospective, as a result of the deceased's death. I revert later to the possibility, on this approach, of a contingent loss.

The plaintiffs actuary presented a somewhat more sophisticated argument. Both parents, he said, were under a duty to support each other and the minor children of the marriage. The money paid into the pool by each of the parents must therefore be taken to have been contributed for the purpose of his or her own maintenance, as well as for the maintenance of the other spouse and the children. Thus each parent's contribution must be divided according to the accepted formula into two parts for each of the parents and one part for each of the children. Each member of the family would then be maintained from the income of both parents. The two parents would each receive

two parts from his or her own income and two parts from the income of the other spouse. The children would each receive one part from the father's income and one part from the mother's income. When the mother died, the children would have lost the support which she provided. They are entitled to be compensated for this. The mere fact that the father, being no longer responsible for the mother's maintenance, would have more money available than was necessary to pay the mother's share of the children's maintenance, is, according to this contention, irrelevant.

In deciding the case in favour of the plaintiff the trial court followed the line of reasoning advanced by the plaintiffs actuary.

In my view these actuarial theories obfuscate what is a pure question of fact. As a matter of simple common sense the defendant's

actuary must, I consider, be correct on the facts of the present case.

Where a mother makes a contribution to the common pool in circumstances like the present the natural inference is that she is primarily paying for her own keep. Of course, if she contributes more than her share, the position would be different. But where, as here, she does not even contribute enough to cover her own needs it seems completely artificial to infer that she made contributions to the maintenance of the plaintiff and the minor children.

The basic fallacy in the plaintiffs approach, it seems to me, is the following. It assumes that, because the wife is in principle under a duty to support her husband and children, every contribution which she makes to the common pool must be taken to be (in part) a payment pursuant to that duty. This does not follow. The question

whether she paid for the maintenance of the children is, as stated

above, one of fact. There are no legal rules as to appropriation of payments in this situation.

The artificiality of the plaintiffs contention is illustrated if one considers the family income as a whole. There are certain losses which, it was suggested in evidence, were suffered by the family even if the defendant's approach were to be accepted. First, there are possible contingent losses suffered by the children arising from the fact that after their mother's death they had only one parent to look to for support. So, for instance, the father might re-marry a non-working woman, or might lose his income, et cetera. However, it was agreed between the parties that such factors, even if they could properly be taken into account, would not affect damages in the present case.

Then there are possible increases in housekeeping costs arising

from the death of the deceased. In principle the plaintiff would be entitled to claim in this regard but has not done so.

Apart from the possible heads of damage mentioned above, it is clear that the family did not suffer financially through the death of the deceased. It is true that her income was lost, but on the other hand the family saved the cost of her maintenance, which was higher than her income. Per capita the family was better off financially after her death. This simple, if somewhat unpalatable, truth is obscured by the complicated reasoning of the plaintiffs actuary, which in effect gives the father the benefit of the saving arising from the deceased's death and burdens the children with the loss of her income. In this way a theoretical loss of support is created for the children which bears no

relationship to the practical reality of the situation.

For the reasons stated above, I consider that the plaintiff did not establish that the minor children had suffered any patrimonial loss as a result of their mother's death. It follows that the appeal must succeed.

The problem with which we are concerned has apparently been considered in only one previous case. This is the unreported judgment in the matter of Marlene Bosch v Mutual and Federal Versekeringsmaatskappy Bpk to which reference is made at page 68 of the reported judgment a quo. In so far as it is contrary to what I have stated above it was, I consider, wrongly decided.

The appeal is upheld with costs, including the costs of two counsel. The order of the court a quo is set aside and the following

substituted:

The plaintiffs claim is dismissed with costs, including the qualifying costs of Dr R J Koch.

E M GROSSKOPF, JA

EKSTEEN, JA
HOWIE JA
SCOTT, JA ZULMAN, JA
Concur