THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NUMBER 412/00

In the matter between:

KALISTHENE LAMBRAKIS **Appellant**

and

SANTAM LIMITED **Respondent**

Before: **NIENABER, OLIVIER, MPATI JJA, HEHER & LEWIS AJJA**

Heard: **28 FEBRUARY 2002**

Delivered: **26 MARCH 2002**

Summary: **Measure of damages for loss of support; interest on investment in deceased estate constitutes an accelerated benefit to heirs.**

JUDGMENT

LEWIS AJA

[1] Frixos Lambrakis (the deceased) was killed on 27 February 1987 in a motor collision. The respondent was an agent of the then Multilateral Motor Vehicle Accidents Fund, and the insurer of the driver responsible for the deceased's death. The appellant (referred to for convenience as the plaintiff), who is the divorced wife of the deceased, sued the respondent (the defendant) in her capacity as the guardian of her two minor children for damages for loss of support. The defendant admitted that the death of the deceased was caused solely by the negligence of the insured driver. The only issue for the determination of the trial Court, therefore, was the quantum of damages to be awarded to the plaintiff on behalf of her children.

[2] Shakenovsky AJ made no such determination, however, granting absolution from the instance on the basis that the plaintiff had not discharged the onus of proving that the children had in fact sustained any loss at all. The judgment of the court *a quo* is reported in 2000 (3) SA 1098 (W).

[3] The circumstances of the deceased, the plaintiff and the children were unusual. The deceased was young (38) when he was killed. He had been divorced from the plaintiff three years previously. At the time of his death their children, N. and G., were ten and seven respectively. The deceased had a third child, A., a year old at the time of his death, who was born out of wedlock from his relationship with his partner, then a Mrs Pretorius, who was at the time of the trial, Mrs Styos.

[4] The deceased had built up a flourishing business (Jaguar Catering Equipment Manufacturers CC) making catering equipment. It was run as a

close corporation, of which he was the sole member. It was undisputed, however, that Mrs Pretorius had in fact been his partner in the business as well: she had formerly been the deceased's secretary, but had advanced to become the administrative manager of the business while the deceased was the marketing or sales manager.

[5] Despite his financial acumen, the deceased died intestate. His two heirs were thus N. and G.. A., being born out of wedlock, inherited nothing. The Intestate Succession Act 81 of 1987, which would have conferred on her a right of inheritance on her natural father's death intestate, was passed shortly after his death.

[6] When the plaintiff and the deceased had divorced they had concluded an agreement of settlement, made an order of court, in terms of which the deceased would provide a house for the children and the plaintiff; and would pay the plaintiff monthly maintenance for herself of R400 and for the children of R250 each. It was common cause that the deceased had always paid the agreed maintenance and, in addition, being a generous and loving father, had paid whatever the children or the plaintiff had needed or asked for. He had also bought a house in which the plaintiff and the children lived, and in respect of which the plaintiff incurred no costs. The house was registered in the names of the children and the plaintiff had a life usufruct in respect of it.

[7] The deceased estate was administered by a Mr Buckerfield of Syfrets Trust Ltd over a period of nearly 11 years: the final liquidation and distribution account was dated 17 December 1997. During the whole of this period

Buckerfield paid the plaintiff and her two children the maintenance stipulated in the divorce settlement, and also paid various medical and other expenses. Although the plaintiff testified that she and her children had been financially worse off than they had been when the deceased was alive, it became plain during the course of the trial that in fact the plaintiff had been paid not only the maintenance to which she was entitled in terms of the divorce settlement, but also that the maintenance had been increased over the years. Buckerfield, as executor of the estate, had in effect paid to the plaintiff whatever she and the children had asked for. Moreover, there was an excess of income in the estate that had not been used by them when the estate was wound up. No evidence of any amount of money that the children had needed, and not been able to obtain from the estate, was led by the plaintiff.

[8] The assets in the estate, when eventually it was wound up and after all liabilities had been paid, comprised a block of flats, Elba Court, worth some R150 000; gold coins worth R1 898, and a cash sum, R185 904.17. The unused income generated by the capital (invested wisely by the executor over the period of winding up) amounted to R456 255.45. The cash was paid into the Guardians Fund for the children. It should be noted that N. had attained majority at the time of the trial and that, by the time this court heard the appeal, G. too had become a major.

[9] The court *a quo* accepted the submission that both children should be regarded as self-supporting on reaching the age of 24. Shakenovsky AJ concluded, however, that because the children's needs for maintenance had been

fully met from the income derived from the investment of estate assets, and from the rental obtained from the letting of Elba Court, they had suffered no pecuniary loss as a result of the death of their father and were not entitled to damages – hence the order of absolution from the instance. This is the issue before this Court, leave to appeal having been granted by the Court *a quo*.

[10] The principles governing the award of damages to dependants 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 in so far 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). And the defendant did not take issue with the claim that the children had been the dependants of the deceased and were entitled to maintenance until they were self-supporting.

[11] The contested issues were thus the quantification of the 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 negativing or reducing that loss.

[12] The measure of damages for loss of support 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: Joubert (ed) *The Law of South Africa* (1st re-issue) vol 7 para 89, citing *Jameson's Minors v Central South African Railways* 1908 TS 575 at 603; *Hulley v Cox* 1923 AD 234; and *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A).

The particular equities of the case must also be taken into account and an adjustment made if appropriate: *Botes* above at 614F—H where Holmes JA said that the trial judge 'has a discretion to award what under the circumstances he thinks right'. Thus any addition to a dependant's income, arising from the death of the deceased, must be deducted from the total amount of the loss. In assessing the value of the benefit – and indeed the loss – the court 'may be guided but is certainly not tied down by inexorable actuarial calculations' (Holmes JA in *Botes* above at 614F—G). It is to be noted that in terms of s 1(1) of the Assessment of Damages Act 9 of 1969, insurance money (which includes a refund of premiums and payment of interest on premiums) and pensions do not fall to be deducted.

[13] Where property is inherited by a dependant, in determining the extent of his or her loss the court should take into account not the value of the property but that of the accelerated accrual (cf *Groenewald v Snyders* 1966 (3) SA 237 (A) at 248C—F). This entails assessing the probabilities of the dependant having inherited the property should the deceased not have been killed through the wrongdoing of the defendant, but dying from a different cause at a later date.

[14] The assessment of loss, on the one hand, and of benefits on the other, must necessarily depend on the making of a number of assumptions, none of which can be proved at the time of making the assessment. Thus, for example, where a widow is claiming damages, the possibility of her remarrying and finding a new source of support is taken into account; the life expectancy of the deceased had he not been killed must be estimated; his future earnings must be quantified,

taking into account both taxation and inflation; and his probable age of retirement must be estimated. These are all contingencies that will determine what the actual loss of the dependant is when the breadwinner is killed. The exercise is, in effect, no more than the making of an educated guess. Thus Holmes JA in *Anthony & another v Cape Town Municipality* 1967 (4) SA 445 (A) said, in assessing such damages (at 451B—C):

> '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 damages for future loss.'

And in *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 113G—114A, dealing with loss of earning capacity rather than loss of support, but where a similar assessment must be made, Nicholas JA said:

> '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.
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> It has open to it two possible approaches.
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> 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.
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> 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.
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> 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.'

Nicholas JA went on to say (at 114D) that where the court does have material on which an actuarial calculation can be made, the first approach offers no advantage over that involving actuarial calculations.

[15] In the court *a quo* the plaintiff had relied on the evidence of the actuary, Mr G W Jacobson. His approach was the following: the income of the deceased must be determined by having regard to his earnings prior to death. That amount would form the basis for assessing his income from the date of death until the time when both children were self-supporting, but would be adjusted by taking into account various factors that might affect the amount earned. Thus the total sum at the end of the period was discounted by between 20 and 25 per cent. The reduced sum is then divided into shares. The standard practice, Jacobson testified, is to allocate two shares to each adult (deceased and spouse) and one share to each child. In this case he allocated four shares to the deceased (being unmarried but living with a partner) and one each to the three children (including A.). In his final report, prepared in 1999, Jacobson estimated that on this basis the total sum that would have been available to the children N. and G. amounted to close to R2 million. He then deducted from this sum the amounts of maintenance received from the executor over the period between the deceased's death and the date of winding up the estate, based upon the divorce settlement (plus the increases agreed to by the executor), as well as the amounts received by the children by way of inheritance (the value of Elba Court, the cash

residue left in the estate and the value of the gold coins), which he referred to as the ‘accelerated benefits’, and concluded that the balance represented the loss of the dependants. On this basis, he calculated that N. had been deprived of some R849 738 and G. of R1 095 380.

[16] Shakenovsky AJ rejected the conclusions reached by Jacobson on the basis that his assumptions were in several instances unfounded (at 1117ff). I shall not deal with these since in my view they make no difference to the actual result.

[17] Mr Jordaan, for the defendant, argued that the children had in fact suffered no loss. They had been paid by the executor whatever they had required. The amounts of maintenance that the deceased had been obliged to pay under the agreement of settlement had been paid to the plaintiff. In addition, all medical expenses, and various other claims made by the plaintiff, had been paid by the estate. And when the estate was finally wound up there was, as indicated earlier, an excess of income that was paid into the Guardian’s Fund. Mr Wessels for the plaintiff countered this submission by arguing that the income used for the children’s support was in fact their money: they had paid for their own support (and indeed their mother’s) from their own resources and had still therefore suffered a loss of support from their father.

[18] Another aspect of the plaintiff’s case was that the income generated through the investment of cash in the estate did not constitute an accelerated benefit that fell to be deducted from the loss of support. The defendant’s argument, on the other hand, was that the financial position of the dependants at

the time of the trial had to be compared with the position they would have been in had their father not died. This requires one to take into account any income that they receive from an inheritance from the erstwhile breadwinner. In *Jameson's Minors* above at 603—4 Innes CJ stated that in determining the amount to be awarded to the children of Dr Jameson, the amounts that they received after his death from income on his investments, and interest on life policies and on cash had to be taken into account.

[19] Mr Jordaan rightly submitted that where a deceased 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. This submission is bolstered by the general principle that a child who is able fully to support himself or herself is not legally entitled to support from anyone else: *Boberg's Law of Persons and the Family* 2nd edition by Belinda van Heerden, Alfred Cockrell and Raylene Keightley 245—6. Further, a child's right to support continues against the estate of a deceased parent: *Hoffman v Herdan NO* 1982 (2) SA 274 (T) and *Boberg's Law of Persons and the Family* 270ff.

[20] The approach of the plaintiff is in my view also in conflict with the principle that the dependants of the deceased should be compensated only for financial loss, and that they should not profit from the wrongdoing of the defendant. See in this regard *Groenewald v Snyders* 1966 (3) SA 237 (A) at 247A—D. Moreover, there was no authority cited in support of the proposition that income generated by assets in a deceased estate does not constitute an accelerated benefit to dependent heirs. And such argument is in conflict with settled law

applied at least since the decision in *Jameson's Minors*. The trial Court cited in this regard *Indrani & another v African Guarantee & Indemnity Co Ltd* 1968 (4) SA 606 (D) where Fannin J said (at 607F-H):

> 'The general principle applied by the 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" (see *Hulley v Cox* 1923 AD 234 at p 243). 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 which from whatever source comes to him *by reason of the death*' (my emphasis).

Fannin J also referred (at 607G—H) with approval to the work of Professor P Q R Boberg in his series of articles dealing with actions for loss of support in (1964) 81 *SALJ* 198, where he had shown that our courts have 'consistently applied this principle of the "balance of losses and gains" '. The argument of the plaintiff that the children had paid for their own support, and thus suffered a loss, must accordingly fail.

[21] It cannot be disputed that the income on the funds in the estate came to the children 'by reason of his death'. The death of their father was the cause of the receipt of the income by the children and his estate its source. But for his death, the children would not have received the income when they did. Further, Jacobson adopted a somewhat inconsistent approach to the benefits that should be deducted from the support to which the children were entitled. While not deducting interest on estate assets, he did deduct the rental paid from the letting of Elba Court. Mr Wessels argued that this indicated a very conservative

approach on the part of Jacobson. But it seems to me to show that he recognized that the rental would not have been payable to the children had their father not died, and thus that it constituted an accelerated benefit. There cannot, in my view, be any difference in principle between rental from property and interest on funds invested. The 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.

[22] The actuarial basis for the computation of the children's loss was argued to be inappropriate in this case. While the formula entailing a division of future income into shares, and an allocation of two shares to each adult and one to each child, may work well in certain instances, it cannot be used as a general guide in the calculation of loss of support. The formula might be appropriate, argued Mr Jordaan, where the deceased was employed and had a fixed income, and where his estate was inherited by all of his dependants. But in this case, in my view, the application of the formula resulted in the untenable conclusion that a large sum of money (calculated on assumptions based on the deceased's income and projected future income) would have been payable to the dependants when they had in fact not been deprived of support.

[23] For these reasons I consider that the Court *a quo* correctly found that the plaintiff had not discharged the onus of proving that her children had suffered any financial loss as a result of the wrongdoing of the insured driver. As indicated earlier, the children of the plaintiff have both reached majority. They have undertaken to abide by any costs order made against the plaintiff.

[24] The following order is made: the appeal is dismissed with costs.

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C H LEWIS

ACTING JUDGE OF APPEAL

NIENABER JA)

OLIVIER JA) CONCUR

MPATI JA)

HEHER AJA)