''Not Reportable'

CASE NO.: I 1769/2004

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

MARTHA CECILIA VAN WYK **Plaintiff**
(born VAN DER WESTHUIZEN)

and

AMBATA MARTIN TSHOOPALA **Defendant**

***CORAM*:** **PARKER AJ**

Heard on: 2012 July 16 – 19

Delivered on: 2012 August 7

JUDGMENT

PARKER AJ: [1] On 29 June 2010 this Court gave judgment for the plaintiff in an action she had instituted in her personal capacity and in a representative capacity as mother and natural guardian on behalf of her three children who were minors when the combined summons was filed with the Court on 22 February 2002. The plaintiff

claimed from the defendant N$360,000-00, and later amended the claim to read N$224,427-00, plus interest *a tempore morae*, costs of suit and further and/or alternative relief. By agreement between the parties, the issue of quantum of damages was held over for decision in due course. This judgment concerns the quantum of damages.

[2] The plaintiff herself gave evidence on behalf of the plaintiff, and Mr Dirk Sauber, an actuary, also gave expert evidence on behalf of the plaintiff. I accept Sauber as an expert; and I did not hear the defendant to maintain otherwise. It is important to make the point that Sauber's computation and the method applied remained unchallenged at the close of the plaintiff's case, and I have no good reason not to accept Sauber's computation. It is equally significant to note that when it was his turn to put his case to the Court the defendant did not put forth any matter of substance capable of persuading the Court not to accept the Sauber computation. The only significant and relevant point that emerged from the defendant's cross-examination of Sauber was Sauber reducing the net total loss from N$157,432-00 to N$154,980-00; as I have already mentioned previously. The claim was then amended in accordance therewith.

[3] The first consideration I should look at is to ascertain whether any loss at all has in fact been suffered by the plaintiff and the children, namely, Glaudina, Christonette and Albertus, before coming to computation of such loss; that is to say, the plaintiff must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner, namely, the plaintiff's husband and the children's father. (*Santam Insurance Co Ltd v Fourie* 1997 (1) SA 611 (A), accepting *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814, and relied on by Shakenovsky AJ in *Lombrakis v Santam Ltd* 2000 (3) SA 1098 (W)) Furthermore, what is important is

that the ascertaining whether any loss has at all been suffered is ‘a pure question of fact’ (*Santam Insurance Co Ltd v Fourie* supra at 615D).

[4] Having regard to the parties’ joint proposed pre-trial order the following issues of fact are to be resolved during the trial: (1) the quantum of the plaintiff’s and the minor children’s damages, (2) the earnings of the deceased, (3) the deceased’s age at the time of death, (4) the earnings of the plaintiff at the time of the deceased’s death, and (5) the children’s ages at the time of the deceased’s death.

[5] From the evidence I make the following factual findings which go to resolve the issues of fact. At the time of the deceased’s death, Glaudina was about 18 years old, Christonette was about 15 and Albertus was about 11. The earnings of the plaintiff was N$2,200-00 per month. The earnings of the deceased was around N$1,600-00 per month and he was 42 years old at the time of his death.

[6] Furthermore, both parents, that is, the deceased and the plaintiff were under a duty to support each other and the minor children. Consequently, the money paid into the pool of the family by the deceased and the plaintiff must undoubtedly be taken to have been contributed for the purpose of his or her own maintenance and also for the maintenance of the other spouse and the children. I accept Sauber’s method and reasoning that the deceased and the plaintiff had put together their income into one pool from which the joint estate was supported. The combined income of the family has been notionally divided in such a manner that the deceased and the plaintiff received two shares each and the children one share each of the pool. When the deceased died, the plaintiff and the children lost the support which the deceased provided. They are therefore entitled to be compensated for this. On the totality of the evidence I am satisfied that the plaintiff has established that she

and the children have suffered patrimonial loss as a consequence of the death of a breadwinner, the deceased.

[7] I now pass to consider the computation of loss. In doing so the Court, as I have said more than once, has the assistance of the Sauber expert report which in my view is not tainted with artificialities or fallacies: it presents a sophisticated and sustainable arguments and conclusions and so it should be supported. Nevertheless, in assessing the compensation the Court has a large discretion to award an amount which under the circumstances the Court considers right and also fair, I should add. Thus, the Court may be guided but is certainly not tied down by inexorable acturial calculation. (See *Lambrakis v Santam Ltd* supra, relying on *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A).) Moreover, it seems to me that the Court is entitled to take into account equitable considerations in favour, in my opinion, of the plaintiff or the defendant. And in that regard, the Court is entitled to take into account the element of harshness. This factor would have been invoked in favour of the defendant but he did not place any evidence before the Court to enable the Court to properly ascertain in what manner the payment of the compensation might harshly affect him. He said only that the amount claimed is more than his annual salary, and he has some seven children to maintain. The defendant's *ipse dixit* is not enough. No evidence in that respect was placed before the Court, as I have said, in support of his submission, to enable the plaintiff to have challenged it. The submission can, therefore, carry little weight.

[8] Be that as it may, what is good for the goose must be good for the gander in considering the two Basis underlying the Sauber report computation. Under Basis A, the deceased would have retired at the age of 60, but under Basis B at the age of 65. Since no credible evidence was placed before the Court, establishing

conclusively that Basis B should apply, for equitable considerations the computation under Basis A is taken as supported in this proceeding, and so, therefore, the N$152,727-00 should be reduced by N$2,452-00, as was conceded by the plaintiff in respect of Basis B, for the total amount to come to N$150,275-00 I have also taken into account the fact that Glaudina who was as at 1 August 2012 (the pegged – down date for the Sauber expert report) about 29 years old and has been working – even if as a casual employee – since 2002; and so Glaudina must at least notionally be self-supporting. It must be remembered that the amount claimed is in the nature of compensation, it is not to make the plaintiff and the children rich. It is to compensate them for their pecuniary loss, that is, loss of support of a breadwinner.

[9] From the above reasoning and conclusions, in my judgement the plaintiff is entitled to recover damages from the defendant in respect of loss of maintenance and support as a consequence of the death of the deceased.

[10] In the result I grant judgement for the plaintiff, and I make the following order in respect of damages:

1. The defendant must pay the plaintiff N$130,132-00, plus interest *a tempore morae* from the date of this judgement to the date of final payment.

2. The defendant must pay the plaintiff's costs, including costs of one instructing counsel and one instructed counsel and qualifying costs of Mr Dirk Sauber.

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PARKER AJ

COUNSEL ON BEHALF OF THE PLAINTIFF:	Mr I D Titus
Instructed by:	Koep & Partners
ON BEHALF OF THE DEFENDANT:	Mr A M Tshoopala (In person)