CAROLINE MABAIRE
versus
SHEPHERD JAILOSI
and
THE MINISTRY OF TRANSPORT AND
COMMUNICATIONS

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 21 July and 13 October 2010

Civil Trial

B Diza, for the plaintiff
Ms S Kundai, for the defendants

KUDYA J: Liability in this matter is admitted. The dispute concerns the measure of damages that is due to the plaintiff. On 1 June 2010 the parties filed a stated case, which reads:

1. It is common cause between the parties that on 15 November 2006 at No. 17 418 Flanagan Road Hillside Harare, the first defendant who was driving in the course and scope of his employment drove a Mazda B2500 registration number R58PY onto the plaintiff's property.
2. It is common cause that the plaintiff's husband was standing just outside the gate of his property when the first defendant veered off the road and rammed into him causing his death instantaneously.
3. It is common cause that as a result of the accident the electric gate, the intercom device and the adjacent wall was extensively damaged.
4. It is common cause that the first and second defendants are admitting liability with regards to negligently causing the death of the plaintiff's husband who was the bread winner for his family.
7. The issue which the parties have failed to agree on is with regards to the computation of damages due to the plaintiff.
8. In the premises, the Honourable Court is requested to adjudicate on the question of the amount of damages due and payable to the plaintiff as against the defendants and to make such order as to costs as seems just under the circumstances.

In her summons issued on 5 November 2009, the plaintiff sought damages in the sum of US$19 102-00 for the cost of repairing the electric gate, intercom and wall; US$144 000-00 for her personal loss of support; US$66 000-00 for the loss of support of her three minor children with the deceased; interest on these amounts at the rate of 30% per annum from the date of judgment to the date of payment and costs of suit. At the commencement of trial the plaintiff applied to amend her summons by the substitution of US$2 970-00 for US$19 102-00 for the cost of repairing the electric gate, intercom and wall and 5% for 30% for the interest sought. The amendments were granted by consent.

In her declaration she placed the retirement age of the deceased had he lived at 65. As he died at 50, her claim traverses a period of 15 years. She further averred that the deceased spent US$800-00 per month in maintaining her and US$500-00 per month in maintaining each child. She them multiplied these amounts by the number of months it would take him to support each child to its majority year and for 15 years for her to arrive at the totals she sought.

The evidence

The plaintiff gave evidence. She was the sole witness in her case. She produced eight documentary exhibits. The defendants opened and closed their case without calling any evidence. The measure of damages will thus be determined on the basis of the testimony of the plaintiff that survived cross examination.

The plaintiff was married to the deceased by civil rites. The marriage was blessed with four children that is, Tsitsi, who at the time that she testified, was in her final year at the Midlands State University, Rumbidzai born 29 August 1991 who was in Form **IV** at a boarding school in Harare and the twins Faith and Anesu born 7 April 1995 who were in Form III at a boarding school in Chiweshe. The deceased was born on 6 September 1956 and was 50 years old when he met his death. He was a businessman who ran his own construction company and was a farmer growing tobacco and paprika and rearing poultry and cattle. She is a school teacher at a primary school in Harare. She produced her pay slip as exh 8.

Loss of support for the children

She testified that the tuition for the form four child was US$1 090-00 per term. She produced exh 1, the school fees invoice for Rumbidzai, a boarder at Hillside High School. The invoice indicates that tuition and boarding fees are in the sum of US$950-00 while uniforms cost US$150-00. The invoice for the twins, exh 2 shows that the school fees for each child was pegged in the sum of US$295-00 a term. She produced exh 3, a quotation from a Harare

based school uniform stockist dated 11 June 2010 indicating the cost of the school requirements of each girl of US$569-00 and for the boy of US$617-00. She indicated that she spends US$400-00 per month on her food and tuck for the school children; she spends US$40-00 every term on fuel in visiting the children at school once a term. Her other expenses are US$80-00 a month on the maid, US$200-00 a month on fuel, US$70-00 a month for the telephone, and US$400-00 a month on rentals inclusive of water and electricity. Her children used to go on holiday twice a year during the April and December school holidays. She would need US$3 000-00 a year for the local holidays in Kariba, Nyanga and Victoria Falls for the children.

Repair to gate, intercom and wall

The repairs were done in 2006 by a sole contractor. She did not keep the invoices of the cost of repairs. She failed to lead his evidence because she could not locate him. She bought a new gate. She sourced for quotations from suppliers and fitters who are in the business of manufacturing gates, selling intercoms and repairing walls similar to her own. She produced these quotations as exh 4. Raymond Alarms and Gates quoted an amount of US$2 505-00 on 14 June 2010; Aderan Enterprises (Pvt) Ltd quoted an amount of US$2 280-00 on 15 June 2010 while Fencerite Services (Pvt) Ltd provided her a quotation of US$2 970-00 on 16 June 2010.

Construction business

She stated that her late husband was a builder by profession. He would buy undeveloped stands and build and then dispose of the developed property. She produced three agreements of sale of the properties that he developed and sold as exh 5. These were the property in Ruwa that was sold for a cash sum of ZW$66 000-00 on 17 November 2000; the property in Katanga in Norton that was sold for the cash sum of ZW$700 000-00 in March 2001 and the property in Good Hope, Marlborough, Harare that was sold for ZW$4 200 000-00, revalued, on 24 August 2006. She estimated, with great difficulty, the profit margin from the construction business at 25 per centum.

Farming

He was a commercial farmer. He commenced to grow tobacco in 2003 at the family farm in Chivhu. He grew tobacco on 3 hectares, had three permanent workers but would hire seasonal labour on a needs basis. She produced the fourteen paged Zimbabwe Industry

Tobacco Auction Centre (Zitac) sales statements of the tobacco deliveries made by the deceased as exh 6. The long and shot of exh 6 was that in the 2005 selling season the deceased delivered a total of 23 bales weighing 1 430 kgs sold at average of US$0.7152 per kg. It also shows that in the 2006 selling season the deceased sold a total of 10 bales with a mass of 543 kgs at an average of US$0.98 per kg. The farm was, however, repossessed by her mother-in-law after her husband's death

He was also a poultry farmer. He would order 500 chicks every month. He reared 300 chicks at the farm and 200 at his Harare home. He would sell the grown broilers after 7 weeks to outlets in Harare. He sold an average of 400 birds a month. She produced three purchase orders from three customers who purchased the broilers from the deceased as exh 7. These were a Farm and City cash receipt dated 1 June 2006 for the purchase of 300 broilers; a purchase order by Metro Café dated 24 July 2006 for 91 kilograms of chicken and another purchase order from Four Girls Enterprises of 1 August 2006 for 28 birds.

After her husband's death she carried on with the poultry project, but at a reduced rate. She rears both layers and broilers. She multitasks as a cross border trader and conducts extra lessons and organizes round tables with other women to augment her salary. She moved out of the matrimonial house in January 2010 and rented a smaller one in order to benefit from the rental differentials between the two properties. She rents out the matrimonial property for US$1 000-00 and rents a much smaller property for US$400-00.

She was cross examined. She revealed that the construction company was a registered private company. Her husband was the driving force behind it. She was a co-director and secretary of the company. It folded on his demise. She did not have any documentation to show the levels of income and expenditure of the company. She averred that her in-laws forcibly dispossessed her of the company documents on the demise of her husband. Her husband earned a salary from the company but she could not recall the amount. During his life time, he only sold the three houses whose agreements she produced. The proceeds were used to support the family and to purchase farming equipment. These were reposed by her mother-in-law. She did not have documents to indicate the viability of the farming activities. She believed her standard of living testified to the high net worth of her late husband.

The poultry venture was viable as he used to sell 400 birds every month. She indicated that the present cost of rearing a bird was US$2.50 and she sold each bird at US$5-00. She has continued to rear 200 birds at her new home. She sells about 150 birds every month and earns

a profit of US$375-00 every month. She had a car which was fueled and serviced by the construction company. The daily home expenses were all charged to the company. She needed US$500-00 every year to maintain the matrimonial home. She acknowledged her failure to produce evidence on the full extent of her husband's annual income during his life time.

The Law

The law on the computation of damages is set out in a plethora of cases and in both ancient and modern text books. I was referred to some of the cases and text book writers by both counsel. Mr *Diza*, for the plaintiff, referred to the cases of *Lebona* v *President Versekeringsmaatskappy Bpk* 1991 (3) SA 395 (W); *Nichols* v *Pearl General Ins Co & Anor* 1994 (1) ZLR 193 (H); *Hulley* v *Cox* 1923 AD 234; *Ebrahim* v *Pittman NO* 1995 (1) ZLR 176 (H); *Cattle Breeders Farm (Pvt) Ltd* v *Veldman* 1974 (1) SA 169 (RAD). Ms *Kundai*, for the defendants, referred to *The Quantum of Damages in Bodily and Fatal Injury Cases* by Corbett, Buchanan and Gauntlett 3rd ed; *Jameson's Minors'* v *Central South African Railways* 1908 TS 575 and *Hulley* v *Cox, supra.*

It is well to remember that damages for loss of support constitute general damages, and as such, are calculated as at the date of judgment. See *Biti* v *Minister of State Security* 1999 (1) ZLR 165 (SC) at 173A, *Graaff* v *Speedy Transport* 1944 WLD 236 at 238-9 and Corbett *et al, supra* at pp 96 and 97. The *locus classicus* case on the point is *Jameson's Minors'* v *Central South African Railways*, *supra.* At p 602 INNES CJ stated that:

> "There only remains the question of damages, and it is one of the most difficult points in this case. The general principles which should guide us are plain. I need only refer to Voet, who lays down the rule very clearly. He says (9, 2, 11): 'According to the modern practice the scope of this action' - that is, an action by the widow or children of a man who has been killed through the default of another- 'has been extended, in as far as an action is now allowed to the wife and children of any husband or father killed through another's default, for such damages as the equity of the judge will determine, account being taken of the maintenance which the deceased would have been able to supply, and had usually supplied, out of his labour, to the wife and children, or to other near relatives'. I do not think Voet intended to restrict, or that we should restrict, the word 'maintenance'- *victus* - to the supply of mere necessaries of life. It must include all the material advantages, conveniences, comfort and support, which the father would have afforded the claimants, but for his death. The language used shows that the court must pay regard to what the deceased had been used to supply in the past-that is, to the station in life of the parties, and the comforts, conveniences and advantages to which they had been accustomed. Only actual material loss can be taken into account in an action of this kind. The court is not justified in awarding compensation for a shock to the feelings, or in granting relief on any sentimental ground. But clearly the plaintiffs are entitled to compensation for the pecuniary loss involved in a reduced income, and a

> restricted provision for the supply of what they have been accustomed to, and could reasonably have anticipated that the deceased man would continue to supply. Our law lays down no hard and fast rule for such a calculation. It leaves a large discretion to the judge to award what under the circumstances he considers right."

Again, in *Hulley* v *Cox, supra* at pp 243-4 the LEARNED CHIEF JUSTICE affirmed these views when he stated that:

> "Some authorities consider that the calculation should be based upon the principle of an annuity (see Grotius 3 33 2; Mattheus, *De Criminibus,* 48 5 11*).* Voet, on the other hand, favours a more general estimate. Such damages, he thinks, should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his wife and children (*Ad Pand* 9 2 11). That would seem the preferable view as giving a greater latitude to deal with varying circumstances. It is at any rate desirable to test the result of an actuarial calculation by consideration of the general equities of the case."

And yet again HOLMES JA crystallized these overall principles in *Legal Ins Co Ltd* v *Botes* 1963 (1) SA 608 (A) at 614E-F thus:

> "The remedy has continued its evolution in South Africa - particularly during the course of this century - through judicial pronouncements, including judgments of this Court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss 'caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and *sui generis* - but it is effective. In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations. In its present form, robust and practical, the remedy illustrates the growth and flexibility of the system of law, basically Roman-Dutch."

These views have been followed and applied in a number of decisions in both Zimbabwe and South Africa. In fact, the practical steps in estimating the damages for loss of support that are set out by Corbett *et al, supra,* at pp 84 to 96 affirm and are largely based on these sentiments. In all the decided cases on loss of support that I have consulted, the plaintiffs either relied on medical or actuarial evidence; or on the general evidence of the deceased's earning capacity prior to his or her death or on both. In this jurisdiction actuarial evidence was adduced in *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR 1 (S) at 12E. In *Rusike* v *Tenda Transport (Pvt) Ltd & Anor* 1997 (1) ZLR 495 (HC) BARTLETT J referred to the

actuarial method and the future earning capacity with contingencies discounted method as some of the ways that may be used to establish damages for loss of support.

It is clear that where there is proof of loss of support even in the face of inadequate evidence the court is enjoined "to pluck a figure from the air". See FIELDSEND CJ in *Santam Ins Co Ltd* v *Paget* (1) 1981 ZLR 73 (A) referred to in *Rusike's* case, *supra*, at 500B-C. In *Jackson's* case GUBBAY JA, as he then was, confirmed at 11H-12A that there are cases "where it was incumbent upon the trial court to "pluck a figure out of the air" or "plunge blindly into the unknown."" The LEARNED JUDGE OF APPEAL proceeded at 13G and 15B to make "arbitrary" assessments. However, as was stated by BARTLETT J in *Ebrahim* v *Pittman N O* at 187F and 188C and by GILLESPIE J in *Mavheya* v *Mutangiri & Ors* 1997 (2) ZLR 462 (HC) at 469F and *Venture Capital Co of Zimbabwe Ltd* v *Chirovero Investments* (*Pvt*) *Ltd* 2000 (2) ZLR 30 (HC) at 40A-C judgment will be denied to a plaintiff who through lack of diligence fails to produce evidence that would have been available to him or her.

The total amount of loss of support that is arrived at may be subjected to two discounts. The first of these discounts caters for the capitalization rate of the award. This is often equivalent to the rate of interest that the plaintiff would earn on investing the award. In J*ackson*'s case, *supra*, it was pegged at 8%. At the moment the rate of interest, in Zimbabwe, differs from one financial institution to the other. Real interest on savings is in negative territory as it is often swallowed up by bank charges. In the present matter no purpose would be served in discounting the judgment debt by the rate of interest that the plaintiff would earn were she to invest it. The second discount caters for contingencies. The basis was set out in *Jackson*'s case at 17F. The point is however made in that case that the fortunes of life are not always adverse but may turn out to be favourable. In *Jackson*'s case the contingency allowance was set at 20%. This cater for errors in calculations, taxation and other unforeseen events such as weather disparities, the absence of inputs, the shortage of chicks, the outbreak of diseases that may have adversely impacted on the deceased's ability to farm and rear chicken had he lived.

Quantum of damages

Mr *Diza* urged me to award damages for loss of support based solely on the proven expenses of the plaintiff. He relied on *Lebona* v *President Versekeringsmaatskappy Bpk* 1991 (3) SA 395 (W). The facts in that case were that the plaintiff, the widow of a man who had been her partner in a customary union, claimed damages for loss of support after her husband's

death, which had been caused by the negligence of a driver insured by the respondent. The dispute involved *inter alia* the question of whether the deceased had been under a legal duty to maintain the plaintiff. It appeared from the evidence that the deceased had been a hawker who had practised his trade without the necessary licence. FLEMMING J held that in resolving the above dispute, two questions had to be answered: (a) whether a maintenance court would have held that the deceased had a duty to maintain the plaintiff and (b) whether the said court would in the circumstances have made an order for maintenance. He further held that as the deceased had earned his income in an unlawful manner; (a) had to be answered not with reference to the deceased's earning capacity but with reference to his actual income. It seems to me that that case does not support the submission made by Mr *Diza* for FLEMMING J went further to determine the earning capacity of the deceased in a bid to estimate the loss of support. In my view, while the level of maintenance that the deceased used to give to his widow and children is important, the court cannot use the expenses incurred by the plaintiff to calculate the loss of support without reference to the deceased's earning capacity. This is because it is a basic fact of life that expenses may often be much higher than a breadwinner's earning capacity. Thus to use the expenses to calculate the estimated loss of support may distort the award for loss of support to the prejudice of the defendant and in, my view, would amount to an improper exercise of the court's discretion.

Mr *Diza* conceded on the authority of *Ebrahim* v *Pittman N O* 1995 (1) ZLR 176 (H) at 187B-188C that the failure by the plaintiff to adduce tax returns and substantial proof of earnings of the deceased was a material flaw in the plaintiff's claim. He, however, submitted that the plaintiff had led sufficient evidence upon which the court could assess her damages.

Ms *Kundai*, for the defendants, conceded that sufficient evidence had been led by the plaintiff to establish the loss of support to the children for their educational requirements and upkeep (school fees, uniforms and food). The educational requirements for the children are set out in exh 4. She contended that the plaintiff had failed to prove that the cost of taking the children on holiday twice a year to the country's resorts in Kariba, Nyanga and Victoria Falls would be approximately US$3 000-00 a year. I did not hear her challenge the plaintiff's assertion that the children used to go on such holidays when their father was alive. The plaintiff indicated that they would drive to and from and spend three nights at these resorts. She did not produce any quotations from the service providers from these resorts to assist the

court in computing an estimate of such expenses. This was evidence that she could have produced with a little diligence on her part.

It is apparent that the plaintiff was supported by her husband. Her salary as a teacher would have been inadequate to cater for the high standard of living she was accustomed to. She lived in an up market accommodation which had a 3 bedroom guest wing and which property she is renting out for US$1 000-00. She lives in a smaller property for which she pays US$400-00 inclusive of water and electricity. She makes a profit of approximately US$600-00 on her rental account. This profit in my view would be adequate to cater for the insurance and maintenance costs of the matrimonial property and the municipal rates and taxes that are borne by the owner. I will not discount from the final award that I will grant her any gain she makes on the rental account because her decision to move to a cheaper accommodation was triggered by her failure to meet the expenses of maintaining the matrimonial home such as the municipal and electricity charges that were levied in foreign currency. She lost the prestige, conveniences and comfort associated with residing in her large house. The gain she makes compensates for the fall in her standard of living occasioned by the death of her husband.

Her evidence that she used to derive benefit from the sale of 400 chickens but presently benefits from the sale of 150 chickens after the repossession of the farm by her mother-in-law was not challenged. Her loss of income from the loss of 350 chickens at a profit margin of US$2.50 a bird amounts to US$875.00 a month. I would have to discount availability of chicks and other vicissitudes that could possibly affect the rearing of chicken and would reduce the expected profit to approximately US$600-00 a month. The material loss over a 15 year period would be approximately US$108 000-00.

The loss of the farm affected the tobacco income. The average kilograms sold were approximately 1 000 a year. The price would depend on the quality. It could rise to as much as US$4-00 per kg in the market. It would be fair to estimate that he would have produced tobacco worth a dollar per kilogram. He would have earned a gross income equivalent to US$1 000 a year from the sale of tobacco. The plaintif did not lead any evidence on the cost of producing this amount of tobacco. I have decided, as I am permitted to do, to pluck a figure out of the air of the cost of producing the tobacco of 50 per centum. Over 15 years she would have lost US$7 500 from growing tobacco.

She lost income from the cessation of the development of immovable property. It does not appear that he operated a company, so the principle enunciated in *Cattle Breeders Farm*

(*Pvt*) *Ltd* v *Veldman* 1974 (1) SA 169 (RAD) that should be regarded as its *alter ego* would not apply. The properties were not sold in the name of a company. One was sold in the deceased's name and the other two in both the deceased and the plaintiff's names. The plaintiff did not adduce evidence on the costs incurred in developing the properties. She plucked from the air a profit margin of 25 per centum. I am prepared to accept it. The first property that he developed and disposed of was the Ruwa property. The agreement of sale indicates that it was sold on 17 November 2000 for a cash sum of ZW$66 000 in local currency. At the time the official exchange rate of US$1-00 was ZW$38-00. The deceased grossed in Zimbabwe dollars the equivalent of US$1 736-84. The second property, the Katanga property, was sold in March 2001 for ZW$700 000. At that time the official exchange rate of the Zimbabwe dollar to the United States dollar was 55:1. The amount was equivalent to US$12 727-27. The last property to be sold was the Marlborough property. It was sold on 25 August 2006 for the sum of ZW$4 200 000, revalued. The sale took place after the first revaluation of the local currency of 1 August 2006 which saw the removal of the three zeroes from the Zimbabwe dollar. After the revaluation, in August 2006 the Zimbabwe dollar was pegged to the United States dollar at the rate of $250-00 revalued to US$1-00. The deceased received the equivalent of US$16 800-00.

These calculations reveal that over a period of six years the deceased received a gross sum equivalent to US$31 265-00. I have accepted that he made a profit of at least 25 per centum from the gross receipts; which was equivalent to US$7 816.25. His average profit over the six year period would have been equivalent to US$1 302.71. This would translate to the sum of US$19 540.65 over the fifteen years of active life that still awaited him. I would add the prospective proceeds from the tobacco crop of US$7 500-00 and the loss of the chicken sold of US$108 000-00 to this figure and arrive at a total of US$ 135 040.65. I would round it off to approximately US$135 000-00. In my view this would have been the amount which would have been equivalent to material loss suffered by the plaintiff from the pre-mature death of her husband at the hands of the defendants.

I do not in the exercise of my discretion, for reasons already advanced above intend to discount for any capitalization of this amount. I would, however, in the light of the sentiments expressed in the *Jackson* case, discount for contingencies at the rate of 20 per centum. This would leave an amount for loss of support for the plaintiff and her children of US$108 000-00.

The claim for the cost of repairs for the gate, intercom and wall was reduced to US$2 970-00. The lowest quotation that was supplied was in the sum of US$2 280-00. By the time

the plaintiff issued summons the gate, intercom and wall had long been repaired in Zimbabwean dollars. She did not produce the cost of such repairs. It is not possible in the absence of that evidence to determine the value of the repairs at the time in United States dollars. The plaintiff has failed to prove the measure of her damages for these repairs. I would grant the defendants absolution from the instance on this claim.

Costs are always in the discretion of the court. The plaintiff has succeeded in receiving an award of damages for loss of support. She is entitled to her costs of suit.

Disposition

Accordingly, it is ordered that the defendants shall pay to the plaintiff, jointly and severally, the one paying the other to be absolved:

a) The sum of US$108 000-00 together with interest thereon at the rate of 5 % per annum from the date of judgment to the date of payment in full.
b) Costs of suit.

Musunga & Associates, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendants' legal practitioners