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NEWSLETTER

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WE WISH YOU A VERY HAPPY XMAS AND A PROSPEROUS NEW YEAR

Precribed Rate of Interest Amendment Act 7 of 1997: This Act provides for mora interest to run from the date of "demand". Date of demand is usually taken to be the date on which summons is served. However, the Act defines "demand" to be "a written demand setting out the creditor's claim in such a manner as to enable the debtor TO reasonably assess the quantum thereof". This definition would include the delivery of a suitably worded statement of account.

The provisions of the Act do not apply to claims against the Road Accident Fund for compensation for personal injury and death.

The prescribed rate of interest is that applicable at the time that the debt arose. The prevailing rate of 15½% per year was gazetted 1 October 1993. Interest is calculated as simple interest. The *duplum* rule applies, in other words the interest ceases running when it has accumulated to the amount of the original capital (*LTA Construction v Administrateur Tvl* 1992 1 SA 473 (A)).

Loss of inheritance prospects: In *Pretorius v McCullum* 2002 2 SA 423 (C) it was ruled that an attorney who negligently allows a witness to a will to initial instead of signing in full is liable in damages to a disappointed heir. This is not quite the same thing as depriving a dependant of inheritance prospects with the wrongful killing of a breadwinner, but the ruling does provide a good starting point. In *Marine & Trade v Mariamah* 1978 3 SA 480 (A) at 488 the Court cited with approval the words of Prof Boberg:

> 'In this type of case it is possible to regard the unspent, saved portion of the income as though it had been spent on support instead of saved, and so to give the plaintiff the benefit of the deceased's probable future savings by allocating to her an appropriate proportion of the deceased's gross anticipated future income, not first deducting from that income what he would have saved, but treating the whole income as available for the support of his family'

In *Groenewald v Snyders* 1966 3 SA 237 (A) at 248 the Court observed as regards the deduction for acceleration that:

> 'The better way is to value the benefit as the excess of (a) the sum received, over (b) the value of the prospect, which the dependant had, of receiving it eventually. The latter value will take into account any contingencies, such as the possibility that the breadwinner might have altered his testament...'.

Item (a) is a deduction, item (b) increases the damages. One does encounter situations in which item (a) is nil, but not item (b), for example: if the deceased breadwinner had been due to come into a substantial inheritance on the death of his father but, by reason of his premature death, does not inherit at all. Other examples arise with the Assessment of Damages Act 9 of 1969 which precludes from deduction the pension received by the widow of a civil servant, but does not prevent claiming for the loss of the widow's pension she would

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otherwise have received had her husband died at some other time (*Du Toit v General Accident* 1988 3 SA 75 (D)).

Damages that are difficult to quantify: It is trite law that a Court may not avoid assessing damages just because the quantification is difficult (*Sandler v Wholesale Coal Supplies* 1941 AD at 198). The Court must do the best it can with the available evidence. *Rudman v RAF* 2003 2 SA 234 (SCA) provides an example of circumstances where notwithstanding the injuries the claimant's financial circumstances were such that it could not be said that he had proved that he had suffered any loss of earnings at all. There was thus no need for the Court to attempt to assess the damages on limited information.

With claims for loss of support, however, it is common to award damages to children despite the total absence of evidence that the deceased did in fact support the child.

The problem of non-cohabitant parents: *Santam v Fourie* 1997 1 SA 611 (A) has established the principle that where both parents work then to assess the damages for loss of support one must add together the net after tax incomes of both parents, apportion this total combined income according to the appropriate ratios (usually two parts to each adult and one part to each child), and then deduct from the widow's two-parts share her own net income. If her net income exceeds her two parts share then to that extent she is deemed to contribute in equal shares to the support of the children. The loss of the children by reason of the death of their father is then the child's one part share of total combined income less the *pro-rata* contribution by the mother of the child. If the widow's earnings substantially exceed her two parts and the parts of all the children, then there is no loss of support. This approach has been developed against the background of a father and mother and children who all live together in the same common household.

But what of the family that does not cohabit? If the children lived with their mother and the father dies there is no good reason to allocate one part to each child. Strictly speaking evidence should be provided as to the support provided by the father. In practice this is difficult to obtain. A popular solution is to allocate two parts to the deceased and one part to each child and to disregard the earnings of the mother of the children. The rationalisation is that the children have lost a "right" to support. The argument ignores the fact that compensation is for the economic value of that right and that the economic value may sometimes be close to nil due to the weight of accumulated contingencies. One of those contingencies is that the mother of the children worked and contributed to their support. My own preference is to apply the *Fourie* approach regardless of whether the parents of the children cohabit or not. It is not uncommon that the deceased breadwinner was a petrol attendant earning R15000 per year and the mother of the child a nurse earning R90000 per year. If the child had been living with the mother it then seems preposterous to suggest that the deceased was under any obligation to contribute to the support of the child. However, if the child had been living with the petrol attendant father then a different conclusion is appropriate. Settlement can sometimes be achieved by averaging the damages ignoring the mother and her earnings, and a second "Fourie" calculation assuming a joint household.

Maintenance orders actually in force tend to be for much less than the amount indicated by a "parts" approach. This has the curious effect that a child who was receiving maintenance in terms of a maintenance order will usually receive less compensation than a child for whom there was no maintenance order.

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