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## **NEWSLETTER**

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**Inflation rates:** *www.statssa.org.za* reports an inflation rate of 3,5% for July 2010. The average rate for the last 12 months has been 5,4%. Civil servants have been offered a 7% salary increase from July 2010, despite the much lower rate of inflation.

**Post office savings:** Government is offering 9% per year on a 5-year investment, or an inflation linked return with a guaranteed real rate of return of 2½% per year over 5 years (*visit www.rsaretailbonds.gov.za*). A 9% per year return and a 2½% real rate implies an average inflation rate of 6,34% per year ( $[1,09/1.025-1] \times 100$ ) over the next 5 years.

**RAF file references:** Tracing a file at the RAF can often be a frustrating paper chase as the file gets moved from one department to another and the first two digits of the claim number are changed with each transfer. To get around the associated confusion the claim number has now been supplemented with a "link number". It also helps to have the name and ID number of the claimant.

**Damages for pregnancy termination failure:** In *Sonny v Premier Kwazulu Natal* 2010 1 SA 427 (KZP) the defendant was held liable for damages for failure to warn parents of foetal abnormality. The parents were thereby denied the opportunity to terminate pregnancy and avoid the high costs and psychological distress of caring for a retarded child. The Court making this ruling was not aware of the concurrent ruling in *Stewart v Botha* 2008 6 SA 310 (SCA) which decided that there was no claim for damages by the mother of a deformed child. It seems that the *Sonny* judgment had been overruled before it was handed down.

**The remarried widow:** In *Ongevallekommissaris v Santam* 1999 1 SA 251 (SCA) it was ruled that if a widow has remarried then explicit regard should be had to the earnings of the new husband, his age and the relevant contingencies. The capital value of her expected support from the new husband is then calculated and this is the deduction to be made for remarriage. When doing this calculation it is usual to ignore the children of the deceased because they have been fully compensated and are prima facie self-supporting. But what of a widow who after the death has gone out to work? In *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W); 1965 3 SA 367 (A) it was ruled that a widow is not obliged to mitigate her damages by going out to work. Should the calculation of her dependency on her new husband also ignore her earnings, or should they now be brought into account? If regard is had to her earnings then the deduction for remarriage will be less than if her earnings are ignored. Considerations of even-handed justice suggest that what is good for a claimant must also be good for a defendant and thus that her earnings should be ignored when calculating her dependency on her new husband.

**Damages for death of a bridegroom:** When a bridegroom is wrongfully killed the deprived bride has no right of action for damages for loss of support (*Sibanda v RAF* 2008 (WLD) (unreported 10.10.2008 case 9098/07)). I now have a copy of the judgment (see newsletter 77 for March 2010).

**"Likely" earnings:** It is well established that for purposes of the assessment of damages for loss of earning capacity the test is "likely" "probable" earnings and not what claimant could possibly have earned in an optimal scenario (see *Quantum Yearbook* 2010 at page 106). The expression "likely" has much the same meaning as the statistician's expression "expectation", the scenario for which the probabilities are equally balanced between better and worse. Strictly speaking a "probable" scenario is one for which the chances of occurrence are greater than 50%. However, the word "probable" is often used synonymously with "likely" or "expected". A "possible" scenario is one for which the chances of occurrence are less than 50%.

**Percentage impairments:** There is no necessary fixed relationship between percentage impairment and loss of earnings. An uneducated labourer who has a 40% permanent impairment will usually be 100% unemployable. A white-collar worker (such as an actuary or accountant) with a 40% impairment will in certain circumstances be able to function at close to 100% of normal earnings. Pain, such as whiplash, can be a destructive force that impedes ability to work despite a fairly low assessed permanent impairment percentage. For purposes of settlements it is common to assess compensation according to percentage impairment solely because there is no better evidence on which to base an agreement. Events such as unpaid attendances for medical treatment and early retirement are the mechanisms by which a percentage impairment converts into a loss of earnings. To allow an increased deduction for general contingencies on top of an explicit allowance for medical absences and early retirement runs the risk of double compensation. The mere fact of an impairment does not automatically disqualify a victim from further promotions. Management jobs generally demand greater intellectual effort and less physical effort. Thus in *Prinsloo v RAF* 2009 5 SA 406 (SECLD) the industrial psychologist was chastised for presuming loss of promotion opportunities without having properly investigated the realities which indicated quite the contrary. In *Van der Mescht v RAF* 2010 6 QOD J2-421 (GSJ) the Court ordered a 15% general contingency for the uninjured condition, and a 10% general contingency having regard to the injuries.

**Adv John Mullins says:** With regard to what you say about general damages for adultery (*Wiese v Moolman* 2009 (3) SA 122 (T) - see newsletter 78 June 2010), I read in the newspapers that the SCA recently upheld an appeal against an award in favour of Sunette Bridges for breach of promise, saying that times have moved on. I think that this sounds the death-knell for adultery as a delict. I suspect that if *Wiese* is tested, it will be reversed. It just seems to me that our times have moved on sufficiently that, with the divorce rate we have, and with many if not most of those divorces involving adultery, times have also moved on there as well. See *Sepheri v Scanlan* 2008 1 SA 322 (C); *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA).

In *Godfrey v Campbell* 1997 1 SA 570 (CPD) damages for adultery were awarded against a minor female who had persistently continued an affair with claimant's husband. The defendant's parents were absolved from liability for the conduct of their clearly uncontrollable daughter.

It is perhaps relevant to observe that even while married one spouse may sue the other for damages (*Van der Merwe v RAF* 2007 1 SA 176 (C)).

**Finis**