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NEWSLETTER

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Dear Reader,

Financial statistics:

	Inflation (year-on-year)	Interest (long bond yield)	Real Rate of Return	6 months ago
South Africa	3,4%	14,2%	10,4%	10,8%
United Kingdom	2,0%	5,8%	3,7%	4,0%
Japan	-1,1%	1,8%	2,9%	2,7%
United States	2,7%	6,8%	4,0%	4,1%

The above reflect data available at time of publication (RSA=03/00 for CPI, 05/00 for yield; others=01/00). Negative inflation means that prices are falling. The "headline" South African inflation rate of 3,4% is seriously misleading because of its excessive dependency on housing loan interest rates. The vast majority of the South African population do not have housing loans. Inflation (after exclusion of housing loan interest payments) is 8% per year. The fact that the South African long bond yield remains at about 14% per year is because investors are expecting inflation to rise to over 10% per year.

Loss of support & illegitimate children: When a breadwinner has died and a claim is made for loss of support it is usual to apportion the deceased's net after-tax income with two parts to the deceased, two parts to his wife (now a widow), and one part to each child. In many instances there may also be one or two illegitimate children who did not live with the deceased. Such children are not automatically entitled to a one part share and should, in theory, prove the value of support provided by the deceased. In practice such evidence is usually non-existent. To fill the gap claimant attorneys submit affidavits by the mothers of the illegitimate children which depose to the level of support that was being provided. The amounts stated commonly correspond exactly to a one-part share of the deceased's income. This seems too much of a coincidence, and I am often left wondering to what extent the amount has been calculated after the event. It also happens that the settlement of the claims of the legitimate children is unduly delayed pending evidence as to the date of birth and/or level of support of an illegitimate child. In general one would expect that a child who did not live with the deceased breadwinner received less support than a child who was part of the common household. This consideration suggests that where there was no common household only ½ of a child's share should be allocated.

A point of law that is often overlooked is that the mere fact of a duty of support does not automatically entitle a child to compensation for loss of support. It must also be proved that the deceased did in fact provide support and would have continued to do so had he not died

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when he did.

Assessment of Damages Act 9 of 1969: This Act provides that when assessing damages for loss of support then pension and life-insurance and other similar benefits payable as a result of the death must be ignored. However, benefits from inheritance are not ignored and a deduction continues to be made for accelerated benefits. Modern pension provision has, by popular worker demand, tended away from pooled contributions to a "savings account" approach. When a member dies there is then an insured death benefit payable (usually 2 or 3 times annual salary) **plus** a refund of accumulated contributions. This refund is not, strictly speaking, a benefit payable as a result of the death. The deceased was entitled to it prior to his death, as with a bank deposit. However, the Act defines a pension benefit to include "a refund of contributions and any payment of interest on such contributions". It follows that no deduction may be made if a dependant has received a refund of accumulated contributions.

State welfare child grants: These benefits are now being phased out by Government, but in times gone by the amounts involved have been quite substantial (R800 per month) relative to lower income earnings levels. In *Indrani v African Guarantee & Indemnity* 1968 4 SA 606 (D) it was ruled that such payments are deductible from past loss of support, but not from future loss. One occasionally encounters the argument that such benefits should be ignored by reason of the Assessment of Damages Act. State child welfare is clearly neither an insurance benefit nor a pension benefit. The Act also refers to "any payment by a friendly society or trade union". A State welfare grant does not fit into this definition either. It thus seems that State welfare grants are deductible benefits. It has been argued that State welfare benefits are gratuitous charity and should for that reason be ignored. However, one needs to bear in mind that entitlement to such a benefit is a right derived from statute and allowed by way of administrative action. It seems that the *Indrani* ruling continues to be good law.

Contractual support as a basis for damages: The Roman-Dutch law of the 20th century has emphasised that in order to succeed in a claim for loss of support the claimant must demonstrate a **common-law duty** of support. The loss of a contractual right to support was not compensated (see, for instance, *Barnes* 1977 3 SA 502 (E)). The writings of Grotius and Voet indicate that this somewhat draconian restriction was not part of the classical Roman-Dutch law (see Voet *Ad Pandectas* 25.3.4; *Grotius* Inleidinge 3.33.2). Modern South African law seems to be shaking off this inequitable restriction and damages have been awarded for loss of a quasi-contractual right to support in at least 3 instances (*Kewana* 1993 4 SA 771 (TkAD) - adoption by Bantu customary law; *Amod* 1999 4 SA 1319 (SCA) - Islamic customary marriage; *Henery* 1999 3 SA 421 (SCA) - divorcee with divorce order for maintenance). The new approach does not mean recognition of every casual agreement. There is clearly a requirement that there be a quasi-legal/customary-usage foundation for the agreement to provide support. In *Amod's* case it was furthermore emphasised that the marriage relationship must be de facto monogamous. In other words polygamy was viewed in that context as *contra bonis mores*. Polygamous black customary unions are recognised by statute so why should *boni mores* be invoked against polygamous customary unions that do not enjoy statutory recognition? One may observe, however, that for *de facto* polygamous black customary unions the damages payable for loss of support continues to be restricted to the amount payable if there was only one widow (s31 Black Laws Amendment Act 76 of 1963).

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