

SOUTH AFRICA / JUDGMENT

Drude v Road Accident Fund (1127/2023) [2024] ZAFSHC 397 (12 December 2024)

[2024] ZAFSHC 397**COURT**

Free State High Court, Bloemfontein

BEFORE

JP Daffue

CASE / FILE NUMBER

1127/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable:**

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Case

no: 1127/2023

In

the matter between:

DELIA

ROCHELLE DRUDE

Plaintiff

And

ROAD

ACCIDENT FUND

Defendant

Coram:

JP DAFFUE J

Heard:

09 OCTOBER 2024

Delivered:	12 DECEMBER 2024 This judgment was handed down electronically by circulation to the parties’ representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 15H00 on 12 DECEMBER 2024.
Summary:	The plaintiff, a 54-year-old woman at the time of the trial, claimed past and future loss of support from the Road Accident Fund following upon the death of her son in a motor vehicle collision. It was her case that her deceased son de facto maintained her during his lifetime. Although she initially informed the industrial psychologist that the deceased supported her and his brother, this version was later changed. It also became clear during the evidence that her elder son also contributed to her maintenance in the past and that he has continued to support her after the passing of his brother. Contingencies were applied as follows: 15% in respect of past loss of support and 25% in respect of future loss of support. ORDER 1. The defendant shall pay to the plaintiff the amount of R652 109.00 in respect of the plaintiff’s claim for past and future loss of support. 2. The defendant shall pay the plaintiff’s costs of suit on party
and party scale, such costs to include:	2.1 the reservation, preparation and qualifying fees, including the reasonable costs of obtaining the expert reports, of the following
experts:	· Mr Wim Loots – actuary; and · Ms S van Jaarsveld – industrial psychologist; 2.2 the fees of counsel on scale A.

JUDGMENT

Daffue J

Introduction

- [1] This is one of those cases against the Road Accident Fund (the RAF) that judges so often come across nowadays. The RAF is understaffed and/or employs inexperienced personnel who are just not equipped to carry out their tasks successfully. Claims are not diligently and timeously investigated. This leads to an unnecessary wastage of legal resources. The local attorneys in its service do not get proper and timeous instructions and they are often not to be blamed for the RAF's unpreparedness for trials.
- [2] The plaintiff, a 54-year-old woman born on 29 January 1970, instituted action against the RAF following upon her one son's death in a motor vehicle collision, claiming past and future loss of support from the RAF as well as funeral expenses. She was 51 years old at the time of her son's death.
- [3] Mr Wim Loots, an actuary, prepared the required actuarial calculations based on collateral information received via the reports of Ms Van Jaarsveld, the industrial psychologist, and instructions from the plaintiff's attorney. He prepared two reports, one in 2022 and a final report on 2 October 2024. According to his last report he calculated the plaintiff's past loss to be R69 119.00 and the future loss in the amount of R791 144.00, adding up to a total loss of support of R860 263.00. This is a slight increase from his first report. He did not allow for any contingencies. He based his calculations on information that the deceased had supported his mother during his lifetime in amounts ranging between R1000 and R2000 per month. This was the equivalent of a division of income in a ratio of four parts of the deceased's income to himself and one part to the plaintiff. The expert mentioned that although the plaintiff would qualify for old age pension at the age of 60, he did not take that into consideration based on *Modibedi v RAF*.^[1]
- [4] The RAF did not care to file any expert reports or to do a proper investigation of the plaintiff's circumstances. I shall refer to some requests made by it at one stage for more information.
- [5] After lodgement of the claim documents in 2022, correspondence ensued between the plaintiff's attorneys, Phatshoane Henney Inc, and employees of the RAF. On 12 October 2022 the RAF conceded the merits 100% in favour of the plaintiff and therefore admitted that it was liable for all damages to be proved by the plaintiff in respect of the death of her son. However, the parties could not settle the quantum of the claim.
- [6] On 31 October 2022 the plaintiff's attorney forwarded the plaintiff's supplementary affidavit together with the supporting documentation that the RAF required as out in its letter

of 7 October 2022. These relate to the funeral expenses.

[7] On 3 March 2023, summons was issued out of this court and served on the RAF at its headquarters on 7 March 2023. The RAF failed to file a notice of intention to defend. On 6 July 2023 the plaintiff's attorneys set the matter down for default judgment to be heard in the unopposed motion court of 13 July 2023. The default judgment application consisted of 176 pages. The plaintiff intended to obtain judgment for R781 037 calculated as follows:

Past loss of support : R 22 259.00

Future loss of support : R 714 778.00

Funeral expenses : R 44 000.00

TOTAL

: R 781 037.00.

This is the same amount that she claimed in the summons. The loss of support was calculated by Mr Loots in his first report referred to earlier. It has always been the plaintiff's case that she was unemployed and relied upon the deceased to maintain her which he effectively did during his lifetime by paying the monthly amounts to her mentioned in Mr Loots' reports.

[8] On 13 July 2023 the default judgment application was removed from the roll, the RAF to pay the wasted costs. Thereafter the RAF filed a plea dated 19 September 2023. Contrary to its former admission and settlement of the merits, it denied that the plaintiff's son was killed in a motor vehicle collision as a consequence of the insured driver's negligence as pleaded. Such denial in the face of the formal admission and agreement in respect of the merits would amount to an unethical response by the legal representative. In all fairness, we do not know what instructions were given to the draftsman and whether or not information about the settlement was indeed conveyed. Hereafter, the legal representatives held a pre-trial conference. Ex facie the minutes thereof, the RAF again recorded that the merits had been conceded fully. On 25 March 2024 Musi JP certified the matter trial-ready in respect of the quantum of the plaintiff's claim.

[9] When the quantum trial was allocated to me, I immediately requested my secretary to send an email to the legal representatives in order to obtain certainty about certain aspects. The email is dated 30 September 2024. I quote paragraphs 4 to 7 thereof which read as follows:

'1. Ms Van Jaarsveld stated in paragraph 3.2.2 of her report that the deceased maintained his mother and brother. Was a separate claim filed for the brother and what was the outcome of that claim?

2. Mr Loots did not recognise that the deceased allegedly maintained the brother as well. If this is factually correct, the plaintiff's claim will have to be revised.

3. Is it the plaintiff's case that the deceased paid her maintenance to her in cash or into her bank account?
4. It is expected of the plaintiff to present full details of her employment history for the last ten years.'

[10] The RAF failed to respond to this email. Ms Mkhwanazi, the person to whom the litigation was allocated, apparently resigned as attorney during this time as later informed. The plaintiff's attorney responded to the email and confirmed that they had received a fresh report from the actuary, Mr Loots, the one I referred to earlier. The

attorney insisted that the deceased maintained his mother only and not his brother as stated in the first report of Ms Van Jaarsveld who also filed a supplementary report on 1 October 2024.

[11] The two reports of Ms Van Jaarsveld, if read together, again serve as proof what I have said so many times in the past. It is often dangerous to accept the collateral information provided to experts. We see too often that claimants or their relatives change their versions from time to time, from the first appointment with an expert

until the eventual hearing. In her first report of 24 June 2022, Ms Van Jaarsveld stated the following in paragraph 3.2.2:

'At the time of his death, Mr Drude was the breadwinner of his family and looked after his mother and brother.'

The plaintiff indicated to her that she and her children were living in a rented two-bedroom house which was equipped with electricity and running water. On receipt of the aforesaid email emanating from my office, Ms Van Jaarsveld prepared her second report which 'was compiled after the following additional information was received:

'1. At the time of his death, Mr Drude was the breadwinner of the family and looked after his mother'

The contradiction is apparent. No word is mentioned – after my enquiry - of the deceased supporting his sibling. Upon perusal of this second report, the first question I asked myself was whether the brother was a major and employed and whether he did not, and/or could not assist as co-breadwinner of the family. Eventually the testimony provided clarity. More about this later.

[12] On 8 October 2024, the first day of the hearing, the plaintiff was ready to proceed on trial. There was no appearance for the defendant. I was not prepared to continue with the trial until more information

was obtained from the RAF in respect of its failure to appear. The matter stood down till the next day. As informed, the plaintiff's

attorney had contact with Ms Gouws and Ms Banda, attorneys in the employ of the RAF in Bloemfontein, to establish whether they had any instructions. Neither of them had been allocated the case and they were unaware of the matter. On the second day, ie 9 October 2024,

Adv I Macakati who appeared for the plaintiff, handed up from the bar a bundle of emails exchanged between the plaintiff's attorneys and employees of the RAF. These were dated 8 October 2024 and reference was also made therein to earlier emails and requests for information. The RAF even indicated that it should be invited on the case lines platform which is not available at the Free State high court. After studying the documents, I decided to allow the plaintiff to proceed with her case. I emphasise that the RAF did not seek a postponement of the trial, either informally, or formally.

[13] I repeat that the RAF failed to file any expert reports. Adv Macakati sought leave to present the evidence of the plaintiff's experts by way of affidavit in terms of rule 38(2) of the Uniform Rules of Court and furthermore, that the court admits into evidence various documents in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. I refused to admit the documents as evidence in terms of s 3(1)(c), but granted leave that the evidence of Ms S van Jaarsveld, the industrial psychologist and Mr W Loots, the actuary be presented by way of affidavit. In granting this relief, I followed the trite principles again summarised in *Madibeng Local Municipality v Public Investment Corporation Ltd*[2] which I quote:

'The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.'

[14] Ms Delia Rochelle Drude, the plaintiff, presented her viva voce evidence where after her son, Mr Kerwan Conroy Drude (Kerwan) testified as well. Bearing in mind the fact that the two witnesses

were not cross-examined and no contradictory evidence was presented on behalf of the RAF, it is really not necessary to give a detailed summary of the evidence.

[15] After the leading of evidence and the closure of the plaintiff's case, I directed the plaintiff's legal representatives to obtain and forward a transcript of the evidence to Mr Loots to reconsider his opinion based on the testimony of the plaintiff and her son. Mr Loots responded in a supplementary report confirmed under oath. He mentioned that if the plaintiff's evidence were to be accepted, revised calculations might be required and deferred to

further instructions. That was the end of that. I accept that Mr Loots suggested that the claim might be increased. The plaintiff

testified that the deceased had contributed to her maintenance in amounts varying between R2 500 and R3 000 per month. This is much more than the figures of between R1 000 and R2 000 relied upon by Mr Loots in his reports. There was nobody to cross-examine the plaintiff, but the difference between her version in 2022 on which the experts filed their reports and her evidence two years later is obvious. This was never explained.

[16] We know that the plaintiff, who was 27 years old when he passed on, was still a relatively young man. In line with accepted norms and practice he would in all probabilities one day get married or be involved in a romantic relationship and become a father of children. In such a case the maintenance of his wife / life partner and children would become his first priority. It is furthermore evident that the deceased's brother, Kerwan, assisted with the plaintiff's support during the deceased's lifetime, although no word was said to the experts in this regard. A contradictory version was presented by the plaintiff. In fact, Kerwan testified that whenever the deceased asked for assistance, he would contribute. This is an aspect that will be taken into consideration in order to calculate contingencies to be applied.

[17] I considered Adv Macakati's submissions in respect of the plaintiff's entitlement to be maintained by the deceased and her consequent right to claim her loss of support from the RAF. I am satisfied that our law has recognised the duty of support of children towards their parents. Although the plaintiff worked for most of her

life and was even a taxi owner at a stage, I accept that she did receive support from her deceased son who was not only legally

obliged to support her, but accepted the duty to support. In this regard it is relevant to consider some authorities.

[18] In *Amod v Multilateral Motor Vehicle Accident Fund*[3] the Supreme Court of Appeal dealt with the death of a breadwinner who had a duty to support their dependants. Although that case dealt with a dependant's action following upon a Muslim marriage, the court confirmed the view that the common law should be developed in line with our constitutional imperatives. In *Paixão v Road Accident Fund*[4] the Supreme Court of Appeal dealt with cohabitation, but confirmed a dependant's right to claim support which is worthy of the law's protection and the breadwinner's correlative duty of support which is determined by the *boni mores* criterion.

[19] In *Jacobs v Road Accident Fund* the court held that it was apparent from the unchallenged evidence that the plaintiff's son owed him a duty of support at the time of his death. The court stated the following:[5]

'While it is true that several claims by parents that their children were under a legal duty to maintain them have failed because the parents failed to prove that they were indigent (see, for example, apart from *Smith and Wigham*, *supra*, *Petersen v South British Insurance Co Ltd* 1967

(2) SA 235 (C) and *Anthony and Another v Cape Town City Council* 1967

- (4) SA 445 (A)), these judgments do not establish an absolute line between indigence and 'mere' poverty when it comes to determining the duty of children to support a parent. They must all be read in the light of their own facts. The deciding principle, it seems to me, is whether the parent can prove that he or she was dependent on the child's contribution for the necessities of life. What constitutes necessities will in turn depend on the parents' station.'

I am satisfied that although the plaintiff is not indigent in the true sense of the word, the accepted evidence indicates that the deceased did in fact support her and would probably continue to support her in future, although the other son, Kerwan also contributed. This aspect will be considered when contingencies are to be applied.

- [20] I do not intend to enter into the debate as to whether any possible old age pension that the plaintiff may qualify for six years from now should be disregarded in order to claim her damages. Fact of the matter is that we are dealing with a situation where the deceased might in future become a married man with dependents which might

cause him to either terminate any further payments to his mother, or substantially reduce them, especially insofar as the State could assist her during her old age. I cannot completely ignore this.

- [21] Although the plaintiff is married in community of property, she and her husband has been staying separately since 2014. The husband is seriously ill, does not work and cannot contribute to her maintenance. The plaintiff is still relatively young and has vast experience in the employment market. She worked for 14 years at a pre-primary school until 2014 and is healthy. I have been told that she had applied for work recently, but was told that her age counted against her. I cannot discount the probability that she might find work at a crèche, or as a day time carer, if she is really interested in gainful employment. She is still young in today's terms. Unlike as initially recorded, both the deceased and Kerwan assisted the plaintiff financially during the deceased's lifetime. At that stage Kerwan was employed by the South African Police Service as a constable. At present he has his own business and is earning much more than earlier and also more than the deceased's predicted income.

- [22] Although Adv Macakati suggested that normal contingencies of 5% in respect of past loss and 15% in respect of future loss should be applied, she did not take this in consideration in her conclusion. I am not prepared to accept the so-called normal contingencies in this case, relying on what I mentioned earlier, as well as the following

vicissitudes of life:

- a. although the deceased accepted responsibility to partially maintain his mother, there is serious doubt as to the exact amounts paid from time to time due to the lack of record-keeping and whether payments were regularly made, especially bearing in mind the allegation that these payments were in cash all the time and the huge difference between the version of the plaintiff in 2022, when she consulted her attorney, and her evidence in court;

- b. the deceased made payments at a stage when he was still resident in the same residence with his mother and brother, but as is the case with any young person, a time would come for him to leave the proverbial nest in order to stay on his own, to get romantically involved and father children which would obviously cause severe pressure on his financial situation and which in turn may have a detrimental effect on his willingness and/or ability to continue supporting his mother;
- c. when things in future would get tough financially, the deceased might opt to request his mother to apply for old age pension in order to alleviate his own financial burden in supporting her;
- d. unlike as suggested to Ms Van Jaarsveld, the deceased did not play the role of sole breadwinner of the family, consisting of the plaintiff, the deceased and his brother, as he did not solely support his mother;
- e. the plaintiff's other son, Kerwan, is an affluent person who has in any event taken over the role of sole breadwinner and there is no reason why he will not continue doing that in the foreseeable future.

[23] Having considered the above factors, a contingency deduction of 15% in respect of past loss of support and 25% in respect of future loss of support shall be applied. The effect hereof is that the total loss

of income of R652 109.00 is calculated as follows:

Past loss of support

R69 119

less 15%

R10 368

Sub-total

R 58 751

Future loss of support

R791 144

less 25%

R197 786

Sub-total

R593 358

TOTAL

R652 109

[24] The plaintiff's claim for funeral costs shall be disallowed notwithstanding Adv Macakati's submission. The plaintiff did not prove that she paid the funeral expenses. In her testimony she did not say anything about the funeral costs and/or payment thereof to the funeral parlour. Eventually, Kerwan testified that he personally paid the funeral expenses as follows: R34 000 before the funeral and R10 000 thereafter. This even included the flowers according to him. Kerwan did not cede his claim to the plaintiff.

Order

[25] The following order is made:

JP DAFFUE J

Appearances For plaintiff: Adv I Macakati Instructed by: Phatshoane Henney Inc
BLOEMFONTEIN For defendant: No Appearance

[1] (45626/13) [2015] ZAGPPHC 767 (18 November 2015).

[2] 2018 (6) SA 55 (SCA) para 26.

[3] 1999 (4) SA 1319 (SCA) paras 21-24 & 30.

[4] 2012 (6) SA 377 (SCA) paras 13-16, 18 & 20; see also JT v RAF 2015 (1) SA 609 (GJ) paras 26-29; and Jacobs v Road Accident Fund 2010 (3) SA 263 (SECLD) paras 20-23; and Road Accident Fund v Mohohlo 2018 (2) SA 65 (SCA).

[5] Jacobs loc cit para 20.

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