

SOUTH AFRICA / JUDGMENT

Gesina v Road Accident Fund (18069/2015) [2017] ZAGPPHC 188 (22 May 2017) [2017] ZAGPPHC 188

COURT

North Gauteng High Court, Pretoria

BEFORE

B Mahalelo

CASE / FILE NUMBER

18069/2015

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 18069/2015****Reportable:**

No

Of

interest to other judges: No

Revised.

22/5/2017

In

the matter between: VISAGIE
 RAGEL
 GESINA Plaintiff
 and
 ROAD
 ACCIDENT
 FUND Defendant

JUDGMENT

MAHALELO, AJ:

- [1] The plaintiff instituted a claim for damages for loss of support as the mother of the deceased in her personal capacity against the Road Accident Fund.
- [2] The following damages were claimed:
- 2.1 Estimated past and future loss R400 000,00
- [3] The following was admitted by the defendant:
- 3.1 The negligence in respect of the collision.
- 3.2 The death of the deceased.
- 3.3 The date of the death of the deceased being 21 April 2012.
- 3.4 The nexus between the collision and the death of the deceased.
- [4] The only issues which remains for determination therefore involves the indigence of the plaintiff as a parent of the deceased and whether the deceased owed her a legal duty of support at the time of his death. If the answer to both questions is in the affirmative the court must then proceed to assess and make an appropriate award to the plaintiff.
- [5] The plaintiff filed two expert reports, being an Industrial Psychologist and an Actuarial report and proceeded to call the plaintiff to testify. The defendant filed no reports and did not lead any evidence in rebuttal.
- [6] The plaintiff testified that she is currently 64 years old. She is the biological mother of the deceased and two other siblings. At the time of the deceased's death, the deceased was employed by the South African Defence Force earning a salary of close to R11 000,00 per month. The plaintiff lived with the deceased, his two siblings and a grandchild. The plaintiff received a state pension of R1 500,00 currently. Her husband passed away a long time ago and her children, including the deceased received a grant up to the age of 18 years. She was not sure of the amount of pension she received at the time of the death of the deceased. She stated that she could barely survive with whatever pension she received. She had to seek assistance from the deceased's other siblings whenever they were employed. The deceased's siblings were not permanently employed. They could only afford to assist her financially

whenever they found employment. Sometimes they were employed for six months or a little longer. At the present moment the other sibling is unemployed.

- [7] She testified that the deceased supported her and his siblings by buying food for the household and everything that she required. He also gave her amounts of money which she used for her needs. The plaintiff stated that they were initially staying in a shack. The deceased built them a brick house but that at the time of his demise he had not yet completed building the house.
- [8] She testified further that she uses her current pension together with whatever contribution there may be from her other two children to, amongst others, pay for water and electricity, food, transport to go to town, medical expenses and airtime. The current pension is insufficient because when her other siblings are not working she struggles to make ends meet with her pension money only. Since the deceased passed away her life is no more the same as she cannot afford some of the necessities of life.
- [9] The plaintiff was an honest witness who did not seem to exaggerate her plight and personal circumstances. I am satisfied that there is no basis to reject her evidence.
- [10] The defendant did not call any witnesses to challenge the evidence presented by the plaintiff.

SUBMISSIONS

- [11] It is the plaintiff's case that the deceased was the breadwinner at home and supporting her financially. Further that, the deceased saw the need for contribution and volunteered to assist the plaintiff since she was and still is unemployed.
- [12] The defendant challenges the plaintiff's claim of indigence and in the event the court finds that she is indigent, it contends that the plaintiff is able to meet the costs of her necessities of life with the financial assistance from the deceased's siblings. The defendant further argued that the plaintiff could be in a position to meet the necessities of life with her pension money if she was not staying with the deceased's siblings and in that regard her claim for loss of support should be dismissed with costs.

THE LAW

- [13] The issue of whether a party is indigent and whether a duty rests upon a child to support his or her parents was considered and discussed in a number of judgments. In *Fosi v Road Accident Fund and Another* [2007] ZAWCHC 8, 2008 (3) SA 560 (C) the court held that:
 - "(a) The test set in *Smith v Mutual & Federal Insurance Co Ltd* 1988 (4) SA 626 (C) was too stringent and onerous when compared to pronouncements of courts in earlier decisions.
 - (b) The principles enunciated in *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W) were to be preferred.

(c) The court, with reference to *Khan v Padayachy* 1971 (3) SA 877 (W) accepted the principle that where another child subsequently contributes to the plaintiffs needs, such contribution does not affect the plaintiffs claim.

[14] In *Jacobs v Road Accident Fund* 2010 (3) SA 263 (SE) the court similarly dealt with the Smith and Wigham matters. In that regard the court held that the deciding principle is whether a parent can prove that he or she was dependent on the child's contribution for the necessities of life. The court further held that:

"There is a further consideration. It would in my view be invidious were this court to rule that the deceased had no duty to support his father when he had voluntarily assumed that obligation. In my view this undertaking gave the plaintiff a reasonable expectation that his maintenance contributions would continue. A duty of support between family members is one of those areas in which the law gives expression to the moral views of the society. In the present case the plaintiff did not have to enforce his right to maintenance from the deceased. The deceased voluntarily assumed that obligation. In my view this is sufficient in itself to warrant a finding that the plaintiff has acquired a right to maintenance from his son, which was enforceable against the insured and, by law, against the defendant."

[15] The undisputed evidence of the plaintiff paints a picture of indigence. The question that remains is whether the deceased had a duty to support his indigent mother.

[16] The liability of children to support their parents, if indigent, is beyond question. Support includes not only food and clothing in accordance with the quality and condition of the person to be supported but also lodging and care in sickness. See *Oosthuizen v Stanley* 1938 AD 322 at 327 to 328.

[17] In the *Fosi* matter supra the court upheld a claim for compensation for the loss by a child to a parent. It was held that the origin of the obligation resided in customary law and more especially in the idea that were a child not to support a needy parent the child would not be possessed of Ubuntu.

[18] Sutherland J expounded further on the issue of duty of support in *J T van Road Accident Fund* 2015 (1) SA 609 (GJ) at para [26] as follows:

"It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise in a given case, from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of 'family', constituted as being a network of relationships or reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in relationships akin to that of a family."

- [19] This court has a discretion in deciding what necessities of life the plaintiff can claim. The object of the Road Accident Fund is to give prejudiced plaintiffs the fullest possible compensation by placing them, insofar as possible, in the same position in which they were before the damage-causing event. See *Pretorius v Road Accident Fund* 2013 JDR 1096 (GNP).
- [20] The only evidence in this matter is that of the plaintiff that her son owed her a duty of support at the time of his death. It is clear from the evidence of the plaintiff that although she has two other children who also assist her with a certain contribution whenever they are employed, the deceased's contributions were clearly required and were used by the plaintiff to acquire the basic necessities of life. There is no evidence before me that there are other sources of income to replace the contribution which the plaintiff has been deprived by the death of the deceased. In my view the plaintiff was dependent on the deceased for the necessities of life. I am satisfied that the plaintiff is indigent and is entitled to a claim for loss of support.
- [21] The plaintiff submitted an actuarial report on which the calculations of the plaintiff's loss is based. The actuarial report estimates the accrued loss of income at R120 702,00 and the prospective loss of income at R249 777,00. In terms of the report contingency deductions are applied at 5% in respect of the accrued loss of income and at 10% in respect of the prospective loss of income.
- [22] It is trite that contingency deductions are within the discretion of the court and depend upon the judge's impression of the case. Contingencies are the normal consequences of life, which beset every human being and which directly affect the amount which the plaintiff would have earned. See *Southern Insurance v Bailey* 1984 (1) SA 98 (A). General contingencies cover a wide range of consideration which may vary from case to case and may include early death, loss of employment and promotion prospects.
- [23] The evidence in this case supports the grant of a pre-morbid contingency deduction of 10% and a post-morbid contingency of 15%. This is based on the plaintiff's circumstances before the death of the deceased and the current circumstances she finds herself in after the death of the deceased.

THE ORDER

[24] An order is made as follows:

1. The defendant is ordered to pay the plaintiff's past and future loss of support in the amount of R320 942, 25.
2. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto that:

2.1 In the event that the costs are not agreed:

2.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

2.1.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) Court days from date of allocator to make payment of the taxed costs.

2.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10%.5 per annum on the taxed or agreed costs from date of allocator to date final payment.

2.2 Such costs shall include but not be limited to the following:

2.2.1 The costs incurred in obtaining payment of the amount mentioned in paragraphs 2 and 3;

2.2.2 The costs of and consequent to the employment of Counsel, including counsel's (Advocate H Groenewald) charges in respect of his preparation as well as his full High court day fee for 24 April 2017 and 25 April 2017.05.18

2.2.3 The cost of all medico-legal and actuarial calculation and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles.

2.2.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the experts mentioned in 3.2.3 above;

2.2.5 The costs of holding all pre- trial conferences and compilation of minutes, as well as round table meetings between the legal

representatives for both the Plaintiff and the Defendant, including counsel's charge in respect thereof; and

2.2.6 The costs occasioned by the preparation of trial bundles.

2.2.7 The costs to date of this order, which costs shall further include the costs of the attorney which include necessary travelling costs and expenses (time and kilometres), preparation for trial and attendance at Court on the 24th of April 2017 and 25th of April 2017.

2.2.8 The amount referred to in paragraph 2 and 3 will be paid to the Plaintiff's attorneys, Gert Nel Incorporated, by direct transfer into their trust account, detail of which are following;

ABSA Bank

Account number: [...]

Branch code: 335545

Ref: GN 82321

There is an applicable contingency fee agreement

HEARD ON: 25 April 2017

FOR THE PLAINTIFF Adv. H R GROENEWALD

INSTRUCTED BY: Gert Nel Inc, Pretoria

FOR THE DEFENDANT: Adv E Mogane

INSTRUCTED BY: Rambevha Morobane Attorneys, Pretoria

B MAHALELO

ACTING JUDGE OF THE HIGH COURT

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