

SOUTH AFRICA / JUDGMENT

Leask and Another v Road Accident Fund (33281/2013) [2015] ZAGPJHC 76; 2015 (5) SA 20 (GJ) (30 April 2015) [2015] ZAGPJHC 76

COURT

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

33281/2013

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FLYNOTES:

ACTUARIAL – Loss of support – Parents of deceased –
Plaintiffs contending that deceased was contributing
each month
prior to and at time of death – Lack of documentary proof of
deceased's pay – Failing to adduce
sufficient evidence
that the deceased was gainfully employed and earning claimed
salary and that he would have continued
to do so for the duration
of their lives – Failing to show that the deceased was in a
financial position to support
them – Absolution from the
instance granted.
REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 33281/2013

In the matter between: LEASK,
 JACOBA ALBERTINA
 First
 Plaintiff
 DE
 BEER, WILHELM STEPHANUS
 Second
 Plaintiff
 And
 ROAD
 ACCIDENT FUND
 Defendant

JUDGMENT

WEINER J:

Introduction

- [1] Zacharias Jakobus De Beer (“the deceased”) died as a result of a motor vehicle collision which occurred in Heidelberg on the 7th April 2013. The defendant admitted the negligence of the insured driver and conceded liability in respect of the merits.
- [2] The plaintiffs are the biological parents of the deceased. They both instituted action against the defendant for loss of support. Their claim is based on their allegation that the deceased supported them from the time that he was employed until he died and that he would have continued to do so, but for his death. The plaintiffs further contend that the deceased supported them by giving them R10 000 per month at the time of his death and for a considerable period of time before his death. The defendant denies the fact that the deceased supported the plaintiffs at all and denies further that the deceased owed the plaintiff a duty of support. Defendant claims that the plaintiffs are not indigent.

The Background Circumstances

- [3] The plaintiffs have been living together for approximately 35 years. From such relationship three children were born a son (the deceased) and two daughters Edna and Angelique.
- [4] The Second plaintiff gave evidence that he previously worked as a truck driver until 1989 when he fell ill at the age of 35. He had completed school up to Standard 6. Although his evidence was not very clear, he described his illness as being concerned with cancer and that he suffered two heart attacks thereafter. He applied for an old age pension when he recently turned 60 and receives same.
- [5] The first plaintiff was apparently involved in a collision when she was a child. She completed school up to Standard 2 and has been on a disability grant from the age of 8. She suffers from a mental condition which renders her incapable of securing employment.

- [6] According to the second plaintiff he presently receives a pension of R1 410 as does the first plaintiff. Their total income is accordingly R2 820 a month.
- [7] The second plaintiff's evidence was not entirely clear but what can be gauged therefrom is that the parties lived in different rented accommodation over the years. In addition, all three children lived with them over the many years that they were living only on the first plaintiff's disability pension.
- [8] They initially stayed in Heidelberg in a house owned by an uncle who had died that year, as a result of which they did not pay any rent. They lived there until 1999. They thereafter moved to Jamieson Park, where they paid approximately R680 per month and lived there until 2005. At certain times the second plaintiff's mother lived with them and her pension was also used to support the two plaintiffs, the second plaintiff's mother and the three children. They moved to Nigel where they stayed until 2009. According to the second plaintiff, the house belonged to his sister's son-in-law and he did not charge them rent. In 2009, they moved to a farm where the rent was allegedly R4 000 per month plus R1 000 for electricity. Although the second plaintiff claims that he was getting R10 000 per month from the deceased, his evidence appears to suggest that they never paid the R4 000 per month as rent and have always been in "arrears". A friend of his one Du Plessis is the owner and seems to be content with receiving R500 per month as payments on arrear rental.
- [9] Angelique who is presently 31 years old has, according to the second plaintiff never worked (save for a period of about 8 months). She passed Standard 8 and there appears to be no valid reason why she has not worked. The second plaintiff believed that the deceased started working in 2006 and was paying them R10 000 from the start. It appeared from the evidence of the deceased's employer (his brother-in-law) André Jacobs, that he began work in 2008. The second plaintiff conceded that the deceased lived with them and paid them, inter alia, a contribution towards his living expenses. The first plaintiff did his washing and ironing. He ate breakfast at home and took lunch with him to work that was made at home. He also ate dinner at home. The R10 000 that the deceased contributed was, according to the second plaintiff, used for all of those staying in the house, that included the first and second plaintiffs, the deceased, his two sisters and three grandchildren. The sister, Angelique, apparently got married in September 2014 but still lives with the plaintiffs. Her husband one Fourie is self-employed and, according to the second plaintiff, he contributes about R300 per week when he can.
- [10] Accordingly the parties appeared to be living, until 2008 on the first plaintiff's pension, occasionally the second plaintiff's mother's pension (when she stayed with them) and the approximately R300 per week that was sometimes paid by Fourie for Angelique and the three children.

- [11] Somehow the family managed to survive on this. This is the basis upon which the defendant claims that the first and second plaintiffs are not indigent in that they were able to survive on much less than R2820 for many years.
- [12] According to the second plaintiff the deceased left school in Standard 6 at the age of 18. He had failed school for many years. For two years, he did not work but stayed with another person in Vereeniging.
- [13] Their second daughter, Edna, got married five years ago to Jacobs and they had two children now aged 5 and
2. She passed away in 2014 as a result of an allergic reaction to a bee sting. The second plaintiff gave evidence that the deceased worked for Jacobs. He was unable to testify precisely when he started working there or what he did.
- [14] The plaintiffs' expenses to which the R10 000 was apparently contributed, included the rent (R4 000), electricity (R1 000), food and clothing (R2 500) for the plaintiffs, Angelique and her three children and the deceased. The second plaintiff concluded his evidence by stating that he was unable to exist simply on the two pensions.
- [15] Jacobs gave evidence that he was married to Edna, the deceased's sister in 2011. He met the family in approximately 2008 when Edna was working for him. She began working as a receptionist in his CC, styled Merlin Auto Glass CC (the CC) in Nigel. Later it moved to Heidelberg. According to Jacobs, the deceased worked for him from about 2008 or 2009. The reports completed by him for this claim, which include the certificate of service in relation to the deceased, state that he was working for the CC from the 1st May 2008 until the 7th April 2013 and was earning R4 000 per week plus overtime at the rate of R100 per hour. These forms were according, to Jacobs, filled in by Edna and he signed the certificate. He cannot recall whether these figures were ever discussed with him. He stated that the deceased was a fitter who installed windscreens. He was trained by Jacobs and another fitter. It is apparently not a complicated process. According to Jacobs, the standard salary for such an employee would be starting at R1500 per week and then increasing to approximately R2 500 to R3 000 per week. The deceased started on the lower salary and received the amount of R2 500 to R3 000 per week after six months. It was decided by Edna and Jacobs that in order to support her and the deceased's parents, the CC would pay the deceased R20 000 a month so that he could support their parents.
- [16] Edna apparently took over the running of the CC whilst Jacobs had other obligations in Zimbabwe.
- [17] The amount paid to the deceased by the CC did not include tax deductions and was paid in cash. He was not registered for PAYE and did not pay any tax. After Edna died, Jacobs closed the business as he was not in a state to continue running it.

- [18] Although Edna and Jacobs did not tell the deceased how much to contribute towards the plaintiffs' support, he apparently paid half his salary ie R10000 per month to them. Jacobs conceded that the average salary for the deceased's experience was R2 500 to R3 000 per week (with overtime). He was receiving R5 000 per week (with overtime). Accordingly at least approximately R8 000- R10 000 of his salary was paid by the CC, on Edna's instruction, in order for him to support his parents.
- [19] Jacobs was unable to produce any documentation confirming the payment to the deceased. There were no books and records of the CC which he could produce. He did however produce certain of his personal bank statements which were not of much assistance. Firstly, they contained many deposits and withdrawals which he could not explain. Secondly, he was involved in a business in Zimbabwe and some of the payments could be related to that business. Cash monies were deposited and then withdrawn almost immediately as a result of which the debit orders on the account were not paid. Accordingly there was no documentary evidence to substantiate in any way, the averments that the deceased was in gainful employment.
- [20] The CC also did not pay tax nor was it registered to do so. In addition, the CC was not registered for VAT and no VAT was ever paid. Jacobs also gave evidence that all the purchases for the products such as windscreens etc were made in cash and payments to employees were made in cash. There is no means by which this court is able to ascertain whether the CC was in a financial position to pay the deceased R20 000 per month.
- [21] From the above evidence what appears is the following:
- [21.1] In 2008 when the deceased commenced working he was only earning R1 500 per week. Accordingly, he would not have been giving the plaintiffs R10 000 per month as testified to by the second plaintiff;
- [21.2] The salary paid to the deceased was arranged by Jacobs and Edna (partially as her contribution to the support of her parents). The deceased earned a much higher salary than he would have received, had he not been a family member, assisting to support their parents;
- [21.3] Approximately R8 000 to R10 000 was the amount that he was overpaid per month. In reality, it was Edna who was supporting her parents and not the deceased. The deceased contributed towards his own living expenses, as he continued to live in the house and eat the food and have his laundry done by the first plaintiff;
- [21.4] From the R10 000 the plaintiffs allegedly received from the deceased, the second plaintiff supported the entire family including Angelique and her children. It appears that the amount Angelique receives from the fathers of the children is minimal and inconsistent;
- [21.5] The deceased did not have a duty to support his sister, Angelique and her children, as she was capable of working;

[21.6] Until the deceased started working, the plaintiffs appeared to support the entire family of five or six people on the pension of the first plaintiff which in 1996 was the amount of R430 per month. It increased over the years. By 2008 when the deceased began working, the pension that the plaintiffs and the extended family were living on amounted to R960 per month. It was only in 2014 that the second plaintiff began receiving his pension of R1 410;

[21.7] It cannot be accepted that the rental that the plaintiffs are obliged to pay is R4 000 per month plus electricity of R1 000 when they are only paying R500 per month which according to the second plaintiff is repayment of the arrears. Their expenses bear no resemblance to reality;

[21.8] If anyone was contributing to the plaintiffs support, it was Edna through the CC. According to Jacobs she was drawing R40 000 per month.

[22] The actuary employed by Jacobson Actuaries, one Ryan Imerman ("Imerman") gave evidence in regard to the actuarial report filed in support of the plaintiffs' claim. The assumptions on which Imerman based his opinion are that the deceased was earning R20 000 per month and that in terms of the normal distribution he would be entitled to 50% of his salary and each of his parents 25% each. The way in which the life tables were used assumes, according to the evidence, that the second plaintiff would have been supported by the deceased until he turned 97 and the first plaintiff turned 87 or until the deceased turned 65. However the reality is that Edna died in 2014, and the CC ceased operating. The deceased would have been unemployed by 2014.

Indigence

[23] The Defendant's counsel referred to the case of *Smith v Mutual & Federal Insurance Co Ltd* [1] where it was held that a stringent criterion of need has to be established to prove indigence.

[24] In *Oosthuizen v Stanley* [2] Tindall JA at 327-328 concluded that:-

"Support includes not only food and clothing in accordance with the quality and condition of the person to be supported by also lodging and care in sickness ... Whether a parent is in such a state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income is a question of fact depending on the circumstances of each case."

[25] Whilst it is correct that the defendant is unable to contradict the evidence of second plaintiff and Jacobs, the court is not obliged to accept such evidence as necessarily true. The court's findings are based upon the demeanour of the witnesses and the probabilities of the matter. See *Smith supra*. [3]

[26] In *Singh v Santam Insurance Co* [4], it was held that a court, in considering the plaintiff's financial position, must consider his needs as well as those of his wife and children living with him (presumably those to whom he owes a duty of support)

[27] At best for the plaintiffs and based upon the paucity and vagueness of the evidence:

[27.1] Taking into account their reasonable necessities of life, it is arguable that living only on their pensions would have placed them in the position of being indigent. For the reasons set out below it is not necessary to make a finding hereon;

[27.2] The alleged amount paid to the plaintiffs of R10 000 was, if it existed, the support provided by Edna, alternatively, it would have ceased when Edna died and the business closed, thus rendering the deceased unemployed;

[27.3] The Plaintiff's did not attempt to demonstrate that the deceased would have obtained other employment and/or income, after the CC ceased operating.

[28] The Plaintiffs have failed to adduce sufficient evidence that the deceased was gainfully employed and earning R20 000 per month, and that the deceased would have continued to do so for the duration of their lives. They have failed to show that the deceased was in a financial position to support them.

[29] Accordingly the following order is made:-

1. There will be absolution from the instance;
2. The Plaintiffs' are to pay the Defendants' costs.

WEINER J

APPEARANCES:

For Plaintiff:

B. Ford

Instructed By:

Leon JJ Van Rensburg

For Defendant:

A. I. Cajee

Instructed By:

Pule Incorporated

Date of Hearing:

2 March 2015

Date of Judgment:

[1] 1998

(4) SA 626 (C)

- [2] 1938 AD 322
- [3] 1998
- (4) SA 626 (C)
- [4] 1974(4) SA 196 D
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