

SOUTH AFRICA / JUDGMENT

Modibedi v The Road Accident Fund (45626/13) [2015] ZAGPPHC 767 (18 November 2015)

[2015] ZAGPPHC 767

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

45626/13

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 45626/13

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

IN THE MATTER BETWEEN

DIKELEDI ALICE MODIBEDI obo ISHMAEL M MODIBEDI Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

LEGODI J,

HEARD ON: 03 NOVEMBER 2015

JUDGMENT

HANDED DOWN: 18 NOVEMBER 2015

[1] In this matter I have been asked to deal with a stated case defined in the pre-trial minutes as follows:

“4.1 The aspect of loss of support was at the request of the Defendant stood down for allocation to 15 September 2015.

4.2 The parties further agreed that the only aspect in dispute was whether a disability grant could be taken into consideration for purposes of calculation a loss of support claim. The Defendant was of the opinion that that should the minor child be compensated for loss of support and should the minor child then claim either a child grant or foster grant, the minor child would be in receipt of double compensation.

4.3 The Plaintiff referred the Plaintiff (sic) to the recent Constitution Court case of Coughlan N.O v Road Accident Fund and Centre for Child Law 2015 ZACC 10 and particulars paragraph 59 thereof which states:

The purpose of the RAF is to give the greatest possible protection to claimants. A deduction of wither (sic) foster or child support grant would undermine the purpose. A reading of the RAF Act suggests that those grants should not be deductible. The RAF Act expressly provides that double compensation for persons who are entitled to claim under the Compensation for Occupational Injuries and Disease Act should be deducted from compensation by the RAF but there is no equivalent reference to social grants.

4.4 The parties accordingly agreed that only a point of law should be argued:

4.4.1 If the above honourable court finds that the minor child is entitled to compensation by the RAF for loss or earnings regardless of any potential claim for a child or foster grant, then the minor child shall succeed outright.

4.4.2 If however the above honourable court finds that the minor child is not entitled to compensation by the RAF for loss of earnings, as such compensation would lead to a duplicated compensation by virtue of the minor child having access to claim for a child or foster grant, then the minor child's claim for loss of earning shall be dismissed.

4.5 After the matter was allocated to 15 September 2015 the parties were informed that that trial roll was overburdened and therefore matters that where (sic) standing down for allocation would be set down in early 2016”.

[2] I have further been requested by counsel on behalf of the plaintiff to have regard to paragraph 6.1 of the pre-trial minutes which reads as follows:

“The Defendant has been provided with proof of the deceased's earnings in the form of disability grants and is satisfied therewith”.

[3] During oral argument counsel for the plaintiff articulated the issue to be determined as: ‘Whether the minor child would be entitled to compensation for loss of support, should the minor child be in receipt of either foster care grant or child grant’. On the other hand, counsel for the defendant articulated the issue as follows:

“Whether the disability grant is to be seen as an income for the purpose of suing for loss of support”.

- [4] On behalf of the plaintiff it was argued that the issue raised and identified on behalf of the defendant differs from what was agreed upon and that the defendant was therefore not allowed to argue the point captured in paragraph 3 above seen in the light of paragraph 4 of the pre-trial minutes referred to in paragraph 1 of this judgment.
- [5] On 5 November 2015 I requested the parties to file written heads of argument to deal with the following questions:

Whether disability grant upon which loss of support is claimed is an income? And if not,

Whether the plaintiff is entitled to claim from RAF damages for loss of support calculated on an amount which is not income? (see section 9 of Act 13 of 2004, and the purpose thereof, see also paragraphs 41 to 46 in Coughlan's case).

Whether the disability grant ceased to exist upon the death of the deceased? And if so;

Whether the plaintiff is entitled to claim damages for loss of support despite termination of the disability grant on the death of the deceased? (Check the Act, regulations, and see www.gov.za/services/social/disability-grant paragraphs 47 and 55 in Coughlan's case).

Whether the foster care grant and or child grant has already been granted? And if so,

What is the amount thereof?"

NEW ISSUE

- [6] Counsel for the plaintiff objected to the determination of the issue identified by the defendant's counsel in paragraph 3 of this judgment. At the risk of repetition the question objected to is, 'whether the disability grant is an income for the purpose of suing for loss of support?' The request for written heads of argument was meant to deal with this question as well.
- [7] The point taken on behalf of the plaintiff was that the issue the defendant now wishes the court to determine was not agreed upon in the minutes of the pre-trial conference. It is a new issue to which the defendant was not entitled to raise in the face of the agreement as in paragraph 4 of the pre-trial minutes, so was the contention. I cannot agree with this contention. What is recorded in paragraph 4.2 of the minutes is clear. Aspect in dispute is 'whether a disability grant could be taken into consideration for the purposes of calculation of loss of support claim'.
- [8] The question is not different from the one articulated by the defendant's counsel quoted in paragraph 3 above. It is the same question put differently by bringing in an element of 'income' which as I see it, is for clarity. Whatever way you look at it, what remains to be determined is whether disability grant can be the basis for calculation of the plaintiff's loss of earning. For this, I find that there is no merit to the argument that a new issue contrary to what was agreed upon, is raised. This then brings me to the critical question.

FACTUAL

BACKGROUND

[9] The deceased who was married to the plaintiff died in a motor vehicle collision on 13 May 2000. Out of the marriage relationship one minor child was born. The plaintiff instituted the present proceedings for loss of support against the Road Accident Fund (RAF). At the time of his death the deceased was receiving a disability grant in the amount of R520-00 per month. For this the plaintiff is claiming for loss of support in the amount of R100 000 for herself and R150 000 for the minor child. The deceased was a passenger in the insured vehicle and liability has been conceded by the defendant.

LEGISLATIVE FRAME-WORK AND CASE LAW

[10] Social Assistance Act no. 13 of 2004 was assented to on 5 June 2004. Its main objective is to provide for the rendering of social assistance for persons, to provide for mechanism for the rendering of such assistance, to provide for the establishment of inspectorate for social assistance and to provide for matters connected thereto. Chapter 2 of the Act deals with social assistance. In section 1 of the Act, “disability grant” is defined as ‘a grant made in terms of section 9’. The section reads:

“A person is, subject to section 5 eligible for a disability grant, if he or she –

- (a) Has attained the prescribed age; and
 - (b) Is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance”.
- [11] Section 5 referred to in section 9 deals with legibility for social assistance and of relevance, provides that a person is entitled to the appropriate social assistance if he or she is eligible in terms of section 9. Other requirements set out in paragraphs
- (c) to (e) of section 5 do not appear to be in dispute as the deceased was granted disability grant.
- [12] Regulation 3 of the Regulations promulgated in terms of section 32 of the Act, deals with persons eligible for disability grant. For its importance, it is repeated herein:

3. Persons eligible for disability grant

In addition to the requirements set out in section 9 of the Act and in regulation 2(b),(c),(d) and (e), a person is eligible for a disability if he or she is a disabled person who has attained the age of 18 years and –

- (a) he or she is a South African citizen, permanent resident or a refugee;
- (b) the disability is confirmed by an assessment which indicates whether the disability is –

- (i) permanent, in that the disability will continue for a period of more than 21 months; or
- (ii) temporary, in that the disability will continue for a period of not less than 6 months or for continuous period of not more than 12 months as the case may be:

Provided that the assessment must, at the date of the application, not be older than three months;

- (c) he or she is unable to enter the open labour market or to support himself or herself in light of his or her skills and ability to work;
- (d) he or she does not unreasonably refuse to accept employment which is within his or her capabilities and from which he or she can generate income to provide fully or partially for his or her maintenance; and
- (e) he or she does not, without good reason, refuse to undergo the necessary medical or other treatment recommended by a medical officer”.

I want to believe that the deceased had satisfied all of the requirements. I deal later in this judgment with regulation 19.

[13] Regulation 28 deals with the lapsing of a social grant and of relevance, sub-regulation (1)(a) reads:

“(1) An older person’s right, a disability grant, and a war veteran’s grant lapse-

- (a) On the last date of the last month in which beneficiary dies”.

Beneficiary is defined in section 1 of the Act and for the purpose of disability grant as a person who received social assistance in terms of section 9 of the Act.

[14] In the matter of Coughlan N.O v Road Accident Fund 2015 ZACC10 (20 August 2015) the Constitutional Court had an opportunity to deal with the question whether foster child grants are res inter alios act, that is, ‘a contract cannot adversely affects the rights of one who is not a party to the contract’ or ‘a matter between others is not our business’. The Constitutional Court also had the opportunity to deal with the deductibility of foster child grants from compensation for loss of support payable to foster children. In finding against the Road Accident Fund, the Constitutional Court came to the conclusion that foster child grants are not predicated on death of a parent and that foster child grants are not payable to the foster child but to the foster parent.

[15] The Constitutional Court in Coughlan’s case was not dealing with the questions raised in the present case, that is, whether disability grant is an income and if not, whether the plaintiff can claim damages for loss of support against the RAF despite the fact that disability grant is not an income. Therefore the enquiry in the present case is different to what the Constitutional Court was enjoined to deal with in the Coughlan case. But the principle laid down in Coughlan’s case is relevant and important to the present case. I deal later with the principle when I deal with specific issues hereunder.

PURPOSE OF DISABILITY GRANT

[16] The disability grant is provided in terms of section 9 read with regulation 3 to persons who by virtue of their physical or mental disability are unfit to obtain any service, employment or profession the means needed to enable them to provide maintenance for themselves.

[17] In paragraph 6.5 of the particulars of claim, inter alia, the cause of action is pleaded as follows:

“The deceased received a disability grant from which he maintained the plaintiff and the minor child, amounting to R520-00 per month at the time of his death”.

[18] That I think is where the plaintiff went wrong. Dealing with foster grant, the Constitutional Court in Coughlan’s supra, held:

“41. On the other hand, compensation by the RAF is calculated on the basis of monetary income and is aimed at placing a child in a position in which they would have been if the parent had not died. It primarily meant and calculated to compensate the child for loss related to his or her material needs. The other aspects that go hand in hand with the notion of care are not taken into account...”

[19] The underlining is my emphasis. Before I deal with the ‘monetary income’, I want to pay attention to what is primarily meant and calculated to be achieved through disability grant. The grant is not provided on monetary income consideration but rather on the physical and mental needs of a particular person. Therefore it cannot be taken into account for the purpose of claiming damages for loss of support, because the latter is purely founded on monetary income which the deceased did not have.

[20] Furthermore, Tshiqi AJ in Coughlan N.O stated:

“42. In Jooste v Botha[1] the court recognized that there are two discrete aspects of a parent-child relationship, an economic aspect of providing for the

child’s material needs, and an intangible aspect of providing for his or her psychological, emotional and developmental needs

43. The loss of provision for material needs can be adequately compensated in money, which has the effect of placing a child in the same position as he or she would have been, but for the delict. However, parental care cannot be compensated for by the payment of money nor can by the payment of money nor can it be readily met by institutional care”.

[21] It is very clear from the underlined quotation above that loss of support finds its support in the loss of provision for material needs which can adequately be compensated in money and which has the effect of placing a child in the same position as he or she would have been, but for the delict. In the same breath, the quotation above recognizes intangible aspect of providing for the child’s psychological, emotional and developmental needs, and institutional parental care. That is provided in the grants and for this purpose the Constitutional Court made a finding that for loss of support you cannot deduct the foster

care grant and or the child grant from the total amount of loss of support.

- [22] Put differently, in the present case the disability grant is not linked to the deceased's obligation to support his wife and child as pleaded in paragraph 6.5 of the particulars of claim quoted in paragraph 17 of this judgment. He was a person with disability as envisaged in section 9 and regulation 3. For the purpose of the disability grant, he must have been found to be unable to enter open labour market or to support himself in light of his skills and ability to work. He must have been found not unreasonably refusing to accept an employment which is within his or her capabilities and from which he could have generated income to provide fully or partially for his or her maintenance and that he did not without good reason, refuse to undergo the necessary medical or other treatment recommended by a medical officer (see regulation 3
- (c) (d) and (e)) quoted in paragraph 12 of this judgment. What is stated above is no replacement for income. In other words, disability grant is not a replacement for income or loss thereof. The word 'income' is defined in the Shorter Oxford English Dictionary as "the amount of money or other assets received or to be received from employment, business or investment, etc, especially periodically or in the course of a year".

- [23] The Constitutional Court in Coughlan's *supra* and under the heading 'a foster child grant is not paid to the child but to the foster parent' with approval referred to the case of *Makhubela v Road Accident Fund* [2009] ZAGPJHC 18, 2010 (1) SA 29 (Makhuvela) at paragraph 9, wherein the High Court held:

"A foster child grant may obviously be used to support the child but its primary purpose is the realization of the constitutional rights of the child through the intervention of the foster parent. It is given to the foster parent who may spend the whole or part of it on the foster child. There may well be some or other connection between their appointment and the death of the child's father. That is not decisive of the case. The grant is payable to foster parent and not to the child".

- [24] This statement must find application in the present case. The disability grant was paid to the deceased because of his physical and or mental disability which rendered him unemployable and had no legal obligation to maintain his family out of disability grant particularly taking into account the amount which was payable to him (the means test). The fact that he could have used the money for himself and his family is not decisive of the case.
- [25] The Constitutional Court in paragraph 46 of its judgment in Coughlan's case in my view, put the matter to rest, including the present matter when it held:

"Payment for loss of support on the other hand is payable to the child in order to compensate the child for the patrimonial loss suffered by the loss of the monetary contribution that the deceased parent would have made towards the support of the child. It forms part of the patrimony of the child. It amounts to an income replacement resulting from the death of the parent as a result of a motor vehicle accident. There is no conceivable basis on which to deduct payments made to foster parents (that the child has no claim to) from the child's award for compensation for loss of support".

[26] The deceased had no income and therefore there can be no 'an income replacement resulting from his death as a result of a motor vehicle accident'. Just to put the issue to rest 'income' in regulation 1 dealing with 'definitions' means 'income' as contemplated in regulation 19. Regulation 19 deals with 'determination of means' and in terms of sub-regulation

(1) (k) 'income' means 'any income or financial support derived from a South African or international organization, excluding social assistance.' 'Social assistance' in terms of regulation 1 means 'social assistance' as defined in section 1 of the Act. In section 1 'social assistance' means 'social grant including social relief of distress' and 'social grant' in terms of section 1 means a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, or a war veteran's grant and a grant-in-aid. It is therefore clear that 'a disability grant' is not an 'income'. I find that the disability grant cannot be taken into consideration for the purpose of calculation of the loss of support claim. Put differently, the disability grant is not an income for the purpose of suing for loss of support.

[26] Consequently an order is hereby made as follows:

26.1 It is hereby declared that disability grant is not an income for purpose of suing for loss of support;

26.2 Each party to pay his or her own costs.

M F LEGODI

JUDGE OF THE HIGH COURT

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[1] 2000 (2) SA 199 (T), 2000 (2) BCLR 187 (T) at 201 E-F

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