

SOUTH AFRICA / JUDGMENT

Nzame and Another v Minister of Safety and Security (9689/94) [2008] ZAKZHC 91 (25 September 2008) [2008] ZAKZHC 91

COURT

High Courts - Kwazulu Natal

BEFORE

Theron

CASE / FILE NUMBER

9689/94

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IN THE HIGH COURT OF SOUTH AFRICA REPORTABLE
DURBAN AND COAST LOCAL DIVISION
CASE
NO: 9689/94

In the matter between:	LINDIWE NZAME
	First
	Plaintiff
	BUZIWE
	GLADYS NYANDA
	Second Plaintiff
	and
	MINISTER
	OF SAFETY AND SECURITY
	Defendant

JUDGMENT

Date heard: 4 June 2008

Date delivered: 25 September 2008

THERON J

- [1] On 30 June 1994, members of the South African Police Service, acting within the course and scope of their employment with the defendant, unlawfully shot and killed Siyabonga Collin Nyanda ('Nyanda').

- [2] The first plaintiff is Nyanda's daughter and the second plaintiff is his mother. In this action the plaintiffs are claiming damages for loss of support arising from Nyanda's death. The defendant has conceded liability in respect of the first plaintiff. The issue for this court to determine is whether the second plaintiff is indigent and entitled to claim for loss of support.
- [3] The second plaintiff testified that she resided in Gamalakhe Township outside Port Shepstone with her daughter, Sibusisiwe, and three teenage grandchildren, including the first plaintiff. Sibusisiwe was not employed. The second plaintiff's daughter Yoliswa, abandoned her two teenage children in the second plaintiff's care several years ago and was living in Pretoria.
- [4] The second plaintiff's evidence was that she received an old age pension and various support payments in respect of her grandchildren. She also supplemented her income by selling sweets, chips and other foodstuffs. She said that her income was woefully inadequate to support herself, her daughter and her grandchildren. She testified that the family also received and were dependent on food and clothing handouts from the local church. It was her evidence that the clinic supplied them with 'porridge'.

The second plaintiff said she was not in a position to pay for municipal rates, and for services such as water and sanitation, which were substantially in arrears. It was apparent from the relevant documentation and her evidence that the local municipality regarded her as indigent and did not proceed against her for recovery of these monies. It was also her testimony that she paid the first plaintiff's school fees as and when she could. It was her evidence that they used a card system to purchase electricity and she could only afford to pay for electricity for lighting purposes. The family's cooking was done over a fire. The second plaintiff owed a debt to the Hibiscus Hospital in respect of medical treatment which she had received and she was repaying this debt at the rate of R50 per month. The second plaintiff testified that the roof of her home had been damaged in a storm several years ago and leaked extensively when it rained. During extremely wet periods the house was very damp and the children's health would suffer as a consequence. It was her evidence that she could not afford to repair the roof. She said that the furniture in the house was old and dilapidated and had not been replaced for approximately twenty years. The second plaintiff testified that Nyanda had, prior to his death, been employed as a taxi driver and had earned approximately R360 per week. She said he had contributed financially to her upkeep and support as well as that of the rest of the family.

- [5] In order to be successful in a claim for loss of support as a result of the wrongful death of a child, parents must show that they are indigent and unable to support themselves and that the deceased child did and/or would have been able to provide the requisite support.¹ In an indigency action, parents must not only prove that the deceased child contributed to their support, but also that there was a legal duty on the deceased to contribute because their circumstances were such that they needed the contribution.² Whether parents are indigent is a question of fact depending on the circumstances of each case.³ Indigency is a relative concept linked, inter alia, to the claimant's 'station in life' and 'dignitas'. A claimant must

establish that he or she is in want of the reasonable 'necessities' of life.⁴ The necessities of life is limited to food, clothing, shelter and medicine and care in times of ill health.⁵

- [6] In *Smith v Mutual & Federal Insurance Company Ltd*,⁶ the court held that a stringent criterion of 'extreme' need had to be established in order to prove indigency. The court differentiated between being poor and having few or no possessions, and being indigent in the sense of being in extreme need or want. Gihwala AJ stated that it was not sufficient for a claimant to prove that he or she lived on very little or nothing – it must be established that he or she has an extreme need or want for the basic necessities of life.⁷ In my view the test of 'extreme' need or want enunciated in *Smith* is not supported by our common law. The common-law duty of support is a flexible concept that has been developed and extended over time by the courts to cover a wide range of relationships. The test in *Smith* is more onerous than that set out in earlier decisions such as *Oosthuizen*, *Valkenborn*⁸ and *Wigham*, where the courts held that an applicant parent must show that he or she is in need or want of the necessities of life.⁹ The test of 'extreme' need or want is also out of kilter with the right to adequate shelter, nutrition and healthcare enshrined in the Constitution. Sections 26 and 27 of the Constitution support the view that while the parent's position in life is clearly a relevant factor, the prevailing mores of society demand that there is a certain minimum standard below which human beings should not be allowed to live. In my view, persons who fall short of such minimum standard are entitled to claim support, provided the remaining requirements are satisfied.
- [7] I support the reasoning of Jafta AJ (as he then was) in *Sokhewu v Minister of Police*,¹⁰ that the law does not require parents to be completely destitute in the sense of not having any income, but rather they need to show that their income is inadequate to support them, and that a contribution from their child is required to purchase the basic necessities of life, as opposed to luxuries. The deciding factor in a claim for loss of support is whether the parents were dependent on their child for the necessities of life, and that in turn will depend on the parents' circumstances and station in life.¹¹
- [8] The contention advanced on behalf of the defendant that parents are only entitled to claim the barest minimum required to keep them alive, cannot be supported. The cross-examination of the second plaintiff was aimed at establishing that she was 'not

emaciated', 'in good nutritional condition', 'not malnourished' and not living in 'abject poverty'.

The cross-examination of the second plaintiff, on this aspect, was as follows:

'Cross examination by Mr Nxusani. Now madam, I note from your physical condition that you are not emaciated, you know, thin, you are in seemingly good health? --- I have got a spine problem, I can't walk or stand straight, I have got a problem with my heart and I have also got asthma.

I am sorry to hear that. What I mean is apart from those health problems that you have, you are in otherwise good nutritional

condition. ---

Theron J I don't understand the question, Mr Nxusani.

Mr Nxusani You are in a good nutritional state. ---

Mr Schumann M'Lady, I am not sure if the witness can comment on that, she is not a physician.

Mr Nxusani Well, perhaps let me put it this way. You are not somebody who is malnourished.

--- Of course, there is the porridge that is being supplied by the clinic and they say it assists the body.' (Emphasis added.)

[9] It is so that where a party is at a considerable disadvantage in challenging any of the evidence presented, the court, in arriving at its conclusion, must have regard to such disadvantage.¹² The fact that evidence is uncontradicted in the context of a dependant's claim does not mean that the evidence is therefore

true. If the story told by the second plaintiff is improbable, the court is entitled to arrive at the conclusion that the onus resting on her has not been discharged.¹³ The second plaintiff presented as an honest witness. Her evidence was clear and straight forward. There is no reason for this court to reject her testimony as improbable. It is noteworthy that it was never put to her that her version was untrue or that in fact she was able to adequately feed, clothe and shelter herself and her family on the income available.

[10] It is trite that a parent remains under an obligation to support a child even when the child reaches the age of majority, although the nature of support is limited to necessities.¹⁴ The parent's duty to maintain a child ceases when the child's income can be applied to their own maintenance and is self supporting. A child's grandparents are liable to support that child if its parents are unable to do so. Where a child is born out of wedlock the duty of support falls upon the maternal grandparents only.¹⁵ Accordingly, the second plaintiff's legal duty to support her daughter and grandchildren must be considered as a charge against her income for the purpose of determining whether or not she is indigent.

[11] In my view the evidence established that the second plaintiff is indigent – her income is insufficient to cover the reasonable necessities of life. She had been receiving financial assistance from her son prior to his death and she has been deprived of such support by reason of his death. In the circumstances, the second plaintiff is entitled to compensation for loss of support due to the wrongful killing of her son.

[12] The following order is made:

12.1 The defendant is liable to compensate the plaintiffs for such damages they are able to prove.

12.2 The defendant is directed to pay the costs incurred in respect of the determination of the issue of indigency.

First and Second Plaintiffs' counsel: Mr P Schumann

First and Second Plaintiffs' attorneys: Viren Singh & Co

Defendant's counsel: Mr J Nxusani

with Mr V Sitaram

Defendant's attorneys: State Attorney, Durban

1 Oosthuizen v Stanley 1938 AD 322 at 327-328.

2 Wigham v British Traders Insurance Company Limited 1963 (3) SA 151 (W) at 153E-F.

3 Oosthuizen, supra at 328.

4 Van Vuuren v Sam 1972 (2) SA 633 (AD) at 643E-F.

5 Ibid, at 642F. Oosthuizen, supra.

6 1998 (4) SA 626 (C) at 631H-J.

7 Ibid, at 632D-E.

8 Valkenborn v Valkenborn 1946 NPD 76.

9 Fosi v Road Accident Fund [2007] ZAWCHC 8; 2008 (3) SA 560 (C).

10 TkH case No. 293/94, 20 December 2001; [2002] JOL 9424 (Tk).

11 Fosi v Road Accident Fund [2007] ZAWCHC 8; 2008 (3) SA 560 (C).

12 Smith v Mutual and Federal Insurance Company Limited 1998 (4) SA 626 (C) at 630A.

13 Siffman v Kriel 1909 TS 538 at 543.

14 B v B 1997 (4) SA 1018 (SE) at 1021.

15 See Van Heerden et al, Boberg's Law of Persons and the Family (1999) 2nd Edition at 252 -253 and the cases cited in footnotes 103 and 104.

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