

SOUTH AFRICA / JUDGMENT

Sizani v Road Accident Fund (1895/2016) [2020] ZAECMHC 4 (13 February 2020)

[2020] ZAECMHC 4**COURT**

Eastern Cape High Court, Mthatha

BEFORE

M Gwala

CASE / FILE NUMBER

1895/2016

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**IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION-MTHATHA)
CASE NO. 1895/2016
In**

the matter between:

LULEKA
NOBANTU SIZANI
Plaintiff
And
ROAD
ACCIDENT FUND
Defendant

JUDGMENT**M GWALA AJ**

- [1] The plaintiff, a 61-year-old female, residing at Lahlangubo Administrative Area in Engcobo, instituted an action against the defendant claiming an amount of R 1, 355, 400.00, for loss of support arising from the untimely death of her son who died in a motor vehicle collision on 27 July 2014. The defendant is resisting the claim. At the commencement of the trial, I was informed by both counsel that the issue of negligence had previously been resolved in favour of the plaintiff. In his opening address counsel for the plaintiff informed me that the issue for determination was whether the plaintiff was indigent and, if so, the quantum of damages to be awarded.

- [2] The plaintiff was the only witness to testify in support of her claim. The defendant on the other hand did not call any witnesses. The plaintiff's evidence was that she stays in a homestead with three separate structures. One structure has four rooms, the other has five rooms and the other is a rondavel. She lives there together with her 66-year-old husband and a helper.
- [3] Both her husband and herself are recipients of government social grant. They each receive a sum of R 1 700.00 per month. The plaintiff was never formally employed. Her husband was a member of the Defence Force but he resigned in 1997 and has not worked since. After her husband's resignation from the Defence Force, she started a business as a hawker, selling chicks and vegetables. She was able to make a living and continued to maintain the family from the proceeds of this business.
- [4] At some point in time and from 1997 to 2004, she was involved in a school nutrition program as an independent contractor. From that program she earned between R10 000.00 to R12 000.00 per month. The school nutrition program collapsed in 2004 and since then she focused on her business as a hawker.
- [5] She had five children including the deceased. The surviving children have all attained the age of maturity, the last born, having been born in 1998, is still attending school.
- [6] As an informal trader, her income would differ from month to month. At most she would make a gross income in the sum of approximately R4 000.00 per a month out of sales of chicks and approximately R500.00 from vegetables sales.
- [7] Over and above the aforesaid income the deceased, who was a medical practitioner from 2011 until he met his untimely death in a car accident, was supporting her. He provided her with money monthly for groceries, medication and also assisted her towards payment of school fees for the last born. The deceased renovated the structures at the homestead from mud to cement bricks.
- [8] When the deceased was working at Qwaqwa in the Free State, he would deposit the money into her Capitec Bank account. Prior to his death the deceased relocated to and worked at Engcobo. During that time, he was delivering the money to her by hand. He was giving her a some of R3 500.00 monthly. The amount would increase to R4 000.00 once a quarter when she had to pay school fees for her last born.
- [9] On 27 July 2014, the deceased met his untimely death. At that time the plaintiff was still actively involved in her business as a hawker. She has since stopped her business for reasons unrelated to the accident but due to growing health concerns she experiences.

- [10] The joint family income is R3 400.00 (including that of her husband). The household monthly expenses are in the sum of R3 000. Be that as it may, her husband does not contribute to the household expenses. She is the only one taking responsibility for household expenses. The other self-supporting children do intermittently buy groceries for her.

IS THE PLAINTIFF INDIGENT?

- [11] Indigence connotes lack of means either to maintain oneself or to meet daily or monthly obligations. The liability of children to maintain their parents, if indigent, is beyond question. Maintenance in its nature is reciprocal and as such children, when they are able to do so, are obliged to provide maintenance to their parents who are indigent. This is also consonant with the values of ubuntu.[1] The support that the parent may receive 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.[2]

- [12] The issue of whether a party is indigent and whether there is a duty on a child to support his or her parents has been considered and discussed in a number of judgments over the years. In SMITH[3] the court formulated the test for indigency as follows:

“To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Accordingly, when the plaintiff pleads indigence, it is not sufficient to show that the plaintiff lives on very little or nothing (vide World Book Dictionary). The plaintiff must prove something more. The plaintiff should prove that there is an extreme need or want for the basic necessities of life.”

- [13] The test for indigence as formulated in Smith supra, namely, that the plaintiff should prove that there is an extreme need or want for the basic necessities of life has not been followed in many cases. Even before that judgment, courts saw things differently. For instance, in Wigham[4] the court held that:

“... [i]n order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received a contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed...The aim and object is to place the dependents in as good as position as regards maintenance as they would have been if the deceased had not been killed, to which end material losses as well as benefits and other prospects must be considered.”

- [14] Not in a very distant past, the court in Fosi[5] did not follow the test as set out in Smith. In that matter the court held that the test as formulated in Smith was too stringent and onerous when compared to pronouncements of courts in earlier decisions. It preferred the test per Wigham.

- [15] Indeed, the test as formulated in Wigham is preferable. I cannot image how one would prove extreme need as propounded in Smith. The need, let alone extreme need, would, in any event, vary from one person to the other as people's stations in life differ. To prove extreme need would require one to prove more than the loss itself. Its effect would be to deprive a right of recourse to those whose standard of living was improved by the contributions voluntarily made by their children.
- [16] In my view, a party claiming loss of support based on indigence is required to prove that her income is insufficient to meet her basic needs, that she was dependent on the support offered by the deceased to meet these needs, that the deceased was able to and indeed contributed towards her maintenance and that the contributions were necessary to cover her basic necessities of life and that the contributions have been lost as a result of the conduct of the wrongdoer.
- [17] In a nutshell, the inquiry should not be whether there is extreme need. The point of focus should be on the individual's station in life as a result of the contributions received from her child and what she has lost. Once the child assumes the responsibility to support the parent, the latter has a right to claim those contributions for basic necessities of life should they be lost through the conduct of the wrongdoer.
- [18] The basic necessities of life are those necessities that would reasonably enable a person to maintain her human dignity which include the provision of food, water, shelter, clothing and healthcare. With the changes in society these would also include things like the provision of electricity, transport, sanitation and, where applicable, education. The plaintiff must prove that she received one or some of these basic necessities from the contributions made by the deceased.
- [19] These however should be within reason and not be required luxuriously. They should be necessary and be to the extent that the deceased was able to provide. The intention is not to improve but to maintain the status quo ante.
- [20] In Jacobs[6] 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 and what constitutes necessities will in turn depend on the parents' station in life.[7] The court further held that:
- "[22] 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."

[21] Sutherland J expounded further on the issue of duty of support in *J T v Road Accident Fund*[8] as follows:

*"[26] 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 of 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. This norm is not parochial but rather is likely to be universal, it certainly is consonant both with norms derived from the Roman – Dutch tradition, as alluded to by Cachalia JA in *Paixao v RAF* supra and, no less, from norms derived from African tradition, not least of all as exemplified by the spirit of Ubuntu, as mentioned by Dlodlo J in *Fosi v RAF* supra."*

[22] In casu the plaintiff has shown that the deceased provided support for her basic necessities of life in the form of groceries (food) and

healthcare. There is no doubt that the plaintiff lost the contributions she used to receive from the deceased. The deceased had

voluntarily assumed the responsibility to contribute towards the upkeep and sustenance of the plaintiff. The plaintiff did not have to enforce her entitlement for these contributions against the deceased. Instead the deceased volunteered them and, on that basis, she acquired a right to receive those contributions. Consequently, any person who unlawfully deprives her of that right ought to be held liable to compensate.

[23] The defendant was unable to challenge the plaintiff's evidence that the deceased contributed financially to her life. The defendant's case was not that the deceased did not contribute or that the contributions were not necessary or needed. The defendant's cross examination seems to me to have been aimed at showing, and this was pursued in argument, that other self-supporting children of the plaintiff were supporting her and that this defeated a claim for indigency. I do not agree. Even if the plaintiff's surviving children were able to contribute to her maintenance, this would not be fatal to the plaintiff's case because the liability of other siblings is not relevant to a claim against one of them.[9]

[24] In *Oosthuizen v Stanley*[10] TINDALL J., with regard to an argument that there were two sons of the plaintiff who were earning money at the date of the death of the son who was killed, said that -

"The ability of the two sons mentioned to contribute may be a factor in assessing the amount of damages caused by the death of Stephanus but it does not show that Stephanus was not under a legal duty to contribute anything..."

- [25] It is true that the evidence was that the other children do intermittently buy her groceries when they visit. That, however, does not take away the right the plaintiff had acquired upon the deceased assuming the responsibility to maintain her.
- [26] In Fosi[11] the court took into account that the younger sibling of the deceased had become employed and did at times give the plaintiff in that matter some money. The court held that the liability of other siblings is not relevant to a claim against one of them. And that even if the plaintiff managed to get some income from her younger daughter that alone would not be fatal to the plaintiff's case.
- [27] Certainly, the contributions went a long way to assist the plaintiff and the family upkeep. The evidence was that she used the money to buy groceries and medication. The groceries and healthcare fit in the definition of necessities of life. The deceased also renovated the structures in the homestead so that the plaintiff and the entire family could live comfortably and provided her with human dignity under a decent shelter. This too fits in the definition of basic necessity of life.
- [28] The groceries as well as the renovations to the houses in the homestead were not to the benefit of the plaintiff only. Every member of the family invariably benefited including, in particular, her husband who had his home refurbished and improved. He benefited too in the contributions towards groceries. The benefits enjoyed by other family members are relevant when computing the damages. Although the money was deposited in the name of the plaintiff, it was used for the benefit of other family members including their last born who was still dependent on them.
- [29] The need to maintain the homestead in a state which is habitable with minimum dilapidation of the buildings cannot be overemphasised. The joint income of the deceased's parent, taking into account the high cost of building materials these days, simply cannot measure up. The homestead described above is bound to be expensive to maintain. The contributions that were made by the deceased contributed significantly towards maintaining its status.
- [30] In the premises, I find that the plaintiff has established that she was an indigent person dependent on the deceased for such necessities of life such as groceries, healthcare and shelter. I find further that the deceased, having voluntarily assumed the duty to maintain his mother, owed her a duty of support. She lost these contributions and could no longer maintain the status she had enjoyed prior to the untimely death of her son. Accordingly, the defendant is liable to compensate the plaintiff for the loss incurred.

HAS THE PLAINTIFF QUANTIFIED HER LOSS, IF SO, TO WHAT EXTENT?

- [31] Having found that the defendant is liable to compensate the plaintiff, I must now examine the extent of the loss she suffered. Although the matter came before me for determination of quantum as well, the plaintiff has done very little to assist me in this regard.

- [32] For a claim of over R1million one would expect that there would be actuarial evidence to assist the court in the computation of the loss. The plaintiff, though, omitted to lead such evidence. I was informed from the bar that plaintiff's legal representatives were in possession of the actuarial report. That notwithstanding it was not used. No cogent reasons were advanced for not handing same in court.
- [33] Counsel for the plaintiff argued that there was an agreement between the parties that the actuarial calculations were not in dispute. This was disputed by defendant's counsel. I am inclined to believe defendant's counsel for at least two reasons. First, in his opening address counsel for the plaintiff stated that quantum was an issue to be determined by court. This would entail the use of actuarial evidence. Second, if they were not dispute as contended by plaintiff's counsel, why was the actuarial report not handed up.
- [34] Furthermore during cross-examination the plaintiff stated that the deceased would deposit money into her Capitec Bank account and that she provided the bank statements to her legal representatives, axiomatically, to prove that deposits were indeed made. However, these were not discovered in terms of Rule 35 and no evidence whatsoever was presented concerning them.
- [35] During argument I enquired from counsel for the defendant whether defendant would object if the bank statements were submitted to court at that late stage. He stated that the defendant would not object, this being in the interest of justice. He informed me that as a matter of fact during adjournment on the first day of the trial, he took an initiative to request from the plaintiff's legal representatives that they show him the bank statements since the plaintiff had mentioned them. This request was not heeded to.
- [36] In the end, the bank statements were not submitted to the court despite invitation and consent by the defendant. No explanation was given for not making them available to the court.
- [37] In matters of this nature it is always difficult, as has been the case here, for the defendant to counter the evidence of the plaintiff because such evidence falls purely within the peculiar knowledge of the plaintiff. In view of this difficulty, it is incumbent upon the plaintiff to place all available evidence before the court to assess it accordingly. This is just and fair to all the parties and would assist the court in its analysis in the end to award a compensation, if it so decides. This objective may not be achieved if a party elects not to divulge evidence at its disposal even worse when it relies on it.
- [38] I am constrained to mention that it is the duty of Counsel to do the best he/she can to assist the court to arrive at a just decision. Counsel is duty bound to disclose all the evidence available which will assist the court to come to a just decision regardless of whether it is against his client. The duty to court overrides the duty to client.[12]

[39] Be that as it may, failure to lead such evidence including evidence on actuarial calculations does not necessarily mean that there was nothing upon which this court could base its assessment of damages. The court has a duty to do its best to quantify the claim the best it can on the available evidence and make an award so as to reach finality in the matter. In Jowell[13] the Supreme Court of Appeal said once the damage or loss is established a court will do its best to quantify that loss even if

this involves a degree of guesswork.

[40] It now remains to consider the amount of evidence the plaintiff placed before the court to estimate the loss she suffered. The uncontroverted evidence was that the deceased would give the plaintiff a sum of R3 500.00 monthly. For some time, the money was deposited into her a bank account. Later it was paid to her by hand.

[41] As pointed out above the contributions made by the deceased were beneficial to both the plaintiff and her husband. The latter has not claimed. In my view the manner to determine a fair award is to divide the said amount between the plaintiff and her husband and make an appropriate award due to the plaintiff subject to contingency deductions to provide for imponderables in life both in the past and in the future of which are many.

[42] In the absence of actuarial evidence there is no information relating to the plaintiff's life expectancy. This is a relevant consideration in awarding any form of future loss. According to the report by the Statistics South Africa, as at July 2019, the life expectance of females was 67.7. Although this is not a conclusive guideline it is the realistic basis upon which plaintiff's loss can be calculated otherwise there will be no limit to the claim. The plaintiff is currently 61 years old. Bearing in mind the above statistics the future loss of damages will be for the next six years.

[43] As for the past lost loss, regard must be had to the fact that the deceased met his untimely death in July 2014. It has been approximately five years since then.

[44] Again, in the absence of the actuarial evidence I will use the flat rate of R 1700.00 being half portion (50%) of R 3500.00 which the plaintiff used to receive for both past and future loss. For the past loss I will apply 10% contingency deductions and 15% contingency deductions for the future as set out hereunder. It is trite that contingency deduction should be applied in the circumstances of this matter. All of the above are used merely as a guide to reach some amount to award as compensation. Accordingly, the computation of the value of the damages incurred by the plaintiff is illustrated as follows:

Past loss [R 1700 x12 x5.6 years] R

114, 240.00

Less 10% contingency deduction R

102, 816.00

Future loss [R 1700 x 12 x 6 years] R

122, 400.00

Less 15% contingency deduction

R 104, 040.00

Total Loss

R 206,856.00

[45] Consequently, I find that the plaintiff is indigent. She was supported by the deceased during his life time. She lost the support consequent to the untimely death of the deceased. I intend to award a sum of R 206, 856.00 in favour of the plaintiff. Axiomatically, the said amount falls within the jurisdiction of the magistrates' court. Accordingly, the costs shall be awarded in a scale applicable in the magistrates' court.

[46] In the result I make an order in the following terms:

[46.1] The plaintiff is declared indigent person;

[46.2] The defendant is ordered to compensate the plaintiff in the sum of R 206, 856.00;

[46.3] Costs are awarded in favour of the plaintiff on the scale applicable in the magistrate's court.

M GWALA,

JUDGE OF THE HIGH COURT (ACTING),

Counsel for the Plaintiff: Adv SY Malunga

Counsel for the Defendant: Adv BN Mbiko

Date of Hearing: 29

November & 13 December 2019

Date of Judgment: 13

February 2020

[1] In *AB v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) para 110 the SCA stated thus: "...[t]he concept of ubuntu emphasises the communal nature of society and carries in it the ideas of humaneness, social justice and fairness and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."

[2] See *Oosthuizen v Stanley* 1938 AD 322 at 327 to 328.

[3] *Smith vs Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C) at 632 D-E

- [4] Wigham v British Traders Insurance Co Ltd 1963 (3) SA 151 (W)
- [5] Fosi v Road Accident Fund and Another 2008 (3) SA 560 (C)
- [6] Jacobs v Road Accident Fund 2010 (3) SA 263 (SE)
- [7] Jacobs footnote 6 supra Para 20
- [8] 2015
- (1) SA 609 (GJ) at para [26]
- [9] Khan v Padayachy 1971 (3) SA 877 (W) at 880E
- [10] Oosthuizen footnote 1 supra at p. 331
- [11] Fosi, footnote 4 supra para 15. The court referred also to Khan and Another v Padayachy 1971 (3) SA 877 (W).
- [12] LAWSA 1st Reissue, Vol. 14 para 277.
- [13] Jowell vs Bramwell-Jones and Others 2000 (3) SA 274 (SCA) para 22
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