

SOUTH AFRICA / JUDGMENT

V d W v Road Accident Fund (55863/2015) [2015] ZAGPPHC 1001 (2 December 2015)

[2015] ZAGPPHC 1001

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

55863/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 55863/2014

DATE:

2/12/2015

In

the matter

between:

E.

J. T. V. D. W.

PLAINTIFF

and

THE

ROAD ACCIDENT

FUND

DEFENDANT

JUDGMENT

TLHAPI J

[1] The Plaintiff ("Mrs V. D. W.) instituted action against the Defendant for the loss of support occasioned by the death of her husband who died in a motor collision on 7 July 2013. The claim was instituted in her personal capacity as spouse of the deceased and on behalf of the following minor children

- JP V. D. W. born on [.....] 2008 and born of her marriage to the deceased;
- A. S. born on [.....]1997 and, born of a previous marriage; and
- K. S. born on [.....] 1999 and born, of a previous marriage;

[2] Mrs V. D. W. and the actuary testified. The defendant did not call any witnesses. Mrs V. D. W. was divorced from her husband during 2002 in Kimberley. At divorce Mr Swart was orD.ed to pay maintenance for Allan and Karen and to provide for medical aid and school fees. Mr Swart failed to pay and she instituted proceedings against him and he remained in contempt of both Court orD.s.

Mrs V. D. W. met the deceased when Allan and Karen were five and three years old. They got married on 26 November 2005. The deceased was employed as a senior shift foreman at Taung Mining. He was thirty years old when he died. The deceased took over responsibility for the maintenance of her children till his death. The deceased had also intended adopting the minor children and before his death had begun making enquiries on the process of adoption. The entire family struggled with the loss of her husband and Karen went through depression. An attempt by her son Allan to have contact his father after the deceased's death was met with rejection and Mr Swart chased Allan away.

[3] Mr Munro was called to testify because the defendant was not prepared to admit the contents of the actuarial report The issues during his cross examination revolved around whether he had sight of deceased's pay slip and whether he had information on how the industrial psychologist arrived at the probable minimum figures of R70 000.00 and

R15

000. 00 used to calculate the minimum amount the deceased's basic salary would have increased as a mine overseer. Mr Munro admitted

that he did not do any calculations which excluded Allan and Karen.

[4] Having granted an orD. dealing with the claims of Mrs V. D. W. and that of her minor son born of the marriage with the deceased, what remained outstanding was the determination of liability of the Defendant for loss of support of the minor children Allen and Karen and the scale of costs to be awarded against the defendant. The uncontested evidence relating to Allen and Karen was that:

4.1 The deceased took over their maintenance when he got involved in a relationship with their mother and that this continued and was more manifest after marriage where the deceased took over the responsibility of their overall maintenance, for example, food, school fees and school uniforms

4.2 There were attempts by Mrs V. D. W. to secure maintenance from the biological father of the minor children and that he had failed to pay maintenance; There was no relationship between these children and their father;

4.3 Prior to his death the deceased intended initiating a legal process to adopt them;

[5] The defendant's plea relating to the loss of support claim in respect of Mrs V. D. W., and her children was a bare denial and at the pre-trial on the same issue and that of quantum as articulated in paragraphs 7 and 8 the defendant indicated that they would revert by 31 March 2015. There was further indication that the Defendant might call witnesses for trial. The defendant conceded liability to compensate in full on 14 May 2014. No expert reports were filed by the defendant. It was recorded and agreed in the pre-trial minute that if no reasons were given why the content of the expert report were not denied by close of business on 12 August 2015 "the expert reports of the Plaintiff would be regarded as admitted". At trial there was indication from the Defendant that the claims regarding Allan and Karen were being disputed despite no plea having

been filed in this regard and despite the agreement the trial that was allocated to be heard and finalized on 18 August 2015 and could have been finalized on this day had it not been for the defendant's attitude in disputing the content of the reports at the last minute. Both counsel were requested by the court to

file heads of argument with regard to the claims of Allan and Karen and on the issue of costs.

[6] The Defendant's objection to liability was articulated for the first time in the heads of argument and was premised on the following:

- Lack of evidence to prove that the deceased contractually bound himself or accepted the legal duty to be liable for the maintenance of the two minor children; that if the agreement did exist then there had to be proof on a balance of probabilities that 'the duty to support was worthy of protection by the law';
- Lack of evidence that the community at large accepted the two minor children to be the children of the deceased and part of the family relationship;

- There was no evidence that the deceased included the two minor children as beneficiaries in his Last Will and Testament;
 - should it be found that the Defendant was liable no evidence was put up from which a calculation could be made to determine the extent of liability or actual pecuniary loss, which, in this case should be confined to such an amount the biological father was not able to provide;
- [7] In the unreported judgment of this Court in the matter of Neliswa Sigwebo v The Road Accident Fund case number 37019/2014 (8 July 2015) Lephoko AJ at paragraphs 5 and 29 stated the following:

Paragraph 5

" The pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties. To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is to limit issues and curtail the scope of litigation paragraph 29

" The defendant deemed it not necessary to call its own experts. What the defendant seeks to do is to criticize the evidence of the plaintiff's experts without presenting its own evidence. Counsel for the defendant tried his best to discredit the expert evidence presented on behalf of the plaintiff. His argument was not supported by any expert evidence or opinion. Good argument without a factual basis may amount to mere conjecture and does not assist the court in unravelling the disputed issues

- [8] The uncontested evidence was that the deceased had maintained Allan and Karen and provided for their needs especially from the time of his marriage to their mother. He was contemplating adoption. It is expected by society that when a man or woman enter a marriage where there are minors from a previous marriage, that such spouse would assume some responsibilities of maintenance and of care over those minor children in the common home. It is to be appreciated if the biological or absent parent contributes financially to such maintenance either voluntarily or by way of a court order. Where there was no contribution from the absent parent or where such parent had abdicated his or her responsibilities, and someone else had taken over such responsibility of maintenance as happened in this case, a finding can be made that by conduct the spouse (deceased in this case) had accepted responsibility to maintain. It would be impossible to measure the value of such contribution because it does not come in the form of a determined amount. Each case has to be determined according to its own circumstances.

- [9] In *Paixao and Another v Road Accident Fund* 2012 (6) SA 377 (SCA) at para 14 it was recognized that a claim for loss of support was also available against third parties where the deceased 'was accustomed to support from a sense of duty'. In *JT v RAF* 2015 (1) SA 609 (GJ) a claim against the Fund was successful where an adoptive parent sued as a result of the death of the natural father who had assumed the obligation to maintain his child

during his lifetime despite the adoption. In this instance the biological father made no contribution towards their maintenance and Mrs V. D. W.'s efforts to claim maintenance did not yield any results and when she got married the deceased assumed the responsibility to maintain the children from a previous marriage. It is a duty he assumed for the entire period before he met his untimely death. The minor children cannot be punished by denying them the right to be maintained by a person (deceased) whom they regarded as a father and provided. In these circumstances the right they enjoyed is one worthy of protection. This does not mean that the biological father is absolved from a duty to maintain his minor children. In the absence of any information relating to his present financial position, I would order that the defendant pay 70% of the claim as calculated as loss of support in respect of Allan and Karen being on the amounts R265 000.00 and R383 600.00, respectively.

[10] It was submitted for the plaintiff that a punitive costs order be made against the defendant because unnecessary costs were incurred as a result of the defendant disputing the actuarial report and the claims of Allen and Karen at the last minute. Except for a bare denial in the pleadings the defendant had not sought to place any expert reports to dispute the calculations of the actuary. I must first state my displeasure at the defendant who insists upon an audience before the court when it knows that it has not placed any evidence before the court in dispute of any claim. The trial which could have been finalized on 18 August

2015 was unnecessarily delayed because the actuary, had to be flown in from Cape Town and after he testified, cross examination was reduced to less than five questions which did not take the matter any further. The conduct of the defendant regarding this matter is dealt within paragraph 5 above. A punitive costs order should not be made lightly. In *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) the court dealt at length with the conduct of the Fund and its officials, where three days of costs were incurred in a matter which at the end 'remained essentially uncontested'. Before awarding punitive costs explanations were sought from the claims handlers and from the newly appointed attorneys. In my view and in this instance it would have been appropriate for the court to have called for an explanation from the claims handler, which was not done. I shall therefore not grant a punitive costs order.

[11] In the result the following order is given:

1. The Defendant shall pay to the Plaintiff on behalf of A. S. an amount of R 185 500 00 (one hundred and eighty five thousand rand) and on behalf of

K. S. an amount of R 268 520.00 (two hundred and sixty eight thousand five hundred and twenty rand) within 14 days from this Order, by way of electronic transfer to the trust account of the attorneys of the plaintiff:

Bank: FIRST NATIONAL BANK

Account Name: ADENDORFF INC

Branch Name: ADD. LEY STREET

Branch Code: 201-409

Account Number: [.....]

2. No punitive costs are awarded against the defendant regarding the reserved judgment and the costs of the entire trial shall remain as stipulated in the interim order of 19 August 2015.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

: 19 AUGUST 2015

JUDGMENT

RESERVED ON : 19 AUGUST 2015

ATTORNEYS FOR THE PLAINTIFF : ADENDORFF ATT.

C/O SAVAGE JOOSTE &

ADAMS INC.

ATTORNEYS FOR THE DEFENDANT : NOZUKO NXUSANI INC.

C/O FOURIE FISMER INC.

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Prepared on 12 October 2026 · Esheria