

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: 1170/2008

In the matter between:

FUNDISWA RIGINA NGQONDELA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAGEZA AJ:

[1] This is a claim for loss of support arising from the death of Mongameli Jackson Ngqondela (plaintiff's deceased husband), who died in a motor collision which took place on 2 May 2004 at KwaNobuhle, Uitenhage within the jurisdiction of this court.

[2] Plaintiff, a business woman and widow, sues in her own right.

[3] The defendant is the Road Accident Fund, a juristic person in terms of section 2 (1) of Act 56 of 1996.

[4] Counsel for the plaintiff, Mr Frost, and this was confirmed by the defendant's counsel, advised the court that liability in respect of the negligent conduct of the 'insured' driver was admitted by the defendant thus disposing of the necessity for an enquiry into the merits. The merits, in so far as they relate to the death of the deceased, are therefor conceded by the defendant. It is common cause that deceased was married to the plaintiff in community of property; that during his lifetime he was legally obliged to contribute to the maintenance and support of the plaintiff; that deceased in fact did contribute such maintenance and support.

[5] The issues in dispute, are (a) the question of damages to be awarded and (b) whether or not the deceased at the time of his death, had the means to provide the support and if so, the extent of the ability to so provide.

[6] An actuarial certificate of Dr Robert Koch was by agreement handed into court and this sets out the nett required support at R129 104.00.

[7] The plaintiff then sought leave to lead evidence in respect of deceased's ability to provide the support and the basis for an amount as an award.

[8] The first witness called, Tololo Mzimkhulu Sirayile, testified as follows:

8.1 He lives in Ponana Street, kwaNobuhle, Uitenhage and knew the deceased as a close friend with whom he also lived as neighbours for many years prior to deceased's death.

8.2 Mr Sirayile, together with deceased had been in the employment of Volkswagen (SA), a motor vehicle manufacturer whose production plant is situate in Uitenhage from 1978 until 2000 when they were retrenched. The deceased's salary at Volkswagen was approximately R750.00 per week. The witness testified that to date there remain some unresolved issues with Volkswagen pertaining to their retrenchment. He could not give full details regarding the nature of these.

8.3 Following the retrenchment, both the witness and the deceased decided to enter the informal transport industry by purchasing vehicles (sedans) that they used as taxis, albeit unregistered taxis transporting passengers in and around the townships.

8.4 The deceased bought a used Opel Kadett which operated as a "Jikeleza", that is a private unlicensed taxi doing township rounds. This vehicle was in operation from sometime in 2000 until the death of the deceased in May 2004. The witness conceded that the vehicle was in the latter stages of deceased's life experiencing breakdowns from time to time but was adamant that it continued to operate.

8.5 According to the witness, deceased himself did not drive and employed a driver whom he paid 10% of the day's takings. These takings were varied but to his knowledge, were on average approximately R100. At times the amount was more, but sometimes less. The vehicle operated between Monday to Friday and not weekends, during which time he and the deceased attended funerals and other functions together.

8.6 The witness testified that being neighbours and close friends, they spent most of their social time together and confided in each other. He is also familiar with deceased's family and knew the deceased as someone who always provided the necessary financial and related support for his family.

[9] Under cross-examination, he stated that the Opel Kadett was sold to "chicks" scrapyard after the death of the deceased.

[10] The second witness, Zukiswa Ngqondela testified:

10.1 That she is the deceased's daughter and was born on 7 March 1981. Plaintiff is not her biological mother but she refers to her as her mother.

10.2 Until May 2004 she lived with deceased and plaintiff and was also supported by deceased. Plaintiff was not employed and the

deceased supported the family and paid her tuition fees at Vista University where she was a student from 2003.

10.3 Following deceased's death she had to abandon her tertiary education endeavours in 2004 and is now employed by a cleaning company.

10.4 The witness confirmed deceased owned a vehicle operated as a "Jikeleza". According to her evidence, the vehicle was a good sedan and did not breakdown regularly. She said the vehicle experienced problems later on prior to deceased's death. The deceased fully supported her and plaintiff and his death resulted in the loss of the said support.

[11] Both witnesses gave their evidence in a calm and relaxed manner. They were not doubtful or uncertain in their responses both in their evidence in chief and under cross-examination. It was clear that what they testified to was within their personal knowledge gleaned in the course of a practical lifelong relationship with the deceased. They did not exhibit any inclination to tell anything other than what they knew as fact. I have no reason to doubt the veracity of their testimony. It is clear therefrom that the deceased was a devoted husband, father and provider to his family. He had been employed for a lengthy period at Volkswagen, Uitenhage, being unfortunately retrenched in 2000. His misfortune did not induce despondency but ignited an entrepreneurial streak no doubt lit by his consciousness towards the

responsibility of providing for his family. He acquired a vehicle which he put into use as an informal taxi.

[12] The business of the deceased was informal in nature and there was no specific licence that was issued by the authorities.

[13] In *Dhlamini v Multilateral* 1992 (1) SA 802 (T) at 806 D-G:

"Dit blyk dus dat die oorledene die onderhoud was hy gedurende sy lewe aan eiseres en sy kinders voorsien het, nie op wettige wyse verdien het nie. Aan die hand van *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) en *Santam Insurance Ltd v Ferguson* 1985 (4) SA 843 (A) het mnr *Terblanche*, namens verweerder, betoog dat die eiseres se eis derhalwe van die hand gewys behoort te word.

Mnr *Geach*, namens eiseres, het egter betoog dat die oorledene werk as 'n wettige huurmotorbestuurder sou kon verkry het en dat hy in so 'n geval ook R800 per maand sou verdien het. Gesien die getuienis van Prinsloo dat daar 'n tekort aan sulke bestuurders was, meen ek dat die oorledene, op die waarskynlikhede, wel so 'n werk sou gekry het. Die feit dat oorledene vanaf 1986 tot sy dood in Mei 1998 onwettige huurmotorwerk verrig het, kan wel in ag geneem word as 'n anduiding van die oorledene se verdienvermoë (kyk *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A) op 964D-E."

[14] In *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 546F it was stated by Vivier JA that:

"In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess. (See *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 113G-114E and the cases there cited).

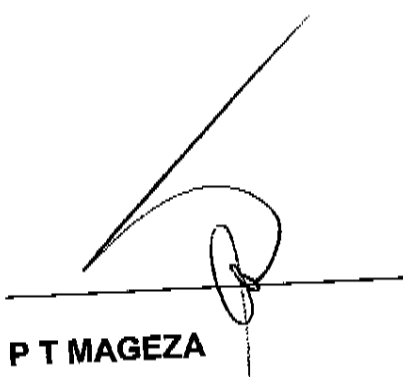
[15] In *Roxa v Mtshayi* 1975 (3) SA 761 (A) Corbett JA said at 769G that:

"While evidence as to probable actual earnings and probable potential earnings (but for the injury) is often very helpful, if not essential, to a proper computation of damages for loss of earning capacity, this is not invariably the case."

[16] In the present case deceased operated an informal passenger conveyancing business which at the very least enables the court to assess his earning capacity. The certificate of Dr Koch submitted by agreement is helpful in this regard. This certificate sets out the quantum.

In the result:

1. **The claim succeeds and plaintiff is awarded damages in the sum of R129 104.00.**
2. **Defendant is to pay costs including Dr Koch's qualifying fees.**



P T MAGEZA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv Frost

Attorneys for the Plaintiff: Lessing, Heyns, Keyter & Van der Bank Inc
14 Baird Street
UITENHAGE

Counsel for the Defendant: Adv Van der Linde SC

Attorneys for the Defendant: Boqwana Loon & Connellan
4 Cape Road
PORT ELIZABETH

Heard on: 16 February 2010

Delivered on: March 2010