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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **4163/2021**

In the matter between:

BLANDINA MASANKOELA LISENE

First Plaintiff

LETSHEGO PRECIOUS PEARL MOTSIE

Second Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: CRONJÉ, AJ

HEARD ON: 3 MAY 2023

JUDGMENT BY: CRONJÉ, AJ

DELIVERED ON: 15 MAY 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 15 May 2023.

- [1] The First Plaintiff ("Mrs Lisene") is an unmarried Mosotho female born on 16 November 1962 and 61 years old. She instituted a claim in her personal capacity for past and future loss of support against the Road Accident Fund ("the Fund") pursuant to the death of her second eldest son, Mr Ntsebane Lisene ("the deceased").
- [2] The deceased was a passenger in one of the two insured vehicles that were involved in a motor vehicle accident that took place on the N8 and R709 in the Free State Province on 22 June 2018. It was pleaded that the accident was the result of either one or both the insured drivers.¹ The Fund does not deny the negligence of the respective driver/s and its liability, subject to proof that Mrs Lisene was and would in future have been reliant on the support of the deceased.
- [3] The Second Plaintiff was in a relationship with the deceased until he passed away. She also claimed in her personal capacity for loss of support but withdrew her claim.
- [4] Mrs Lisene claims R488 685.00 in respect of past- and future loss of support.
- [5] By agreement between the parties, I am called upon to determine only whether the deceased owed Mrs Lisene any duty of support and if so,

¹ Pleadings, p. 6, para 6

whether he did in fact support her. The quantum of Mrs Lisene's loss will be determined separately.

EVIDENCE IN CHIEF

- [6] Mrs Lisene resides in an old and dilapidated brick house in Ladybrand for which she has no title deed. At date of the demise of the deceased, her only daughter was a student at the Central University of Technology (CUT) in Bloemfontein no longer permanently residing with her. Her eldest son presently resides in Cape Town. To her knowledge, he recently succeeded in securing employment and she does not know what his income is. She last saw the father of the children during or about 1999/2000.
- [7] She completed Grade 10 at the Ladybrand Secondary School. She was thereafter employed as a domestic worker in the suburbs of Ladybrand and in the township for two (2), and sometimes three (3) days per week. When the deceased passed away she received an average cash income from her employment in the amount of R900.00 per month. She attempted to make ends meet but the money was not always enough. She would on occasion do piece- jobs and also borrow money from family members. Although her brother and sister assisted her in making ends meet, they were not compelled to do so.
- [8] She relies on Mosotho custom for the deceased's duty of support as well as the discussion she had with the deceased. According to custom, parents have to maintain their children if they are unemployed. Children know that they have to support their parents as soon as they themselves secure employment.
- [9] At date of his death, the deceased worked at the Nissan motor dealership in Bloemfontein where he was a salesman. He played for the Free State cricket team from under 10 up to under 25. He received allowances from the cricket

games which he would share with her in an amount of approximately R1 000.00 on occasion.

[10] He would visit her at the end of the month and buy groceries (maize, bread flour, rice, cooking oil, spices, mayonnaise, vegetables, detergents, etc.) to the value of approximately R1 000.00 and would also give her cash in an amount of R2 500.00 per month. With the R2 500.00 and an average of R900.00 per month that she herself earned, she paid for transport, prepaid electricity, clothing, medication and on some occasions consultations at doctors. She would, if available, set aside approximately R300.00 per month for emergencies.

[11] She testified that it is not easy to obtain employment in Ladybrand. She suffers from high blood pressure since the death of her son for which she uses prescription medication. She has no policies in her name.

CROSS-EXAMINATION

[12] In cross-examination she testified that her son started contributing towards her maintenance round about 2010. Her eldest son found employment in Cape Town approximately one (1) month ago but she knows nothing more. He does not assist her with any maintenance. She has not yet had the discussion regarding the obligation to maintain her with the eldest son, apparently due to the fact that he has for a long time not resided with her and she has not seen him recently.

[13] She applied for State pension from SASSA when she was 60 years old and receives R1 900.00² per month for the past two (2) months. She has not been employed after the deceased passed away as she was not feeling well and is sickly. She is, however, starting to feel better.

² As of 1 April 2023, the old age pension is R2 080.00 per person, per month. See: SASSA Older Persons Grant/ Old Age Pension (sassagrants.co.za)

- [14] Save for the SASSA pension, she does not have any money to assist her daughter who is in her fourth year at the Central University of Technology. Mrs Lisene's sister assists the daughter with accommodation in Bloemfontein.
- [15] She testified that she needs an average amount of R4 000.00 per month for her own expenses which include, electricity, R1 500.00 for groceries (which she states is expensive), R20.00 per day for transport for herself, transport for her daughter when she visits her over weekends, clothing, miscellaneous items in the house, cosmetics, etc. The deceased would buy groceries of approximately R1 500.00 per month and would also contribute towards transport, electricity and clothing expenses. Her medication costs between R500.00 and R600.00 per month, which she has to pay for herself. She visits town every day to *inter alia* look for employment but also to buy groceries and visit pharmacies. The deceased did not have a pension fund when he passed away and she received nothing from his employer or from any other source pursuant to his death. Her brother and sister knows that the deceased helped to maintain her.
- [16] The cricket that the deceased played was only over weekends and it would be seasonal. When he returned from the cricket tours, he would give her some money. The Plaintiff thereupon closed her case and the Defendant did not call any witnesses.
- [17] The last payslip of the deceased shows that he received a gross salary of R8 100.00 and a net salary of R6 453.56. In a document provided by the employer, it is stated that the deceased was employed from 1 November 2017 until date of his death. He earned an average of R12 463.37 (basis salary plus commission) per month over a period of eight (8) months. No commission is reflected on his last payslip. According to the employer he belonged to the NTT Provident Fund and had life cover. She testified that she received

nothing from those sources. Both documents were handed in as admissible evidence by agreement between the parties.

THE LAW

[18] Both the representatives submitted helpful heads of argument and I am indebted for their assistance.

[19] Mr Joubert Zietsman SC relied on Fosi v Road Accident Fund and another³ where Dlodlo J examined the case law pertaining to a child's duty to support his parent. The Court inter alia held:

"(13) I am aware that several claims by parents that their children were under a legal duty to maintain them have failed essentially because the parents did not succeed to prove that they were indigent. Cases such as Petersen v South British Insurance Co. Ltd 1967(2) SA 236 (C) and Anthony & Another v Cape Town City Council 1967(4) SA 445 (A) are examples of cases where such claims did not succeed. I hold the view though, that these cases did not establish an absolute line between indigent and "mere" poverty when one has to make a determination of the duty of the children to support and maintain a parent. Such cases must necessarily be read in the light of their own facts. Simplistically put, the deciding principle seems to be whether the parent can prove that he or she was dependent on the child's contribution for the necessities of life. Indeed what constitutes necessities of life will in turn depend on the individual parent's station in life." [my emphasis]

[20] In Keforilwe v Road Accident Fund⁴ the Court referred to Oosthuizen v Stanley⁵ where it was held:

"... Support (alimenta) includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness; ... Whether a parent is in such a state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income

³ 2008 (3) SA 560 (C)

⁴ [2016] JOL 35680 (NWM)

⁵ 1938 AD 322 at 327–328

is a question of fact depending on the circumstances of each case." [my emphasis]

[21] In Jacobs v Road Accident Fund⁶ the Court took into consideration that it would be invidious if a court would rule that the deceased had no duty to support his father when he had voluntarily assumed that obligation. The court in that case held that such undertaking gave the plaintiff a reasonable expectation that his maintenance contributions would continue and where the deceased voluntarily assumed that obligation it would be sufficient in itself to warrant a finding that the plaintiff has acquired a right to maintenance, which was enforceable."

[22] In JT v Road Accident Fund⁷, Sutherland J held:

"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 or 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." [my emphasis]

[23] Mr Zietsman also referred to Road Accident Fund v Mohohlo⁸ where the Court assessed the legal convictions of the community and the values underlying the Constitution, particularly Ubuntu, as the Courts were required to do in terms of Section 211(3) of the Constitution of the Republic of South Africa.

⁶ 2010 (3) SA 263 (SE). see also Law of Parent and Child, 4th edition, p. 403 by Irwin Spirow

⁷ 2015 (1) SA 609 (GJ) at paragraph [26]. The same principles were applied in Lesotho by Banjane J in Moholisa v District Medical Officer (CIV/T/617/2008) [2021] LSHC 51 (04 June 2021) at para [17]

⁸ 2018 (2) SA 65 (SCA) at para [12] – [14]

[24] In Paixão and another v Road Accident Fund⁹, Cachalia JA held:

“[13] The existence of a dependant’s right to claim support which is worthy of the law’s protection, and the breadwinner’s correlative duty of support, is determined by the boni mores criterion or, as Rumpff CJ in another context put it in Minister van Polisie v Ewels, the legal convictions of the community. This is essentially a judicial determination that a court must make after considering the interplay of several factors: ‘the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas of where the loss should fall’. In this regard considerations of ‘equity and decency’ have always been important. Underpinning all of this are constitutional norms and values. So the court is required to make a policy decision based on the recognition that social changes must be accompanied by legal norms to encourage social responsibility. By making the boni mores the decisive factor in this determination, the dependants’ action has had the flexibility to adapt to social changes and to modern conditions.” (authorities omitted). applicable to customary law, which recognized a duty of support where there rested a de facto relationship of mother and child.” [my emphasis]

[25] Mr Zietsman submits the uncontroverted evidence of Mrs Lisene was that in terms of Mosotho culture, the deceased was obliged to contribute at the time when he started to earn an income. One finds an illuminating exposition of the principles applied in customary law in Seleka v Road Accident Fund¹⁰.

[26] Ms C Bornman, who appeared for the Fund referred to Zysset v Santam¹¹, where the Court held that State welfare payments should be deducted from a claim for damages as compensation came from the same public funds as welfare payments. The Constitutional Court, however, found in Coughlan N.O. v Road Accident Fund (Centre for Child Law as Amicus Curiae)¹²:

“[59] The purpose of the RAF is to give the greatest possible protection to claimants.

⁹ 2012 (6) SA 377 (SCA). See also *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP)

¹⁰ 2016 (4) SA 445 (GP) at para [12] – [15]. See also: *Osman v Road Accident Fund* 2015 (6) SA 74 (GP)

¹¹ 1996 (1) SA 273 (C)

¹² 702/13 [2014] ZASCA 106 (3 September 2014); 2015 (6) BCLR 676 (CC)

A deduction of either foster child or child support grants would undermine that 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.” [my emphasis]

[27] In Horn obo Mokoena v Road Accident Fund¹³

“[22] It is important to stress that this finding does not mean that there is any general principle precluding an award of damages for loss of support where dependants have had the benefit of social support grants. In this situation, as in most, the facts should determine whether there has been an actual financial loss caused by the death of a deceased. Where there is evidence that social assistance grants are warranted, and that double compensation will not ensue, an award of damages may well be appropriate. As was said in Zysset, the enquiry must involve considerations of public policy, reasonableness and justice. A court faced with the enquiry must take into account two conflicting policy considerations: that a dependant should not receive double compensation, on the one hand, and that a wrongdoer should not be relieved of liability because of fortuitous benefits received by the dependant.” [my emphasis]

[28] Referring to Tutubala v Road Accident Fund¹⁴, Ms Bornman submits that the claim of the Plaintiff in that case was dismissed on the basis that the deceased made a monthly contribution to the Plaintiff, which did not make Plaintiff indigent. The Plaintiff had to prove that the contribution was needed. The facts in Tutubala is, however, distinguishable as that Plaintiff had R100.00 left at the end of the month and was not in need.¹⁵ That Court considered Wigham v British Traders Insurance Co Ltd¹⁶ where it was held that in 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

¹³ (915/2017) [2019] ZAGPPHC 470 (4 July 2019)

¹⁴ (2014/34463) [2015] ZAGPJHC 149 (23 July 2015) at para [11]

¹⁵ At para [18]

¹⁶ 1963 (3) SA 151 (W)

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 a position regarding 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. The Court did not doubt the correctness of the Wigham case. The Court held that it does not suggest that the establishment of need is dispensed with. If a particular parent was accustomed to a life of superfluity prior to the death of a child, the parent will still be expected and required to prove the existence of need post the death.¹⁷

- [29] In Jacobs v Road Accident Fund¹⁸ the Court gave recognition to a contractual undertaking/duty to support:

“[11] On the facts presented, I am satisfied that the deceased undertook to support the plaintiff with the intention to be legally bound by such undertaking. The deceased therefore, owed the plaintiff a contractual duty to support.¹⁹ Once a dependent established the duty, it follows, that the law ought to protect it.”

- [30] Examining the Plaintiff's evidence that the deceased bought groceries on a monthly basis amounting to more than R1 000.00 per month, in addition to a cash amount of approximately R2 500.00, Ms Bornman submits that the deceased's last payslip showed his net pay to be R4 429.66. She submits that if Mrs Lisene's evidence is accepted, she was assisted to the amount of R4 000.00 on a monthly basis which would have left the deceased a mere R249.66 to cover his own needs, including rental. She submits that this was highly improbable and that the version should be rejected.

- [31] Referring to the deceased's payslip, she states that the deceased belonged to

¹⁷ At para [14] – [15]

¹⁸ (21427/2017) [2018] ZAGPPHC 830; 2019 (2) SA 275 (GP) (23 November 2018)

¹⁹ Du Plessis v Road Accident Fund 2004 (1) SA 359 para 16

the NTT Provident Fund and if Mrs Lisene did not receive any pay-out from the deceased's pension, an inference can be drawn that the deceased did not view Mrs Lisene to be dependent on him and therefore did not nominate her as a beneficiary, or he may have had other dependents. If he had other dependents, it would influence the calculation of the quantum.

[32] Referring to Mrs Lisene's residential accommodation, as well as the fact that she could not give a satisfactory breakdown of her monthly expenses to cover the necessities, Ms Bornman submits that Mrs Lisene could save between R300.00 and R500.00 per month. She furthermore submits that logic dictates that the person claiming to be indigent and who has lost a source of support, would not really give up the only other source of income, being employment, and that a reasonable inference would be that Mrs Lisene did not need support from the deceased, alternatively that the deceased never supported her. She also receives income from SASSA.

[33] Ms Bornman did not argue that there does not rest a duty support in terms of Mosotho custom.

[34] The question whether there exists such a Mosotho custom is therefore answered in the affirmative. It is also in line with principles in respect of a duty to support in the common law. Over and above that, our law recognises a contractual undertaking to support.

IS MRS LISENE IN NEED OF SUPPORT?

[35] Mrs Lisene used to work as a domestic worker earning approximately R900.00 per month. When the deceased passed away, she started struggling with her health but is now improving. There is no evidence that she now, aged 61, is able to continue to work and receiving SASSA is indicative of an impairment. She testified that employment is scarce. What is known is that she now receives SASSA in an amount of R2 080.00 per month.

[36] I agree with Ms Bornman that the Plaintiff did not give a thorough exposition of her monthly needs.

[37] I am however satisfied that looking at the following factors, the deceased contributed and would on probabilities have continued to contribute, at least in terms of custom, if not contractually, towards a need that she had and still has:

- 37.1 he bought her groceries in an amount of between R1 000.00 and R1 500.00 per month;
- 37.2 she, at that stage, earned R900.00 per month from employment;
- 37.3 in addition thereto the deceased gave her R2 500.00 per month in cash;
- 37.4 she has to expend monies on medical expenses of between R500.00 and R600.00 per month and visits general practitioners;
- 37.5 she purchases electricity;
- 37.6 she uses public transport;
- 37.7 she needs to buy clothing;
- 37.8 she buys cosmetics;
- 37.9 she is not the titleholder of the property in which she stays and cannot liquidate it;
- 37.10 she could not always save monies for emergencies;
- 37.11 she has no other liquid assets; and
- 37.12 the deceased earned more than what appears on the salary slip as is confirmed in the document prepared by the employer.

[38] When the deceased assisted her, she received at least R4 400.00 (R900.00 + R1 000.00 + R2 500.00) per month. The R900.00 that she received from employment up to the deceased's demise is lost. She now receives R2 080.00 from SASSA. This means that she is still in need of support. She does not need to show that she lives in abject poverty.

[39] Mr Zietsman prepared a draft order and requested that same be made an order of Court. I made some amendments to it.

COSTS

[40] There is no reason why the normal principles regarding costs should not be applied and costs follow the result. Mr Zietsman did not ask for costs of senior counsel and considering the questions to be answered and the nature of the evidence presented, I am of the view that costs on such scale would not be justified.

ORDERS

[41] I make the following orders:

1. The deceased, Ntsebane Lisene, had a duty to support, and in fact supported the First Plaintiff, and as a result, the First Plaintiff suffered past and future loss of support.
2. The First Plaintiff's claim for past and future loss of support is referred to Munroe Actuaries to be calculated, within twenty (20) days of the date of this order.
3. Upon receipt of the actuarial calculation, the parties are granted leave to approach Court to make the actuarial calculation an order of Court. Should the parties not be able to agree on the actuarial calculation, the matter is referred to the pre-trial roll for further directives.
4. The Defendant pays the First Plaintiff's taxed or agreed party and party costs on High Court scale until date of this order, including:

- 4.1 the reasonable preparation/qualifying and reservation fees and expenses (if any) of Munroe Forensic Actuaries;
- 4.2 payment of the capital amount, to the extent that same is not referred to pre-trial, shall be made without set-off, or deduction within one hundred and eighty (180) calendar days from date of granting of this order, directly into the trust account of the First Plaintiff's attorneys, the details of which are:

Honey Attorneys – trust account

Bank: Nedbank Limited

Maitland Street branch

Branch code: 1[...]

Account number: 1[...]

Ref: HL B[...]

- 4.3 Payment of the taxed or agreed costs shall be made within one hundred and eighty (180) days of taxation and shall likewise be effected into the trust account of the First Plaintiff's attorney.
- 4.4 Interest shall accrue at 10.5%, compounded in respect of:
 - 4.4.1 the capital of the claim, calculated from fourteen (14) days from date of acceptance or proof of the actuarial calculation of Munroe Forensic Actuaries;
 - 4.4.2 interest on the taxed or agreed costs, calculated from fourteen (14) days from date of agreement, alternatively, final determination of the capital amount.

P R CRONJÉ, AJ

On behalf of the Plaintiffs:

Adv PJJ Zietsman SC

Instructed by:

HL Buchner – Honey Attorneys

Honey Chambers

BLOEMFONTEIN

On behalf of the Defendant:

Ms C Bornman

Instructed by:

Office of the State Attorney

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