

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 65492/2020

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

DATE: 17 April 2024

SIGNATURE

In the matter between:

N[...] N[...]

Plaintiff

(On behalf of minor children)

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Mazibuko AJ

Introduction

1. This is an action for loss of support in a representative capacity for minor children arising from a motor vehicle collision in February 2018, at R410 Queenstown and Lady Frere Road, Eastern Cape, between a Mitsubishi car driven by an identified insured driver (hereinafter referred to as "the insured

driver" and the Nissan Almera car driven by the late father of the plaintiff's minor children (hereinafter referred to as "the deceased").

2. The matter is defended. In the pre-trial minutes dated October 2022, the parties agreed that evidence could be produced by way of an affidavit in terms of Rule 38(2) of the Uniform Rules¹.
3. During the trial, no appearance was made on behalf of the defendant. The application in terms of Rule 38(2) was granted.

Issue

4. The court was to determine whether the plaintiff has made out a case for loss of support in her personal and representative capacity.

Plaintiff's claim in her personal capacity

5. During the opening address, the plaintiff, through her counsel, Mr Mabasa, stated the claim was for the plaintiff in her personal and representative capacity. The plaintiff's heads of argument shared with the court just before the commencement of the trial revealed that the plaintiff claimed loss of support in her personal and representative capacity.
6. I find it necessary to refer to the pleadings before the court at this stage while dealing with the plaintiff's capacity. The defendant raised a special plea contending the plaintiff's *locus standi* that no documentary proof was provided, particularly an unabridged birth certificate, and that necessary averments establishing *locus standi* had not been made.
7. The plaintiff's amended particulars of claim in response to the special plea read:

"The plaintiff is N[...] N[...] adult female person with identity number such as [...], acting on legal representative capacity as the biological mother of the minor children known as (A... with date of birth such as ...) and A... with date

¹ Act 59 of 1959

of birth such as: ...) currently residing at [No. ..., ...,] Queenstown, Eastern Cape Province." (sic).

8. It became apparent that the plaintiff lodged the claim in her representative capacity as a mother when considering the following:
 - 8.1. the face of the combined summons,
 - 8.2. the initial particulars of claim where she lodged the claim only for one child (hereinafter referred to as "AKN").
 - 8.3. the amended particulars of claim where she claimed for two children.
 - 8.4. In paragraph 18 of the completed RAF form, only details for one child are provided as the dependent in the loss of support.
9. Only during the hearing and on perusing the heads of argument and further written submissions, which were filed after the conclusion of the trial, did it transpire that the plaintiff also claimed in her personal capacity. None of the pleadings showed that the plaintiff is claiming in any other way than that of the representative capacity.
10. Her claim seems to be pleaded and argued in the heads of argument, or 'the heads', as they are sometimes referred to. Heads are naturally not pleadings or evidence. Their purpose is a guide outlining the key issues of contention, brief legal arguments, and authorities while engaging the evidence in the pleadings or testimonies. They are a valuable tool, but I do not believe they are a platform to raise new factual issues, claims, or evidence.
11. It is expected of the plaintiff to accordingly disclose facts and pleadings that would make out a case for the relief sought and sufficiently inform the other party of the case it was required to meet to avoid surprising each other on the day of the hearing. Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of

drafting to ensure that the full ambit of a party's case is canvassed. See *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & Others*.²

12. Consequently, there is no claim before the court in which the plaintiff claims loss of support or any other damage arising from the accident in question in her personal capacity.

Liability

13. The plaintiff bears the onus to prove both liability and the quantum of the claim. In order to establish liability, the evidence must demonstrate that it was *(a) the negligence or a wrongful act on the part of the insured driver that caused or contributed to the collision which resulted in the death of the deceased and that (b) the child had a legally enforceable right to claim financial support from the deceased*.³
14. According to the pre-trial minutes, the defendant based its defence on the accident report and plea. The defendant's plea was a bare denial.
15. The uncontroverted evidence is that the deceased was driving from Lady Frere's direction towards Queenstown, whilst the insured driver was from the opposite direction, Queenstown. According to the witnesses' report to the police who attended the scene, the insured driver lost control of his motor vehicle. As he tried to control the motor vehicle, he collided head-on with the deceased's motor vehicle. He died instantly, and the insured driver died some hours later.
16. The probabilities are substantially in the plaintiff's favour that the motor vehicle collision resulting in the death of the deceased arose as a result of the insured

² Case NO: JR2296/12, paragraph 5.

³ *Macdonald and Others v Road Accident Fund* [2012] JOL 29313 (SCA) at para 14 citing with approval *Evans v Shield Insurance Co. Ltd* 1980 2 SA 814 at 839 B Corbett JA: "...the basic ingredients of the plaintiff's cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) damnum, in the sense of a real deprivation of anticipated support."

driver's wrongful driving when he lost control of his motor vehicle. The plaintiff thus succeeded in discharging the onus that the deceased was not the sole cause of the collision and that the insured driver was at least 1% negligent.

17. It was not in dispute that the plaintiff and the deceased resided together with their two children (hereinafter referred to as "AKN", *the older child* and "ANN", the younger one), and the deceased provided financial support for them during his lifetime. Supporting affidavits deposed to by three members of the deceased's family and four of the plaintiff's family members confirmed that the deceased stayed with the plaintiff together with the two children, and he was a breadwinner. I am satisfied that a legally enforceable right of support has been established for AKN and ANN.
18. Both liability requirements are met, as the evidence of negligence on the part of the insured driver has thus been satisfied and a legally enforceable duty of support. In terms of section 17(1) of the RAF Act, the defendant is therefore liable to compensate the children for the proven loss of support, reasonably anticipated, that the deceased would have supplied had he remained alive.

Quantum

19. It is trite that the quantum assessment concerns whether the deceased had a duty to support children until they reached the age of 18 or 21 and the appropriate contingency deduction to be applied.
20. In terms of section 17 of the Children's Act, a child becomes a major upon reaching the age of 18 years. However, a parent's duty to support a child does not cease when the child reaches a particular age; it usually does so when the child becomes self-supporting. Majority is not the determining factor.⁴
21. Bearing this in mind, all the facts of the matter must play a role in reaching a just and equitable decision. Measuring compensation for loss of support is an exercise of judicial discretion in the interest of justice, considering the

⁴ Mfomadi and Another v Road Accident Fund (34221/06) [2012] ZAGPPHC 152 (3 August 2012), paragraph 30.

difference between the current position and the position that the minor child would have been in had the deceased not died.⁵

22. The uncontested evidence revealed that the deceased was 41 years old at the date of the collision, and the children were 12 and 7 years old, respectively. Applying the progression of time, the deceased would have been 47/50 years old when the 12-year-old child attained the age of 18/21. The 7-year-old would have attained the age of 18/21 when the deceased would have been 52/55 years old.
23. The deceased was employed as a senior personnel officer in human resource administration at the Department of Education, Eastern Cape, for about eleven years since 2007. The actuarial report assumes two alternative scenarios without committing to either: one based on dependency until age 18 and the other based on dependency until age 21.
24. In ***Marine and Trade Insurance Co Ltd v Mariamah and Another***⁶, the court had the following to say:

"... At the time of the deceased's death, P[...] was 18 years old, and G[...] 17 years old. They were still at school, and the deceased was supporting them. The court a quo was, in my view, justified in acting on the assumption that the deceased would probably have continued to support his sons until they reached the age of 21."
25. In light of the aforementioned, I am persuaded that loss of support for AKN and ANN until they are 21 years old is sufficient.
26. Applying this principle to the common cause fact that the deceased was, at the time of his death, supporting the children, the court finds that the defendant is obligated to the plaintiff for damages in the sum of

⁵ RAF v Monani **2009 (4) SA 327** (SCA) at paragraphs 2-6.

⁶ Marine And Trade Insurance Co Ltd v Mariamah And Another **1978 (3) SA 480** (AD) at paragraph 489B

R1 372 100.00 to compensate for AKN and ANN's loss of the deceased's support measured until age 21.

27. The amount of R1 372 100.00 is computed as follows;

27.1 R531 700.00 for AKN and

27.2. R840 400 for ANN.

28. in her representative capacity, the plaintiff has been successful, and there is no reason why she should not be entitled to costs.

29. The children's best interests regarding the management and protection of the award for their benefit remain to be considered. In *Master of the High Court v The Pretoria Society Of Advocates (1st amicus curiae) and Others*⁷, it was said, "*In all cases, unless a departure from the practice can be justified, a curator ad litem should be appointed to represent the child and to make recommendations to the court as to which form of protection is in her best interests.*"

30. On the facts before me, no circumstances justify not appointing the curator *ad litem* to investigate and report to the court on the most suitable options for protecting the award in AKN and ANN's best interests. In this regard, the execution of the order for the payment of damages is suspended pending the appointment of a curator ad litem to represent AKN and ANN and to make recommendations to the court as to which form of protection is in their best interests.

31. Notably, AKN had turned 18. However, all the awards must be protected and properly managed while he pursues his studies. The court, therefore, holds that it is necessary to suspend the execution of the award to both children pending the appointment of a curator *ad litem* to investigate and report to the

⁷ *Master of the High Court v The Pretoria Society Of Advocates (1st amicus curiae) and Others* Case 35182/2016 – delivered 20th May 2022, paragraph 147.

court on the most suitable options for protecting the award in AKN and ANN's best interests.

32. Consequently, the following order is hereby made.

Order:

1. The claim for loss of support in relation to AKN and ANN succeeds.
2. The defendant shall pay damages in the amount of R1 372 100.00 to the plaintiff, in her representative capacity for and on behalf of her children, AKN and ANN, as a result of the loss of support and successful claim for damages suffered as a result of the motor vehicle collision that occurred on 23 February 2018, which amount is computed as follows:
 - 2.1 R531 700.00 for AKN and
 - 2.2 R840 400 for ANN.
3. The total amount of R1 372 100.00 shall be paid into the trust account of the plaintiff's attorneys of record. The amounts shall be retained in an interest-bearing account in terms of Section 86(4) of the Legal Practice Act, 28 of 2014, for the benefit of the children pending the appointment of the curator *ad litem* to represent AKN and ANN's interests and to recommend to the court the form of protection that will best serve their interests.
4. The plaintiff's attorneys are directed to take necessary steps within fourteen (14) days of this judgment to seek the appointment of the curator *ad litem* to represent AKN and ANN's interests and recommend to the court the form of protection that will best serve their interests.

5. The defendant will bear the costs.

N. Mazibuko

Acting Judge of the Gauteng Division, Pretoria

This judgment was handed down electronically, circulated to the parties' representatives by email, and uploaded to Caselines.

Representation:

Counsel for the Plaintiff:	Adv V Mabasa
Attorneys for the Plaintiff:	Ngqumshe Attorneys
Counsel for the Defendant:	No appearance.
Attorneys for the Defendant:	
Heard:	27 February 2024
Date of Judgment:	17 April 2024