

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

CASE NO: 25411/2017

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

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

(3) REVISED:

DATE: 16/10/2023

SIGNATURE

In the matter between:

**Z[...]-M[...] V[...] D[...] M[...] OBO
THREE MINOR CHILDREN**

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

TOLMAY J

1. The plaintiff instituted action against the defendant for a claim of damages against the defendant as a result of an accident that occurred on 19 January 2016 that caused the death of her life partner, Mr. J[...] (the deceased). The claim

was for the plaintiff in her personal capacity and in her representative capacity on behalf of three children who were in her foster care. They were Z[...] -M[...] P[...] born on 10 July 2000, J[...] v[...] Z[...] born on 29 April 2005 and J[...] v[...] Z[...] born on 31 October 2006. They were all minors at the time of the passing of the deceased. On 5 November 2018 the matter proceeded on trial on the issue of merits, after having heard counsel, the claims of the children were separated from the claim of the plaintiff in her personal capacity. Merits and quantum were separated, and it was ordered that the defendant will be liable for 100% of the plaintiff's damages in her personal capacity.

2. By agreement between the parties this court was called upon to adjudicate the sole question of whether the defendant is liable to compensate the plaintiff in her capacity as representative of the children, for the loss of support caused by the death of the deceased. It was furthermore recorded that the actuarial calculation provided by the plaintiff was common cause and that, should it be determined that the defendant is liable for the loss of support suffered by the children, the court should award damages totaling an amount of R 1 703 139.00. The actuary calculated the loss of Z[...] -M[...] as R 524 495.00, J[...] as R 589 322.00, and J[...] as R 589 322.00. Only the plaintiff testified, and no witnesses were called on behalf of the defendant.
3. The three children on whose behalf the plaintiff claims loss of support is not biologically related to her or the deceased. They are children who have been in her foster care for most of their lives and are the children of a woman, M[...] P[...], who lives a tragic, tumultuous, and unstable life and who was also in foster care with the plaintiff from time to time since 1999. Ms. P[...] suffers from mental health issues and substance abuse.
4. The plaintiff testified that the children moved into the home of the deceased during or about late 2009 early 2010, when she and the deceased started living together. They lived with the deceased in his home as a family unit until his

untimely demise. The deceased paid approximately R 40 000.00 each month to the plaintiff to cover the household expenses, which included the expenses of the children. He was a satellite engineer and earned approximately R 80 000.00 per month. The children's expenses included inter alia their school fees, medical aid contributions, food, and clothing. The deceased worked outside South Africa for periods of time and did not want the plaintiff to work full time as he wanted her to visit him while he was working abroad. He paid for an au pair to take care of the children when she visited him. The plaintiff at that stage earned an amount of R7500.00 per month and used this money for her own additional needs with the full knowledge of the deceased. Her salary was totally inadequate to maintain herself and the children. The plaintiff testified that the deceased was very fond of the children and that he looked after them as if they were his own, he not only contributed financially, but also emotionally to their needs until his death.

5. During the years that the plaintiff lived with the deceased she received no foster care grant to assist with the support of the children. Seeing that the claim of the plaintiff for loss of support has been conceded, it can be unequivocally accepted that even though the plaintiff and the deceased never got married, their relationship was a permanent life partnership which resulted in mutual obligations towards each other. The plaintiff testified that her reluctance to get married to the deceased stems from her traumatic experience with the institute of marriage in the past. The deceased proposed to her twice during the relationship and finally she agreed to marry him. They planned to get married on his birthday on 16 May 2016, but unfortunately, he passed away during January of that year. At the time of his passing the deceased had two children of his own, one passed away with him in the accident and the other was 22 years old at the time.
6. One of the children, J[...], has special needs and suffers from a deformity of the back and a heart defect. After the accident, and due to her own financial predicament, the children were removed from her foster care and placed in a care center. They were, however, returned to the plaintiff when the youngest two

children were physically and sexually abused. The children are presently still living with her, Z[...] - M[...] is now working, but she still assumes responsibility for them.

7. The court is presented with a unique set of facts because the children are not biologically related to either the plaintiff or the deceased and to complicate matters further, they were in the foster care of the plaintiff and not the deceased. What is abundantly clear is that the plaintiff and the deceased took responsibility for three vulnerable children under circumstances where most people would not have done so. The deceased, with full knowledge of the plaintiff's commitment towards these children, took plaintiff and the children into his home and provided for them both financially and emotionally.
8. The issue that needs to be determined is whether the defendant under these circumstances has a duty to compensate the three children for the loss that they suffered.
9. The defendant contends that it is not liable to compensate the children for the loss of support due to the passing of the deceased, as he had no legal obligation to maintain the children. The defendant argued that the court should consider the Maintenance Act¹ and Administration of Estates Act² and that neither of these acts would entitle the children to claim maintenance from the estate of the deceased. It is however not as simple as that as, a much broader investigation is required to determine whether a duty to support exists.
10. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*³ the following was said: "It is important to emphasize that over the decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and

¹ Act 99 of 1998.

² Act 66 of 1965.

³ 2000 (2) SA 1 (CC).

what it comprises”⁴. The transformative process of defining society and government’s responsibility, in this instance executed through the Road Accident Fund, towards vulnerable children should not be limited to the traditional concepts of what would constitute an obligation to support, a broader and more inclusive approach is necessary.

11. In *Satchwell v President of the Republic of South Africa and Another*⁵ a dependent’s action was developed to include same sex life partnerships and it was held that whether a duty to support exists will depend on the circumstances of each case⁶. The following factors should be considered when determining whether a duty to support exists:

- 11.1 the nature of the relationship,
- 11.2 its duration,
- 11.3 the conduct of the parties,
- 11.4 the financial needs of the person requiring support,
- 11.5 the extent to which they were financially supported,
- 11.6 any other relevant factor.

12. In *Paixao and Another v Road Accident Fund* ⁷(Paixao) the main issue was whether the common law should be developed to extend the dependent’s action to permanent heterosexual relationships, which was duly done. It was held that the Road Accident Fund was to compensate both Mrs. Paixao and her daughter, who was not the deceased’s biological child. The court held that the plaintiff had to establish, not only that an enforceable agreement to maintain had come into existence, but that the obligations created, by the nature of their relationship were worthy of the law’s protection⁸.

⁴ Ibid at para 47.

⁵ 2002 (6) SA 1 (CC).

⁶ Ibid at para 25.

⁷ 2012 (6) SA 377 (SCA) (Paixao).

⁸ Ibid at para 23.

13. In line with Paixao, the first question that needs to be answered is whether an enforceable agreement existed to maintain the children. The agreement could either be express or tacit. An express agreement will be concluded either orally or in writing, and a tacit agreement will be inferred from the surrounding circumstances and conduct of the parties. The court will have to decide whether the contract probably came into existence⁹. In this instance, at least a tacit agreement probably came into existence that the deceased would maintain, not only the plaintiff, but also the children. They were children for whom both the plaintiff and the deceased took full responsibility. The uncontested evidence in this matter is that the deceased earned substantially more than the plaintiff and provided financially for her and the children. Not only did they live as a family unit, but he provided for their material needs and assisted the plaintiff with the care of the children as a father would have done.
14. The second question is whether the obligations created by the agreement are worthy of protection against third parties, such as the Road Accident Fund. In this regard, the boni mores prevalent in our society should be considered. The nature and reality of South African society is that the nuclear family is often vastly different than in many other countries and societies. There is a lower rate of marriage and higher rates of children born of extra-marital relationships¹⁰. In addition, one must acknowledge the profound importance that extended families and even broader societal norms often play when it comes to the care and maintenance of children. The second question must also be answered whilst keeping in mind our constitutional dispensation and especially the constitutional obligation toward children.
15. Section 28(1)(b) of the Constitution states that every child has the right to family care, parental care, or to appropriate alternative care when removed from the family environment. Section 28(1)(c) provides that every child has the right to

⁹ Ibid at para 18.

¹⁰ Paixao at para 31 – 32.

basic nutrition, shelter, basic health care services and social services. Section 28(1)(d) provides that every child has the right to be protected from maltreatment neglect, abuse or derogation. The deceased and the plaintiff provided the care for the children as set out in Section 28(1) during the approximately six years that they lived together. Section 28(2) of the Constitution importantly dictates that the best interest of children is paramount in any matter concerning a child.

16. In addition to the constitutional obligation to protect the rights of children, the court is also the upper guardian of all children and in *H v Fetal Assessment Centre*¹¹ the duty of the court to establish what is in the best interest of children was emphasized. In *LDB v Road Accident Fund*¹² the court quite correctly states: “There is no limitation on the number of different persons who may contribute to the maintenance and support of another. The fact that a biological parent has a duty to support a child, which arises ex-lege, does not preclude or exclude support of the child by others. It is self-evident that such a situation which will necessarily result in a child’s needs being better met, is in the best interest of the child”. This court is both constitutionally and in terms of common law obliged to ensure that the best interests of these children are protected. There is therefore no doubt that the obligations that came into existence due to the tacit agreement is worthy of protection.
17. The evidence was that during the time that the children and plaintiff lived with the deceased, no foster grant was paid to plaintiff as the deceased provided for all their needs. In any event in *Coughlan NO v Road Accident Fund*¹³ the issue was whether a child’s foster grant could be deducted from a loss of support claim and the court found that child support grants are on the same footing with foster child grants and should not be considered when an award of damages for loss of support is made.¹⁴

¹¹ 2015 (2) SA 193 (CC).

¹² 2018 JDR 0112 (GP).

¹³ 2015 (4) SA 1 (CC).

¹⁴ Ibid at paras 43 - 44 and 59 - 60.

18. The conclusion this court came to is strengthened by what was decided in *Fortuin v Road Accident Fund*¹⁵ where the foster mother, acting on behalf of the foster child, sued for loss of support after the death of the foster father and the court found that the foster child had such a claim. It was reiterated with reference to *Evins v Shield Insurance Co Ltd*¹⁶ that only a dependent, to whom the deceased was under a legal obligation to provide, may sue for loss of support, and it was acknowledged that the instances in which such a duty arises has evolved over time¹⁷. In my view the fact that the children were not formally in the foster care of the deceased is of no consequence, his legal obligation to support them found its foundation in the tacit agreement that came into existence, and which is confirmed by his conduct and actions for a period of at least six years.
19. Considering the prescripts of the Constitution, the development of the common law as set out in Paixao and the approach followed in all the authorities referred to above, the plaintiff's claim for loss of support on behalf of the children should be granted and the amount set out above should be awarded for loss of support.
20. It was argued on behalf of the plaintiff that the court should grant a punitive costs order against the defendant in the supplementary heads of argument. However, the defendant's opposition to the loss of support of the children was reasonable due to the unique set of facts. Therefore, it will not be fair and reasonable to award a punitive costs order.

The following order is made:

1. The Defendant is to pay the Plaintiff on behalf of the children, a total amount of R1703 139.00 (One million seven hundred and three thousand one hundred and thirty nine rand) in full and final settlement in respect of loss of support in relation

¹⁵ 2015 (5) SA 532 (GP).

¹⁶ 1980 (2) SA 814 (A).

¹⁷ Ibid at para 8. See also *Jacobs v Road Accident Fund* 2010 (3) SA 263 (SE), *Fosi v Road Accident Fund* 2008(3) SA 560(C), *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP).

to the accident under review, which amount shall be paid into the trust account of Gildenhuys Malatji Incorporated, ABSA Bank, Brooklyn Branch, Account Number 4[...], Branch Code 3[...] under Reference: G[...].

2. The aforementioned capital amount to be paid to the Plaintiffs is specifically paid in the following proportions:

2.1 Z[...] - M[...] P[...], born on 10 July 2000, will be paid an amount of R524 495.00 (Five hundred and twenty-four thousand four hundred and ninety five rand).

2.2 J[...] v[...] Z[...], born on 29 April 2005, will be paid an amount of R589 322.00 (Five hundred and eighty-nine thousand three hundred and twenty-two rand).

2.3 Z[...] - M[...] V[...] D[...] M[...] acting on behalf of J[...] v[...] Z[...], born on 31 January 2006, will be paid an amount of five hundred and eighty-nine thousand three hundred and twenty two rand (R 589 322.00).

3. The capital amount shall be paid into the above-mentioned trust account of Gildenhuys Malatji Incorporated by no later than 180 (one hundred and eighty) days from the date of settlement.
4. Should the Defendant fail to make payment of the capital, as reflected in paragraph 1 above, within 180 (one hundred and eighty) days the Defendant will be liable for interest on the amount due to the Plaintiff at a rate of 10.5% per annum, to the date of final payment, which will include the interest due and payable.
5. The Defendant is ordered to pay all Plaintiff's taxed or agreed costs of suit of the attorneys, in respect of merits and quantum, subject to the discretion of the taxing master, on the High Court scale up to date hereof, which costs include (but not be limited to):

- 5.1 The costs of travelling, accommodation and attending to the examinations, if any, and the costs incurred in obtaining all the medico-legal-, and actuarial reports, addendum reports of specifically (but not limited to) the following experts, if not previously paid, but inclusive of all addendum reports:
 - 5.1.1 Report by Ms M Mills, Educational Psychologist, for all her reports;
 - 5.1.2 Report by Andre Kok, Industrial Psychologist.
 - 5.1.3 All calculations and reports by Mr J Potgieter, Actuary.
- 5.2 All the costs associated with obtaining expert affidavits for purposes of trial and Judicial Case Management Meetings.
- 5.3 The costs of the attendance of Adv WR du Preez to Trial on 28 April 2023 (matter removed to 21 July 2023) and for 21 July 2023 inclusive of preparation, Heads of Argument (Settlement Proposal) and formulation of any Heads of Arguments.
- 5.4 The costs of the attendance of Plaintiff's Attorney to the Trial on 21 July 2023 for settlement negotiations inclusive of preparation, Heads of Argument (Settlement Proposal) and formulation of any Settlement Proposal.
- 5.5 All the costs associated with the Pre-Trial Conferences, in preparation for the Judicial Case Management Meetings, the attendances to the Trial which includes the appointment of counsel.
- 5.6 The costs of the preparation of trial bundles and the uploading of same onto Case Lines system as per the Practice Directive in preparation for the Trial.
6. Should the Defendant fail to pay the Plaintiff's party & party costs as taxed or agreed within 180 (One Hundred and Eighty) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay

interest at a rate of 10.5% per annum, on such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

7. The Defendant shall pay the agreed or taxed party & party costs, within the period of 180 (one hundred and eighty) days from taxation along with all interest incurred, into the trust account of the Plaintiff's Attorneys of Record, Messrs Gildenhuis Malatji Inc, ABSA Bank, Brooklyn Branch, Account Number 4[...], Branch Code 3[...] under Reference: G[...].
8. Should the Defendant fail to make payment of the taxed or agreed costs, as reflected in paragraph 8 above, within the 180 days the Defendant will be liable for interest on the amount due to the Plaintiff at a rate of 10.5% per annum, to the date of final payment, which will include the interest due and payable.

R G TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for Plaintiff:	W R Du Preez
Attorneys for Plaintiff:	Gildenhuis Malatji Inc
Counsel for Defendant:	M Shokane
Attorneys for Defendant:	State Attorney
Date of Hearing:	21 July 2023
Date of Judgment:	16 October 2023