REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES

24/06/2022

CASE NO: 2594/2018

In the matter between:

MIKATEKO HOLENI MDLULI Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is a loss of support claim against the Road Accident Fund emanating from an accident that occurred on 7 November 2015 along Plaston Road in White River, Mpumalanga Province. The motor vehicle accident was between motor vehicle bearing registration letters and number HDH 402 MR, which was driven by Dr Ntando Mdluli ("the deceased") and motor vehicle with registration letters and number DHN 934 MR whose driver is unknown.

[2] In consequence of the accident, the deceased sustained serious bodily injuries of which he subsequently died. He is survived by his widow, the Plaintiff, and two minor children, Mpumelelo and Mncqobi ("the minor children") to whom, as a father and natural guardian, he owed a duty of support during his lifetime. The action was initially defended but the Defendant later terminated the mandate it had given to its attorneys. The matter has therefore become undefended and is proceeding on both merits and quantum. Below follows firstly, the evidence led in respect of the merits and secondly, quantum.

EVIDENCE ON MERITS

[3] The first witness to take the stand was the Plaintiff. Strictly speaking, her evidence had nothing to do with the merits of the accident but it was rather on *locus standi* and partly quantum insofar as she laid bare how much she earned. She testified that she and the deceased were married to each other with antenuptial contract. She earned an amount of **R600 000.00** per annum from two companies. Of her marriage with the deceased, the two minor children were born. She was not present when the accident happened consequently everything that she knows about the accident is hear-say.

[4] The second witness was Ms Matau Nosizwe Nyathi. She was a front seat passenger when the accident took place. She said that she and the deceased were on

the Plaston Road driving into the direction of Ka-Bokweni. Shortly after driving pass the airport stop sign, the road curves. She noticed a vehicle emerging from the bend driving into the opposite direction travelling in their lane. In an endeavour to avoid a head-on collision with the approaching vehicle, the deceased swerved to his left-hand side. Seeing that doing so would cause him to collide with a tree on the left-hand side of the road, he sharply turned back onto the road.

[5] She testified that in veering back onto the road, he probably over corrected the maneuver because he collided with the rear end of the approaching vehicle. On impact, the deceased's vehicle lost balance and overturned. She said that it is at this juncture that her memory fails her completely. She did not know anything about the fate of the other vehicle and its driver. Insofar as she was concerned, the deceased had done everything that a reasonable driver in his shoes would have done to avoid the collision.

[6] The next witness was the actuary, Mr Potgieter. He testified that he received instructions from the attorneys of the Plaintiff, Gama Attorneys, to calculate the loss suffered by dependents of the deceased. He stated that when calculating the loss, he considered the amendment to the Road Accident Fund Act 56 of 1996 ("the Act") introduced in 2008. In short, the claims are affected by the cap mentioned in the Act.

[7] The information that was provided to him was that the deceased was born in 1971 and was therefore aged 44 when he met his premature death. His wife, the Plaintiff, was born in 1978 and would as such, have been thirty-seven years old at the time when her husband, the deceased, died in 2015. Their eldest minor child was born in 2006 while the second in 2010. Mr Potgieter postulated two scenarios, one where the calculations were done until the end of the respective calendar years during which the minor children would reach age eighteen and the other, when they become twenty-one years old.

[8] Mr Potgieter said that since the father of the minor children was a medical doctor, it would be appropriate to assume that their loss would have extended to age twenty-one, which would encompass their years of studying towards the acquisition of a tertiary

education. The deceased was the owner of a medical practice known as Ntandoyenkosi Trading (Pty) Ltd. He testified further that he was furnished with various excerpts of annual financial statement of the deceased's medical practice. He was the sole shareholder of the company.

[9] For the year that ended on 31 December 2014, the previous year before his death, he had earned a net income of **R1 043 712.00**. The year prior to that, however, shows a loss of an amount of **R329 000.00**. The deceased's company having been established in 2012, Mr Potgieter said that the loss suffered in 2013 could be attributed to challenges associated with start-up companies. He assumed that the 2014 income of the company would not grow but would only increase proportional to inflationary influences. A further assumption that he made is that the deceased would work until his retirement at age sixty-five. The income as aforesaid was projected with annual inflation until age sixty-five to which tax was applied.

[10] In a letter of April 2018, Mr Potgieter received confirmation of the Plaintiff's monthly income of **R50 000.00** from her accountant. Her income emanated from two companies – Z2 Consulting Services and Nthwaleng Trading. As an annual income therefore she received an amount of **R600 000.00**. Mr Potgieter testified that he was not provided with any further information concerning her income prior to April 2018 or after. He worked with the 2018 income to determine what the Plaintiff was earning in November 2015 taking into account inflation. He assumed that she would have retired at the same time as the deceased – age sixty-five.

[11] When the accident happened in November 2015, the applicable statutory cap for loss of support in any one year could not exceed an amount of **R237 850.00**. Mr Potgieter testified that his calculations, as are, have taken into account the fact that the cap stood at that amount. He also allowed for normal life expectancy for both the deceased and the Plaintiff. He was advised that the estate of the deceased was insolvent as it could not pay its creditors. As a result, no deductions pertaining to inheritance became necessary to apply.

[12] Mr Potgieter testified that he applied the normal general contingencies but of **5%** on the past loss. He was, however, conservative when coming to the Plaintiff's future loss in that he applied **20%** instead of the commonly accepted **15%**. The total net loss on the second scenario – one where the minor children are assumed that they will acquire a tertiary qualification of some sort, the loss, with the cap having been considered, comes to **R4 353 071.00**.

<u>ISSUES</u>

[13] The issues for consideration here are direct and crisp. Firstly, the Court must determine whether or not the Plaintiff has established that the insured driver was **1%** responsible for the collision that ensued. In light of the fact that the Defendant did not present any evidence before Court on the date of hearing, the determination of the negligent driving of the insured driver will stand or fall by the testimony of Ms Nyathi. Secondly and on quantum, whether or not the Plaintiff has proved, on a balance of probabilities, the loss sustained by the minor children.

<u>LEGAL FRAMEWORK</u>

[14] Insofar as this involves the determination of who of the two drivers, the deceased or the insured, drove negligently, it may be instructive to refer to the *locus classicus* case on negligence - *Kruger v Coetzee* [1]where it was stated:

"For the purposes of liability culpa arises if –

(a) adiligens paterfamilias in the position of the defendant –

(I) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

[1] 1966 (2) SA 428

(b) the defendant failed to take such steps."

[15] In a similar vein, the matter of *Martindale v Wolfaardt* [2]where it was stated that: *"a driver is entitled to regulate the manner of his driving on the assumption that another driver will not suddenly, without warning and recklessly, expose himself and others to danger."*

[16] To the extent that I adopt the attitude that the Plaintiff has failed to prove the loss suffered by the minor children as a result of the death of their father, it is vital to mention the law governing the granting or refusal of absolution from the instance. The law in that respect is trite. The test to be applied for absolution, usually at the end of the Plaintiff's case, is not whether or not the evidence levied before Court by the Plaintiff demonstrates what would customarily be necessary to be proved at the conclusion of the case of both parties. Instead, a Court should ask itself whether or not there is evidence upon which a Court, applying its mind reasonably to such evidence, 'could or might' and not should, nor ought to' find for the Plaintiff were the matter to proceed to finality. See, *Claude Neon Lights (SA) Ltd v Daniel*[3].

[17] It has been said that the test entails that a Plaintiff has to make out a *prima facie* case such that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no Court could find for the Plaintiff. See, *Marine & Trade Insurance Co Ltd v Van der Schyff*[4]. Insofar as inferences from the evidence are concerned, the inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one. That said, a Court should not be too eager to grant absolution at the end of the Plaintiff's case unless doing so, after a careful consideration of the circumstances, will be in the interest of justice. See, *Gordon Lloyd Page & Associates v Rivera*.[5]

ANALYSIS

[2]1940 AD 235 at 240
[3]1976 (4) SA 403 (A)
[4] 1972 (1) SA 26 (A) at 37G - 38A
[5] 2001 (1) SA 88 (SCA)

[18] In the absence of evidence rebutting the version of the case of the Plaintiff on who of the two drivers caused the collision, this Court finds itself in the unenviable position of having to accept the testimony of Ms Nyathi. She told this Court that the insured driver emerged from the curve driving in the lane of oncoming traffic. She testified further that the deceased, confronted with this situation, tried to avoid the collision by moving to the left-hand side of the road.

[19] As he did so, however, he noted that he was likely to collide with a tree on the left-hand side of the road. Avoiding a collision with the tree, he swerved back to the road in the process of which he collided with the rear end of the offending motor vehicle. The impact caused the deceased's vehicle to lose balance. When Ms Nyathi composed herself, the deceased's vehicle was lying on its side and she could not recall what happened thereafter. Her evidence suggests that the insured driver was the sole cause of this collision and I have no difficulty accepting it to be the case.

QUANTUM

[20] According to the original particulars of claim, the loss of support suffered by the minor children amount in all to **R4 000 000.00**. As could be expected, the particulars of claim do not describe in detail how that amount was computed but one would have expected it to be supported by *viva voce* evidence in Court. Mr Potgieter was the actuary who was instructed to calculate the loss of the minor children and he presented his actuarial report in Court on the date of hearing of the case.

[21] His calculation without the application of the cap added up to approximately **R6 300 000.00**. Since this claim is affected by the statutory cap introduced in 2008, he reduced the amount and he arrived at **R4 353 071.00** as the total loss of both minor children. This is therefore the long and short of his evidence. It is immediately evident that the amount claimed in the original particulars of claim and the amount presented to Court as representing the minor children's loss do not correspond.

[22] Confronted with this predicament, on 21 June 2022 I caused an e-mail message to be sent to the Plaintiff's attorneys drawing their attention to the fact that following the evidence levied in Court, there should be an amendment of the particulars of claim in the file. The attorneys were advised to present the amendment on or before 17:00 on 22 June 2022. An amendment of the particulars of claim was duly submitted punctually.

[23] On perusal of the amended particulars of claim, I discovered that the Plaintiff's attorneys neither make reference to the amount claimed in the original particulars of claim nor the figure mentioned by Mr Potgieter in the actuarial report. The amendment submitted reflects the amount claimed as **R6 000 000.00**. Like the amount claimed in the original particulars of claim, there is no account of how the amount has been calculated.

[24] The outcome of all this is that the Court has three different amounts. The two amounts are referred to in the pleadings but with no supporting evidence to explain how they have been calculated. The amount calculated by the actuary has been properly explained but there is no amendment making the contents of the report or the report on its own, part of the pleadings. The evidence of the actuary levied in Court cannot form part of the pleadings to resolve the predicament in which this Court find itself. The upshot is that none of these amounts have been proved as loss of support of the minor children.

[25] When faced with the issue whether to grant or refuse absolution, the question to pose is not whether or not the evidence levied before Court by the Plaintiff demonstrates what would customarily be necessary to be proved at the conclusion of the case of both parties. Instead, a Court should ask itself whether or not there is evidence upon which a Court, applying its mind reasonably to such evidence, 'could or might' and not should, nor ought to' find for the Plaintiff were the matter to proceed to finality. See, the *Claude Neon Lights (SA)* case above.

[26] It is manifest that 'there is no evidence upon which a Court, applying its mind reasonably to such evidence, might find for the Plaintiff were the matter to proceed to

finality’. This is so because neither the amendment that refers to the amount of **R6 000 000.00** nor the amount of **R4 000 000.00** mentioned in the particulars of claim state how the figures were computed. Equally, the actuarially calculated amount is not part of the pleadings notwithstanding that Mr Potgieter gave evidence in Court. That is to say that the Plaintiff has failed to demonstrate one element of the claim – patrimonial loss. Given these facts, it is in the interest of justice that an absolution be granted at this stage to avoid time and resources of this Court being squandered on a matter that is hopeless.

<u>ORDER</u>

[27] In the result, the claim fails and I make the following order:

The claim of the Plaintiff is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties’ representatives by email. The date and time for hand-down is deemed to be 24 June 2022 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:	**Mr D Gama**
Instructed by:	**D Gama Attorneys**
Counsel for the Respondent:	**No Appearance**
Instructed by:	

Date of Judgment: **24 June 2022**