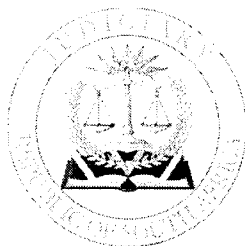


REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

Elmhusk 28/02/2017

28/02/2017

CASE NUMBER:20753/13

In the matter between:

SABELO SYDNEY BOY

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI, J

[1] The matter before me is for a claim for maintenance against the Road Accident Fund. The merits part of the claim has been settled at 100% in favour of the plaintiff. What is outstanding is the *quantum* part of the claim. Defendant has admitted all the issues of *quantum* but would like the court to determine whether the plaintiff is entitled to claim maintenance resulting from the death of a child. The defendant is also not satisfied about the contingency deductions contained in the actuarial report.

[2] The crux therefore is whether the plaintiff is legally entitled to maintenance from his daughter and whether the contingencies in the actuarial report are correct.

MAINTENANCE

[3] The plaintiff is the only witness that gave evidence. The plaintiff is sixty nine years old and presently stays in Folweni Township in the vicinity of Umlazi in Kwa-Zulu Natal. It is common cause that the plaintiff's daughter Purity Thembeke Sabelo ("Thembeke") died in a motor collision in 2012. At the time of her death she was employed. It is, however, not said how much she earned. The plaintiff on the other hand was not employed as he is a pensioner. Thembeke contributed towards his daily living expenses. She used to give money to the plaintiff's wife, who, unfortunately also passed on after the death of Thembeke, on a monthly basis for the household necessities. With that money the plaintiff's wife would buy groceries for the household, candles, paraffin and pay for household utilities.

[4] At the time Thembeke died, the plaintiff was already a pensioner and was receiving an amount of R1 200 old age pension. At the moment he receives R1 500. After buying household necessities there was no money left mainly because the wife was also sickly and constantly required medical attention. The plaintiff testified that according to his Zulu custom and tradition it is the duty of a child, if such a child is working, to maintain her/his parents. Thembeke had a duty to maintain him.

[5] Under cross examination it was determined that the plaintiff has two surviving children - before the death of Thembeke they were three. The eldest child was born in 1980 and the young one in 1982. They are all living together. There are actually six other children from the plaintiff's wife's side of the family who are staying with them and the plaintiff is responsible for their maintenance. Thembeke's twin Thandeka is working and sometimes contributes to the household needs. She cannot contribute much because she has a child to maintain and also pays for her studies. The boy, Sihle is unemployed but at times he gets odd jobs. The plaintiff left work because of an injury he sustained on duty but he was already of a pensionable age. When he left work he was given an amount of R230 000. He used this money for a traditional wedding celebration, renovated his house and used the remaining amount for other household requirements. The money is all used up. With his pension grant and Thandeka's contribution they can only afford the bare necessities of life – no luxuries.

ARGUMENT

[6] The submission by the plaintiff's legal representative is that there was a duty on the plaintiff's daughter, Thembekile to maintain the plaintiff due to tradition and custom. He concedes that to prove a claim the parent should be indigent but argued that indigency does not mean that the claimant should be poor and have nothing.

[7] The defendant's legal representative's contention is that in case of loss of support the requirement is that the person claiming should be indigent in order to qualify. According to her, the plaintiff is not indigent because he has money. He receives government pension grant every month and the duty to support him has now shifted on Thandeka who is presently working.

[8] The parties referred me to the following judgments: *Fosi v Road Accident Fund 2008 (3) SA 560 (C)* and *Jermimah Tutubala v Road Accident Fund 2014/34463 Gauteng Local Division*.

THE LAW

[9] From my reading of the judgments I have been referred to it appears as if the test for a parent's entitlement to maintenance from her/his child is no longer indigency but whether the parent can prove that she/he was dependant on the child's contribution for the necessities of life.¹

¹ See *Fosi v Road Accident Fund* above, at para [13].

[10] I am in agreement that the test for indigency is too onerous and difficult to prove. It may result in many who are in need of the maintenance contribution not being able to claim. The reformulated test is much easier to prove. What constitutes necessities of life depends on the individual parent's lifestyle.

[11] I am satisfied therefore that the plaintiff in his evidence was able to show on a balance of probabilities that he is in need of the maintenance contribution. The evidence shows that the amount of the government pension he receives is inadequate and cannot meet all his household necessities. He does not live a luxurious life. He is a simple man who requires only the bare necessities of life. His money goes only towards groceries and the household utilities and nothing else. He does not have anything left after he has expended his monthly income. The plaintiff has also been able to establish his dependency on Thembekile during her lifetime.

[12] The plaintiff's claim in this regard should succeed.

CONTINGENCY CALCULATIONS

[13] The parties are common cause in regard to the figures used in the actuarial report. What is in dispute are the contingency percentages. The actuary has deducted a contingency percentage of 5% for accrued loss and 10% for prospective loss. These contingencies have been calculated on the life expectancy between the plaintiff and the deceased.

[14] The plaintiff's legal representative's submission is that the contingency percentages used in the actuarial report are correct because the plaintiff is an elderly person.

[15] According to the legal representative of the defendant the calculations should have been based on the life expectancy of the plaintiff as such there must be a higher contingency. The possibility of the deceased getting married and having her own family is not factored in, so she argued. She suggests a deduction of 30% for past loss and 45% for future loss.

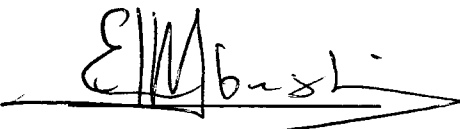
[16] The parties referred me in this regard to the judgment in *R B E v Road Accident Fund 20179/2013 Gauteng Division, Pretoria 15/12/2014 para [39]*.

[17] It is my view that the contingency calculations in the actuarial report are correct. I find the percentages to be fair and reasonable in the circumstances of this matter. The plaintiff is as a result awarded an amount of R340 690 for damages for loss of support.

[18] I make the following order:

18.1 The plaintiff's claim for damages for loss of support succeeds with costs on a party and party scale.

18.2 The defendant shall pay the sum of R340 690 together with interest at the rate of 9% *per annum* to the plaintiff after fourteen court days from date of this order to date of payment.

A handwritten signature in black ink, appearing to read 'E.M. Kubushi', written over a horizontal line.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	: 09 February 2017
DATE OF JUDGMENT	: 28 February 2017
PLAINTIFF'S COUNSEL	: Mr. H.W. Theron
PLAINTIFF'S ATTORNEYS	: H W Theron Inc.
DEFENDANTS' COUNSEL	: Adv. D. M. Matlhabegoane
DEFENDANTS' ATTORNEY	:Borman Duma Zitha Attorneys