

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

22/9/2016

Reportable: No

Of interest to other judges: No

Revised.

CASE NO: 2014/67644

In the matter between:

DOMU BUYISILE LANGA,

First Plaintiff

THANBANI ZUNGU,

Second Plaintiff

GAMELIHLE ZUNGU

Third Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Murphy J

1. The parties have placed a stated case before me for determination.
2. On 21 November 2009, Siphwe Zungu ("the deceased") was a passenger in a motor vehicle with registration number [...] driven by R Veerasamy ("the insured driver").

3. The deceased was killed in a motor vehicle collision in the vicinity of Mayuba, Kwa-Zulu Natal, when the insured driver lost control of the vehicle in which they were travelling. The vehicle left the road and overturned resulting in the deceased sustaining fatal bodily injuries, in consequence of which he died at the scene of the collision.

4. The deceased was 27 years of age at the time of the collision.

5. The first plaintiff is Ms Domu Langa, the mother of the deceased who was 50 years of age at the time of the collision. She originally claimed compensation both in her personal capacity as well as in her representative capacity, as mother and natural guardian of her minor daughter Gamelihle Zungu, the sister of the deceased who was 12 years of age at the time of the collision. The second plaintiff is Thabani Zungu, the deceased's brother, who was 14 years of age at the time of the collision. Both children have now attained majority, and hence Gamelihle is now cited as the second plaintiff.

6. It is common cause that the defendant is liable for damages suffered by any person resulting from the death of the deceased, as contemplated by section 17 of the Road Accident Fund Act 56 of 1996 ("the Act").

7. At the time of his death, the deceased was employed by Tiger Packaging (Pty) Limited and was earning a salary of R 9 000, 00 per month.

8. During the deceased's lifetime, he supported the first plaintiff. The defendant is liable to compensate the first plaintiff in her personal capacity for the loss of support which she sustained. Her loss of support has been quantified at R 491 180, which amount the defendant has agreed to pay. There is accordingly no need to make any order in respect of her settled claim. This judgment is concerned only with the claims of the children.

9. Gamelihle and Thabani were scholars and minors at the time of the deceased's death. Their parents are the first plaintiff, Domu, and the late Phath Zungu who passed away on 27 February 2000. Domu, the first plaintiff, was unemployed at the time of the deceased's death and is still unemployed and was unable to support the minor children.

The deceased was accordingly the sole source of support for his two minor siblings. As the children have attained the age of majority their claim is for past loss of support, which they have agreed to limit to the period before they turned 18 years of age.

10. The only issue this court is required to determine is whether the defendant is liable to compensate Gamelihle and Thabani for their loss of support by the deceased while they were minors. In the event that the defendant is liable to compensate the children for their loss of support the defendant has agreed the amount payable in respect Gamelihle and Thabani is R 115 931 and R 70 015 respectively.

11. Damages for loss of support normally can only be suffered where the third party had a right to claim maintenance from the deceased.¹ The amounts payable by a deceased as maintenance but which he or she is unable to pay due to his or her death caused by the negligent and unlawful driving of a motor vehicle may be recovered by the third party to which the deceased owed a legal duty to maintain.

12. Our law takes a generous view towards the duty of support by recognising the changing nature of relationships of dependency in modern society. The point of departure is whether a dependant has a claim worthy of protection by law. The answer is determined by reference to the morality of society, which is divined by an exercise of judicial policy-making aimed at acknowledging that social changes warrant legal norms to encourage social responsibility. Our law has thus recognised that the duty of support extends to children, parents and even siblings, such as in this case, with due regard to factors such as morality, justice and the history of support even in instances where such support was not mandatory or typical.

13. In *Oosthuizen V Stanley*² the court found that a legal duty of support exists between an indigent parent and an able child. Indigent parents accordingly will have a claim for loss of support in the event that the child was contributing to their maintenance. In an *obiter dictum* the court stated further that an indigent brother or sister might be

¹ Union Government v Warneke 1911 AD 657; Union Government v Lee 1928 AD 202; Paterson v SAR & H 1931 CPD 289; and Evins v Shield Insurance 1980 (2) SA 814 (A)

² 1938 AD 322

entitled to claim support from a sibling if the parents are unable to provide³. The governing principle always must be whether the indigent can prove dependency on the contribution of the deceased for the necessities of life, which in turn is contingent on the dependant's station in life.⁴ In the case of an indigent parent even if the plaintiff's surviving children had been able to contribute to his or her maintenance, this would not exclude a claim: the co-liability of siblings is irrelevant to a claim against one of them.⁵ It would be invidious for the court to rule that there had been no duty of support when the deceased had voluntarily assumed such a duty. An agreement by a deceased to maintain an indigent parent or sibling would normally give rise to a right to maintenance that was enforceable.⁶

14. The duty of support between siblings was considered in *Ex Parle Pienaar*.⁷ There it was stated that the duty of nearer relatives must be considered before remoter relatives can be held liable. Nonetheless, in Roman-Dutch Law a duty of support exists between brothers (including half-brothers).⁸ The court thus held in that case that a duty did exist for a sibling to support his sisters and brothers. As in all cases the degree or scope of maintenance is a matter of some difficulty but is usually payable to an indigent person and in the discretion of the judge. The court went on to consider for how long such a duty endures. The learned judge said as follows:

"The next question is when does the right to receive these payments ceaseThe duty of support due by a parent to a child may involve the duty to afford the child a university education ... No authority has been quoted to me which suggests this applies also as between brothersAs I read (the authorities) ...it cannot be the duty of a brother to support a brother who is physically and mentally well after the latter has attained majority ..

15. The general principle thus would seem to be that a sibling's duty to support his or her indigent sibling would normally not endure beyond the latter attaining the age of majority. However, the learned judge was at pains to point out that his conclusion to that

³ Oosthuizen v Stanley 1938 AD 322 at 331

⁴ Jacobs v Road Accident Fund 2010 (3) SA 263 (SE) 268 E

⁵ 268H -I

⁶ At 268J - 2698

⁷ [1964] 2 ALL SA 62 (T).

effect in the case before him rested upon his interpretation of an applicable agreement which had been made an order of court. He thus left open the question of whether the common law might be developed in accordance with prevailing *boni mores* to allow for such a duty to extend beyond majority. There is no need to canvass that issue further in the present case as the parties have agreed on the amount payable in the event that I find such a duty does exist.

16. In *Du Plessis v RAF*,⁹ the Supreme Court of Appeal ("the SCA") considered the duty of support between unmarried persons, not legally allowed to marry, but who voluntarily assumed an obligation to support each other, thus giving rise to a contractual obligation. It referred to *Knop v Johannesburg City Council*¹⁰ where it was said:

"In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of moral and justice, the convenience of administering the rule and our social ideas as to whether the loss should fall. Hence the incident and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes"

17. In *Paxiao and Another v RAF*¹¹ the SCA considered the duty to support between unmarried heterosexual couples. It held that the dependant's action exists where a contractual duty of support has been established and extended to the child of the plaintiff who was not the biological child of the deceased. The court referred to *Amod v Multilateral Vehicle Accident Fund*¹² where Mahomed CJ stated: - '

"The precise scope of the dependant's action is unclear from the writings of the old Roman Dutch jurists. De Groot extends it to those whom the deceased was accustomed to aliment ex officio, for example his parents, his widows, his children

⁸ Voet 25.3.8 (Gane's translations Vol 4).

⁹ 2004 (1) SA 359 (SCA)

¹⁰ 1995 (2) SA 1 (A) at 27G-I

¹¹ 2012 (6) 377 (SCA)

¹² 1999 (4) SA 1319 (SCA)

... this and other passages in De Groot's writings perhaps support his suggestion that the action was competent at the instance of any dependant within his broad family who he in fact supported whether he was obliged to do so or not but this is unclear. The same uncertainty but tendency to extend the dependant's action to any dependant enjoying a *de facto* close familial relationship with the breadwinner is also manifest in Voet 9.2.11 who seeks to accord the dependant's action to the breadwinner's wife, children and the like.....

18. *Meteso v Padongeluksfonds*¹³ concerned a claim against the Road Accident Fund arising from the death of an uncle of certain children who he had supported. It was held that a binding offer to support the children was sufficient to ground a duty of support because it was consistent with the morality of society¹⁴. In the more recent decision of *Taljaard v Road Accident Fund*¹⁵ the court examined the duty of a biological father who had given his minor child up for adoption, but nonetheless continued to maintain her. The court observed: -

'It seems to me that these cases demonstrate that the common law has 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 of 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. This norm is not parochial, but rather, is likely to be universal; it certainly is consonant both with norms derived from the Roman-Dutch tradition ... and, no less, from norms derived from African tradition, not least of all, as exemplified by the spirit of Ubuntu....

19. The case law thus leaves no doubt that the courts should apply the common law duty of support flexibly. The duty has been extended to various dependants where support has ceased as a result of the death of the person bearing the duty by law or ex

¹³ 2001 (3) SA 1142 (T)

¹⁴ At 110G- H

¹⁵ 2014 JDR 2078

contractu. There is no doubt that the same principles apply in the case of siblings.

20. The minor children in this case should look to their closest relatives for maintenance. Their father has passed away and their mother is indigent. The defendant has settled with the first plaintiff on the basis of her indigence and dependence on her deceased son for support. The only person supporting the minors was the deceased. He voluntarily assumed the obligation and supported them during his lifetime. Accordingly, on the basis of the authorities cited, I accept that the deceased indeed had a legal duty to support the minor children, at least until they attained the age of majority (both having now done so) and as such they have a valid claim against the defendant for that loss of support while they were minors.

21. The defendant's case is that no duty of support existed between the deceased and his minor siblings. For the foregoing reasons I reject that submission. It is common cause that the children were supported by the deceased, that their mother was indigent and their father had passed away. Accordingly, and in terms of the moral convictions of our society, there was a legal duty on the deceased to support the children, which duty he had voluntarily assumed. This support would have continued until such a point that they attained majority. As the stated in the precedents, it would be invidious for a court to rule that a sibling had no duty to support his siblings when he had voluntarily assumed that obligation and they had no parents to turn to for that support.

22. However, the defendant goes one step further. It maintains that the mother of the minor children is no longer indigent, as she had been provided a settlement amount by the defendant of approximately R490 000 and the minor children are required to look to her for their support. The argument is unsustainable. The children only claim for loss of support until the age of 18. Thabani attained the age of majority in 2013 and Gamelihle in 2015. The first plaintiff was awarded her settlement on 15 February 2016. Accordingly, for the time period in which the children were minors, their mother was indigent. The first plaintiff's claim was computed by taking into account what the deceased contributed to her personal maintenance and not the amount which he contributed towards the second and third plaintiffs. The first plaintiff's claim would have been larger had this been accounted for. The basic principle of compensation in delictual actions is to place the plaintiff in the position he/she would have been had the delict not

occurred. She is entitled to the amount necessary to place her in the financial position he or she would have enjoyed had a delict not been committed¹⁶. As stated in *Jacobs V Road Accident Fund*,¹⁷ the fact that there are other family members in a position to support a dependant is irrelevant to a dependant's claim against the one sibling who was supporting him or her.

23. As mentioned at the outset, the parties are in agreement that should the deceased have owed a duty to support the children, they should be awarded the amounts of R 115 931, 00 and R 70 015, 00.

24. The parties agreed that should I find in favour of the plaintiffs the following order should be made:

- i) The defendant shall pay to the second plaintiff, care of Swartz Attorneys' trust account, the capital sum of R 70 015, 00 for his loss of support.
- ii) The defendant shall pay to the third plaintiff, care of Swartz Attorneys' trust account, the capital sum of R 115 931, 00 for her loss of support.
- iii) All payments referred to in this order are to be paid to the following banking details:

DENISE SWARTZ ATTORNEYS
FIRST NATIONAL BANK LIMITED
BALFOUR PARK BRANCH
TRUST ACCOUNT NO: [...]
BRANCH CODE: 212217

- iv) The defendant is ordered to pay the plaintiff s taxed or agreed party and party costs on the High Court Scale which shall include but not be limited to the following: -

¹⁶ Free State Consolidated Gold Mines V Multilateral MVA Fund 1997 (4) SA 930 (0) at 949

¹⁷ 2010 (3) SA 263 (SE)

- a. The costs of counsel;
- b. The reasonable taxable costs of obtaining the actuarial reports from the Plaintiff s experts which were furnished to the defendant being the report of Ivan Kramer.
- c. The reasonable taxable preparation fees of Ivan Kramer of whom notice has been given

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard:	24 August 2016
Date of Judgment:	22 September 2016
For the Plaintiffs:	Adv T Lipshitz
Instructed by:	Swartz Attorneys
For the Defendant:	Adv K Magano
Instructed by:	Diale Mogashoa Attorneys