IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case Number: 70650/2013

In the matter between:

MTETWA NOMVULA MAGGY **PLAINTIFF**

And

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

LEPHOKO AJ

11] The plaintiff sues the defendant for damages for loss of support resulting from the death of her daughter in a motor vehicle collision that occurred on 25 June 2005.

[2] The defendant conceded 100% of the merits concerning the accident. The only issue in dispute is whether the plaintiff suffered any loss of support as a result of the death of her daughter, Nomalizwe Florence Lekane.

[3] The plaintiff testified that she was born in 1946 and is 69 years old. She is the biological mother of the deceased. At the time of the deceased's death the deceased was employed as a social worker and earning a salary. The plaintiff lived together with her husband, the deceased and the deceased's two minor daughters. The plaintiff and her husband received a state pension at the time. Around 2006 her pension was around R800-00 and her current pension is R1 300-00. Her husband who passed away in 2006 abused alcohol and made no contribution towards the support of the plaintiff. She was not certain of the amount of pension she received at the time, she could

barely survive with whatever pension she received.

[4] The deceased supported her and the deceased's two minor daughters. She supported her for about two years before she passed away. She bought food for the household and gave the plaintiff amounts ranging between R500-00 and R1000-00 per month. The plaintiff used the money for her personal needs including medical expenses. She uses her current pension to, among others, pay for rates and taxes, food, funeral insurance, school fees and transport for her grandchildren as well as to support her unemployed sickly elder child. The current pension is too little and after paying the foregoing expenses she sometimes has no money to buy bread. For the past nine years she survives by supplementing her pension by regularly borrowing money from micro lenders at onerous interest. She now receives an additional income of R450- 00 per month from rental income. She also receives some social grant money of about R85-00 for one of the grandchildren. Since her daughter passed away she cannot afford medical expenses, clothing and other necessary expenses.

[5] She testified that according to African tradition or indigenous custom working children are expected and obliged to support their needy parents and needy members of their extended family. The deceased was expected to support her needy parents as they had raised her. She stated that when she was employed she used to support her parents as well.

[6] Under cross examination it transpired from the employer certificate that the deceased had left her formal employment as a social worker on 31 January 2005 whilst she passed away on 30 June 2005 after the accident on 25 June 2005. It was contended by the defendant that as the deceased was not working at the time of her death she would have had no income from which she could have supported the plaintiff. The plaintiff stated that in so far as she was concerned the

deceased was employed at the time of her death as she had continuously provided her with the same level of support until her death. It was then contended by the defendant that the probabilities were that the deceased was unemployed as her source of income was unknown.

[7] The plaintiff was an honest witness who did not appear to exaggerate her plight and personal circumstances or attempt to mislead the court. If it were so she could have easily invented a source of income for her daughter. I am satisfied that there is no basis for the court to reject the plaintiff's evidence.

[8] The plaintiff's granddaughter, Mankube Lekane, was called as a witness. She corroborated the plaintiff's version in material respects. The defendant did not call any witnesses to challenge the evidence presented by the plaintiff.

[9] In order to succeed with her claim for loss of support the plaintiff must establish that she is indigent and that as at the time of the deceased's death, the deceased was under a duty to support her. The three prerequisites of a legal duty of support are a relationship; need on the part of the person to be supported; and adequate resources on the part of the person who is called upon to provide support.[1]

[10] In *Smith v Mutual & Federal Insurance Co. Ltd*[2] the court set the test for indigency as follows: 'To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Accordingly, when the plaintiff pleads indigence, it is not sufficient to show that the plaintiff lives on very little or nothing *(vide World Book Dictionary*). The plaintiff must prove something more. The plaintiff should prove that there is an extreme need or want for the basic necessities of life"

[11] In my view there is no appreciable difference between being in extreme need or want and having few things or nothing. Either situation represents a genuine need for the restoration of human dignity. Whatever the definition, whether a need for support exists will depend on the facts and circumstances of each case, in particular the lack of the necessities of life.[3]

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[1] Schafer: Family Law Service, Chapter C: Maintenance at 1.
[2]1998 (4) SA 626 (C) at 632D-E.
[3] Oosthuizen vStanely 1938 AD 322 at 327-328.

[12] The approach of the court in *Wigham v British Traders Insurance Company Ltd*[4] is to be preferred. In Wigham the court stated that: "I think the authorities furthermore make it clear that in order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received the contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed...... The aim and object is to place the dependants in as good a position as regards maintenance as they would have been if the deceased had not been killed, to which end material losses as well as benefits and other prospects must be considered."[5]

[13] The undisputed evidence of the plaintiff paints a picture of indigence. The question that remains to be answered is whether the deceased had a duty to support her indigent mother.

[14] The liability of children to support their parents, if these are indigent *(inopes),* is beyond question;......Support (*alimenta)* includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness.[6] In African law it is most certainly an actionable wrong on the part of the child who is financially able, not to provide support to his needy and deserving parents. Quite apart from it being an

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[4] 1963 (3) SA151 (W).

[5] Wigham v British Traders Insurance Company Ltd (supra) at 153H-154A; see also Oosthuizen v Stanely 1938 AD 322 at 327-328.

[6] Oosthuizen v Stanely (supra).

actionable wrong, failure to maintain one's parents by a child who is financially able to do so, is, in black traditional law contrary to the public policy *(contra bonos mores)*[7]

[15] The plaintiff submitted an actuarial report on which the calculation of the plaintiff's loss of income is based, updated to 18 June 2015. The actuary based his assumptions on the income that the deceased earned in her last employment, i.e. as a social worker on 31 January 2005. It is common cause that the deceased's source of income as at the time of her death could not be ascertained. The deceased died six months after her last known formal employment. The evidence is that the deceased continued to support the plaintiff to the same standard notwithstanding that her source of income was unknown. For this reason the court is willing to accept the actuarial calculations as a useful guide of the plaintiff's loss of income.

[16] The deceased was 37 years at the time of her death and was a social worker by profession. Even if the court was to accept that she may have been unemployed at the time of her death, given her age and previous work experience, the probabilities are that she would have been able to obtain alternative employment in due course and been able to resumed the support of her mother. In essence, the death resulted in the deceased's loss of earning capacity. It is that loss of earning capacity which in turn led to the plaintiff's loss of support.

[17] The actuarial report estimates the accrued loss of income at R145 492-00 and the prospective loss of income at R128 782-00. The total loss of income is estimated at R254 121-0. In terms of the report contingency deductions are applied at 5% in respect of the accrued loss of income and at 10% in respect of the prospective loss of income.

[18] Contingencies are the normal consequences and circumstances of life, which beset every

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[7] Fosi v Road Accident Fund 2008 (3) SA 560 (CPD) at para [17]

human being and which directly affect the amount that a plaintiff would have earned.[8] According to Koch when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation......... The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include early death, loss of employment, promotion prospects, and divorce. He states that the following are some of the guidelines as regards general contingencies: "Normal contingencies" as deductions of 5% for past loss and 15% for future loss; Sliding scale: *Vz%* per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.[9]

[19] Counsel for the defendant suggested that a higher contingency of 20% should be applied in respect of the future loss of income in view of the uncertainty of the deceased's source of income as at the time of her death. I am not persuaded that this provides sufficient justification for departure from the application of the normal contingency deductions. The purpose of the deduction is to arrive at the most appropriate estimate of a plaintiffs loss whilst ensuring that the award is fair and equitable to both parties. In the circumstances of this case I find a contingency deduction of 15% in respect of the future loss to be appropriate. Accordingly

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[8] Southern Insurance v Bailey 1984 (1) SA 98 (A).
[9] The Quantum Yearbook, Robert Koch, 2015 at 120.

the future loss of income is estimated at R109 465-00. In the result the plaintiff's total loss of income is estimated at R247 682-00

[20] The particulars of claim and the plaintiff's affidavit stated the date of the accident as 25 June 2006 and the date of the deceased's death as 30 June 2006 instead of 25 June 2005 and 30 June 2005 respectively. The plaintiff testified that the accident and the death had occurred in 2006. The parties agreed to an amendment of the particulars of claim to reflect the correct dates as these dates were common cause between the parties. It was also accepted by both parties that the plaintiffs reference to June 2006 was a *bona fide* mistake.

[21] I am of the view that the plaintiff has discharged the onus placed on her as regards her claim for loss of support. Consequently her claim succeeds.

ORDER:

1. **The plaintiff's particulars of claim are amended to reflect the date of the accident as 25 June 2005 and the date of death of Nomalizwe Florence Lekane as 30 June 2005.**
2. **The defendant shall pay to the plaintiff the amount of R247 682-00.**
3. **The defendant shall pay the plaintiff's agreed or taxed costs as between party and party on the High Court Scale, which costs shall include the costs of the actuarial calculations and revised calculations.**
4. **The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorneys of record.**

5. **Such agreed or taxed costs shall become payable 14 (fourteen) court days after such agreement or taxation.**

6. **The payments referred to in paragraphs 2 and 3 above shall be made into the plaintiff's attorneys trust banking account, the details of which are as follows:**

Account holder: Lundell & Hassan - Lundell (Trust Account).

Account Number: 01………………….

Bank: ABSA.

Branch: Von Wielligh Street.

Branch Code: 5…………………….

Account type: Current.
LEPHOKO AJ

(ACTING JUfSCTOF THE HIGH COURT)
Heard on: 18 June 2015.
Judgment delivered on: 03 July 2015
For the Plaintiff: Adv. C De Agrella
Instructed by: Lundell & Hassan-Lundell Attorneys.
For the Defendant: Adv. M M Kgwale Instructed by: Rambevha Morobane Attorneys.