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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 16780/13

In the matter between

MUMTAZ OSMAN

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Ismail J:

[1] The plaintiff seeks damages arising out of a motor collision where her son was fatally injured. The plaintiff's claim is based on the notion of indigent's in that she alleges that her son supported her during his lifetime.

[2] The motor vehicle collision took occurred on the 12 April 2008. The

plaintiff's son was driving a motor vehicle with registration numbers [FB.....
J U D G M E N T

GP] and a motor bike with registration number [D.....P] collided near
Lydenburg.

[3] The plaintiff avers that the collision was caused solely by the negligent
driving of the insured driver.

[4] The plaintiff's son at the time of the collision was 28 years old. He was
married and he resided in the same house as his mother, the plaintiff.

[5] The deceased was employed at the time of the collision at Standard Bank of South Africa, and he earned a monthly salary of R7 837. 00. A certificate relating to his salary was attached to the notices bundle

[6] During the trial before me the plaintiff, Mrs Mumtaz Osman, and her daughter Mrs Mehtar also gave evidence.

[7] In brief, the evidence of the plaintiff was that she never worked in her life. Initially her husband supported her. Her husband is separated from her and he lives with his sisters. He does not support her at all. Her son during his life time would on a monthly basis give her his credit card to utilise for whatever expenses she needed. She would purchase items such as food and other household provisions she needed with the card.

[8] Mrs Osman estimated that he she would utilised the credit card on average in an amount of R2 500,00 per month for herself.

[9] Mrs Mehtar's evidence was that she and her brother assisted their mother, however she is no longer employed and the sole responsibility of supporting their mother fell on her late brother.

[10] During cross examination Mrs Osman stated that since her son's death the bond repayment has not been paid timeously and the bank threatened to foreclosure on the property. The bond repayment amounted to R4 500,00 per month. She does not receive a pension and her father and brother assisted her from time to time.

[11] This in summary form was the evidence presented during the trial.

[12] The matter was postponed in order for the plaintiff to obtain an actuarial

report.

[13] When the matter resumed, Mr Ryan Immermann, an actuary in the employ of Gerald Jacobson actuaries, testified. He handed in a report, the contents of which he confirmed as being correct. In this report Mr Immermann calculated the past and future loss of Mrs Osman to be R 680 302.00. Working on a past contingency of 5% and a future contingency of 20%.

He testified that usually in matters of this nature where there is a claim for loss of support the formula used is 2 parts for the deceased ; 2 parts for the spouse and 1 part for each child.

He stated that he was told by the instructing attorney that the deceased was not married.

[14] During cross examination he was informed that the deceased was married and he was asked whether that would have made a difference to his findings regarding the amount for loss of support towards the plaintiff. He stated that he would then have to re-calculate the figures based on that fact.

[15] Notwithstanding Mr Immellmann testifying that the figures had to be recalculated , plaintiff's counsel failed to request him to do so. The figures were therefore not recalculated in the light of the deceased being married..

[16] Mr Prinsloo, on behalf of the plaintiff submitted that Mrs Osman was indigent and that the deceased owed a duty of support to maintain his mother which he did during his lifetime. He accordingly sought an order in terms of the actuaries findings.

Mr Binase, on the other hand, submitted that the plaintiff failed to make out a case that she was indigent and that the case should accordingly fall and be dismissed with costs. He also submitted that the basis on which the actuarial calculation was done was not on a precise amount which the plaintiff received but rather on an estimate and in addition on the premise that the deceased was a single man and not married.

The Law relating to indigency

[17] In *Oosthuizen v Stanley*¹ Tindall JA stated:

“ There is no doubt on the authorities which are quoted in *Waterson v Mayberry*, 1934 TPD 210, that the plaintiff had to prove not only that either Stephanus or Elsie contributed to his support but that there was a legal duty to contribute because his circumstances were such as that he needed the contribution. The liability of children to support their parents, if they are indigent (imopes), is beyond question; see Voet..... Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent’s income is a question of fact depending upon the circumstances of each case...”

[18] Dlodlo J in the matter of *Fosi v Road Accident Fund and another*² at par [13] succinctly described this duty as follow:

“Simplistically put the deciding principle seems to be whether the parent can prove that he or she was dependent on the child’s contribution for the necessities of life. Indeed what constitutes necessities of life will in turn depend upon the individual parent’s station in life. “

[19] In the *Fosi* matter, *supra*, the judge at great length discussed the duty to support under African Customary Law from para [16] -[23] of the

¹ 1938 AD at 327-328

See also *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C) at 629H-I.

judgment. He concluded that the Constitution prescribed that the Courts should embrace customary law³.

[20] This aspect was not argued before me, however I take it upon myself in the interest of justice and fairness to venture into this domain, by extending the common law.

There can be no doubt that in certain cultures such as Muslim or Hindu cultures , amongst others, there is an similar duty upon children to support their parents as Dlodlo J so eloquently related in the *Fosi's* matter.

[21] In these communities the family is not restricted to the nuclear family but rather to the extended family. It is not uncommon for grand -parents or even an aunt who is single to live with the family. The deceased lived with his mother and wife in the same home. The plaintiffs evidence was that she never worked at all. It is clear that she was dependent upon him to the same extent as a child, had there been one. In these societies there are hardly any old age homes or places where old people can retire. This is not not because these communities can't afford to build such institutions but rather because the societal mores scorns upon children who do not take care of their aged parents.

[22] Community is defined as a “readily available, mutual supportive network of relationships on which one could depend”⁴ Community comes from a sense of sharing an emotional bond of “ being in this together”, often a sense of

³ Section 211 (3) of the Constitution of the Republic of South Africa , Act 108 of 1996

⁴ Community psychology: Linking individuals and communities" By Dalton, Elias and Wandersman p 190

trusting and caring.⁵

[23] The submission made by counsel for the defendant that the plaintiff must have some money stashed away. This it was submitted does not satisfy the test for being indigent since the bond repayments are being met for the past 6 years since the deceased death. In my view does not detract from the *de facto* situation that the deceased supported his mother. The plaintiff stated that she is often assisted by her father and her brother's for assistance. They may have contributed towards the bond. Mrs Mehtar testified that she went on several occasion to her father and fought with him to pay. See *Khan and Another v Padayachy*⁶

[24] As in African culture and tradition there is a moral and social duty in Muslim and Hindu cultures as well, which are family orientated in the sense of the extended family to look after one's elders. Elderly parents often reside with one or other child who supports them and caters for their wellbeing. Old age homes are almost non-existent in these cultures. The social mores of such societies dictate that parents and the elderly are cared for and where this is not done there is a social stigma associated with it.

[22] I am accordingly of the view that the plaintiff was dependent on the support from the deceased.

[23] The problem which arises, however is that Mr Immermann conceded

⁵ Ibid p 187

⁶1971 (3) SA 877 (W)

that the report ought to have been recalculated. He suggested the 2 portion for the deceased; 2 portions for the spouse and 1 portion for child ratio. Working on that formulae I would therefore work on a one fifth ratio to arrive at a figure.

[24] He calculated the total loss as R680 302, 00. One fifth of that amount therefore equals R136 060.40.

[25] Usually the question of cost would follow the result. On the 23 June 2015 Mr Prinsloo was not at court. He was contacted by my registrar as a result he attended court. He requested that the matter stand down till 2 pm. This unfortunate situation arose despite my registrar having sent an e-mail to him and Mr Binase informing them to choose a date during the week of 22 to 26 June 2015 for the finalization of the matter.

[26] In the light of the greater part of the day having been wasted for the reason referred to above I believe that it would not be just to and appropriate to mulct the plaintiff and/or the defendant with counsels costs for the day.

Therefore, I am of the view that costs should only cover Mr Prinsloo's fee for the appearance on the 29 April 2015 and that he is not entitled to costs for the 23 June 2015.

[27] The order of this court is that:

- (1) the defendant should pay the plaintiff an amount of R136 060,40 as damages
- (2) to pay the plaintiff's costs save as indicated in par [29] above.

I s m a i l J Judge of the High Court

APPEARANCES:

For the Plaintiff: Adv J M Prinsloo instructed by Mr C Coetzee
Attorneys Pretoria.

For the Defendant: Adv Binase instructed by Tsebane Molaba
Incorporated , Pretoria.

Date of hearing: 29 April 2015 and 23 June 2015 Date of Judgment: 03 July

2015.

² Under case number 1934/2005 delivered in the Eastern Circuit Local division at George at par [13]