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REPORTABLE

IN THE NORTH GAUTENG HIGH COURT ON

CIRCUIT IN POLOKWANE. LIMPOPO (REPUBLIC OF SOUTH AFRICA)

CASE NO: 68/2012

DATE: 03/07/2013

In the matter between:

V S M

First Plaintiff

R L M

Second Plaintiff

and

THE MINISTER OF POLICE OF THE GOVERNMENT

Defendant

OF THE REPUBLIC OF SOUTH AFRICA

JUDGMENT

INTRODUCTION

1. The question raised in this case is whether a child whose parent/s has died as a result of unlawful conduct of a third party, has a right to sue for constitutional damages arising from an infringement of the constitutional right to parental care as provided for in section 28(1) (b) of the Constitution of the Republic of South Africa

1996 ("the Constitution").

THE PARTIES AND THE CLAIM

2. The Plaintiffs, V S M and R L M are the mothers of two (2) minor children, DMM ("D") and L C Y M ("L") respectively, who have instituted action for damages suffered by them as a result of the unlawful death of their husband and father of the minors W M ("the deceased"). The deceased, who was the family care giver or breadwinner, died after sustaining serious injuries during detention by the police. The Plaintiffs are claiming in their personal capacities as well as in their capacities as mothers and natural guardians of the deceased's minor children. The Defendant is the Minister of Police.

1. In the summons, the Plaintiffs claim R1 225 368, 00 for D and R1 148 346, 00 for L. It is alleged in the summons that the damages suffered "are general in nature and it is neither possible nor practical to particularise the amount in any further detail. "

2. The claim lodged is for common law damages for the Plaintiffs' loss of support, as well as loss of comfort, society and services. There is also a claim for constitutional damages on the grounds that the children were, as a result the unlawful death of their father and natural guardian, deprived of the constitutional right to parental care.

BACKGROUND FACTS

3. When the matter came before me on the 18th April 2013, both the Plaintiffs and the Defendant indicated to the Court that they have reached a settlement in regard to the claim for loss of support and a draft order was presented to the Court to make it an order of Court. The parties indicated to the Court that no agreement has been reached in regard to the claim for constitutional damages and for that reason; they

agreed to present a stated case for adjudication by the Court.

6. The parties presented a statement of agreed facts in terms of Rule 33(1) and (2) of the Uniform Rules of Court. These facts may be summarised as follows:

6.1 On 31 December 2008, one AM Mhangwana laid a complaint at the Ritavi Police Station in Limpopo that four motor vehicle tyres and four magnesium rims belonging to her have been stolen. On 15 March 2009, Leonard Mhangwana, a relative of the complainant, confronted the deceased at his home, claiming that the deceased was in possession of the stolen items. The deceased denied this accusation and stated that he legally purchased the tyres and magnesium rims found in his possession, from a mechanic in Phalaborwa;

6.2 The two men went to Ritavi Police Station where on arrival the deceased was detained by the police at 19h00. He was locked up in a police cell that had 19 inmates. During the night of 15 March 2009, some of these inmates assaulted him by kicking him several times on his back and ribs while others were singing to drown out the noise. As a result of this assault, he sustained serious injuries;

6.3 While the deceased was still in detention, the police investigation revealed that he had indeed purchased the tyres and rims legally. Consequently on 16 March 2009, the day after his arrest, the deceased was then released from detention. At the time of his release, the deceased was suffering pain, sweating and vomiting. His relatives took him to a doctor who diagnosed “a swollen face; swollen on all 4 limbs; aberrations and lacerations on the lumbar region; chest found to be clear with normal heart beats but had mild dyspnoea; acute stress; multiple bruises on the posterior chest wall; soft tissue injuries and racoon left eye.”¹ The doctor referred him to hospital for treatment. He died in hospital on 16 March 2009;

1 From the report of the attending general practitioner, Dr. C. Mangolele.

6.4 At the time of his incarceration, the deceased was healthy and in a normal condition. The police occurrence book records the inspection of the cells with an entry to the effect that everything was normal.

6.5 The parties stated in the statement of facts as well as the Court Order that the issue of constitutional damages is separated from the other claims. The request, as I understand it, is thus for the Court to adjudicate only on the question of constitutional damages.

THE PARTIES' CONTENTIONS

4. The Plaintiffs, acting on behalf of their children, claim for payment of constitutional damages for deprivation of parental care, as a result of the Defendant's alleged unlawful breach of the constitutional right provided for in section 28(1)(b) - the right to family care or parental care. Section 28(1)(a-d) of the Constitution provides:

"(1) Every child has the right-

(a) to a name and nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation." ²

8. The Plaintiffs contend that under the common law, their children would not be compensated for the loss of parental care as there are no such damages provided for in delict. They further contend that such damages as the child's deprivation of

² Subsection (e) and (f) protects the child from child labour while (g) to (i) deals with protection of a child during arrest, detention, trial and armed conflict.

parental care, should be recognised and compensated for in terms of the Constitution, as constitutional damages under the rubric of “appropriate relief”. The Plaintiffs further submit, with reference to a number of authorities including *Fose v Minister of Safety and Security*³ (“the Fose case”) that they are entitled to constitutional damages in vindication of the fact that their minors are deprived of the parental care of their deceased father, who met his demise as a result of the alleged unlawful conduct of the Defendant’s employees.

9. It is further contended for the Plaintiffs that a claim for constitutional damages, was recognised in the Fose case and endorsed in *Modderklip East Squatters v President of the Republic of South Africa*⁴ (“the Modderklip SCA case”), and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)*⁵ (“the Modderklip CC case”).

10. The Defendant on the other hand submits that there is no scope for the introduction of so-called constitutional damages on the facts of this matter, due to the fact that ample compensation is provided for in terms of common law, even in the pre-constitutional form. In this regard, the Defendant also refers to the Fose case as well as the *MEC Department of Welfare, Eastern Cape v Kate*⁶ (“MEC of Welfare v Kate”).

CONSTITUTIONAL DAMAGES AS APPROPRIATE RELIEF

11. The concept “appropriate relief appeared in section 7(4) of the Constitution of the

3 1997 (3) SA 786 (CC).

4 2004 (6) SA 40 (SCA)

5 2005 (5) SA 3 (CC)

6 2006 (4) SA 478 (SCA)

Republic of South Africa Act⁷ (“the Interim Constitution”). This Act was repealed by the current Constitution. Section 38 of the Constitution retained reference to Appropriate relief thus:

“Anyone listed in this section has a right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”⁸

12. It is further significant and also apposite in the context of this case that section 15 of the Children’s Act 38 of 2005 (“the Children’s Act”) makes reference to appropriate relief as a remedy the court may grant in the case of infringement of the Bill of Rights.⁹

13. In the Fose case, the Plaintiff had sued the Defendant (also the Minister of Safety and Security) in terms of the common law, for delictual damages arising out of injuries sustained while being assaulted by members of the South African Police. The Plaintiff further sued for punitive constitutional damages, as “appropriate relief in terms of the provisions of the then section 7 (4) of the interim Constitution, to deter and prevent the members of the South African Police from such infringement in the future. The Defendant raised an exception, which was upheld by the Court a quo, challenging the legal validity of the claim for constitutional damages as appropriate relief. On appeal, the Constitutional Court found, on the facts that the Plaintiff did not succeed to make out a case in support of this claim.

7 Act 200 of 1993

8 The persons who may approach court are listed in the section.

9 Section 15 of the Children’s Act provides:

“(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.” The persons who may approach the court are listed in subsection 2.

14. In considering the question of constitutional damages as appropriate relief, the Constitutional Court in the Fose case held, amongst others, in paragraph 60 of the judgment that there was no reason in principle why “appropriate relief should not include an award of damages where such an award was necessary to protect and enforce Chapter 3 rights. Chapter 3 of the Constitution provides for the Bill of Rights, which include Children’s rights in section 28.

15. The Supreme Court of Appeal (“SCA”) in the Modderklip SCA case awarded constitutional damages to a land owner whose land was occupied by squatters, as compensation for the loss of ownership of that land. The State could not enforce an eviction order as it had failed to arrange alternative land to accommodate the squatters. On appeal, the Constitutional Court in the same case, the Modderklip CC case, confirmed the award as the most appropriate remedy to the infringement of the constitutional right of the land owner.

16. In the matter of MEC Welfare v Kate, the SCA found that the unreasonable delay in considering a claimant’s disability grant resulted in the denial of the claimant’s right to social assistance and as such, a breach of her substantive constitutional right. The Court held that award of constitutional damages was the most appropriate remedy under the circumstances. Constitutional damages equivalent to interest payable on the amount accruing to the claimant during period of delay, were awarded.

17. The significance of these cases is that the Constitutional Court and the SCA not only recognised constitutional damages as part of our law, but also accepted the

principle that any party, whose constitutional rights have been infringed, may seek a remedy under the rubric “appropriate relief. The principle was affirmed by the Constitutional Court in the Fose case, where it stated that “if it was necessary to do so, the courts might even have to fashion new remedies to secure the protection and enforcement of these all important rights. ”¹⁰

18. It is clear that the law in South Africa recognises constitutional damages which may be awarded as appropriate relief in compensation for loss suffered as a consequence of unlawful infringement of a constitutional right. In this regard, a court may fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of a constitutional right. Should these constitutional damages include infringement of the constitutional right to family care or parental care?

FAMILY CARE OR PARENTAL CARE

5. The concept of the right to family care or parental care is not defined in the Constitution. However section 1 of the Children’s Act provides for the definition of care as follows:

“ “Care” in relation to a child, includes, where appropriate-

(a) within available means, providing the child with-

(i) a suitable place to live;

(ii) living conditions that are conducive to the child’s health, well-being and development; and

(Hi) the necessary financial support;

(b) safeguarding and promoting the well- being of the child;

10 P799 para 19

- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring the best interests of the child is the paramount concern in all matters affecting the child;..."

6. It seems to me that the meaning of "care" in section 1 of the Children's Act, adumbrates the concepts of family care or parental care as stated in section 28(1)(b) of the Constitution. The content of these concepts of family or parental care is further expatiated throughout the text of the Children's Act, more specifically in Chapters 2; 3; 5; 9; 10; 11; 12 and 13. The claim for loss of support in terms of the common law of delict or compensation for loss as a result of the death of a parent is applied restrictively to address the child's rights to material or financial support. Such right is expressed in section 28(1)(c) of the Constitution read with section 1(a) of the

Children's Act.¹¹ The payment of fees relating to education, medical treatment, food, accommodation, clothes and entertainment (including attendance of sport and social events) is effected in monetary terms as maintenance.

21. The payment for the loss of support or maintenance of a child as we know and apply it in common law is thus only part (sectionl (a) of the Children's Act) of the wider meaning of family care or parental care. The other aspects of parental care (sectionl (b) to (j) of the Children's Act) are almost always not considered nor included in the award for damages arising out of a child's loss of support.

22. In my view, and as stated above, the content of the right to parental care goes further than just the need for financial support. From the time of the birth of a child, there are numerous duties which parents have to perform and where money is not a factor. These would include teaching the child to eat, to put on clothes, to tie shoes, to use ablution facilities, to walk, to talk, to respect, to express appreciation, to do homework and perform house chores, to be present and supportive of the child during his/her participation in sport and art activities. The list is endless and no attempt is made here to create a numerus clausus. These parental care duties are performed to assist the child to prepare for life challenges. They could be referred to as parental guide, advice, assistance, responsibility or simply parenting or child nurturing.

23. Parental care in general includes a show of love and affection by the parent to the child. However, the definition of "care" in the Children's Act does not make

¹¹ See also WW v EW 2011 (6) SA 53 (KZP) and Krugel v Krugel 2003 (6) SA 220 (T).

reference to a need “to show love and affection to the child” as one of the duties that a parent must perform. It therefore seems to me that for now, actions for damages arising out of section 28 of the Constitution will not be based on the child’s deprivation of parental love and affection as is the case in other jurisdictions.

24. In *Jooste v Botha*¹², the Court had to consider a claim by a child born out of wedlock, for the love and affection from the biological father. The Court wrote as follows¹³:

“The parent-child relationship has two aspects: the economic aspect of providing for the child’s physical needs and the intangible aspect of providing for a child’s psychological, emotional and developmental needs. The best interests of the child demand an environment of love, affection and consideration. This Exception raises the question whether the moral duty to provide the latter is legally enforceable.”

25. In the matter of *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁴ the Court held that Section 28(1)(b) must be read with Section 28(1)(c) and that the responsibility for the fulfilment of the rights in Section 28 lies primarily on parents. Further in the case of *Heystek v Heystek*¹⁵ the Court held that “parental care is not confined to natural parents, but extends to step parents, adoptive parents and foster parents.”

26. There is no doubt in my mind that the rights in Section 28(1)(b) of the Constitution qualify, together with all other constitutional rights, for protection and

12 2000 (2) SA 199 (T)

13 P201E-F

14 2001(1) SA 46 (CC)

15 2002] 2 All SA 401 (T)

enforcement. However, can constitutional damages for family care or parental care be claimed and be compensated for, as part of the appropriate relief provided for in the Constitution or in terms of section 15 of the Children's Act? There seems to be no precedent in South Africa for award of damages arising out of the breach of parental care rights. I now turn to consider the law as it applies in other foreign jurisdictions.

27. Currently in the United States of America ("US") and Canada, there are statutes in place that provide for a child to claim for the loss of parental love, affection, nurturing and care. In United Kingdom and Australia there are common law principles that provide for a child to claim pecuniary loss of parental support but not love and affection as in the US and Canada. The claims are lodged a result of the death of a parent/spouse, caused by unlawful conduct of a third party.

The United Kingdom:

28. The position in the United Kingdom differs from that of Canada and United States in that no claim for damages is allowed in respect of loss of love, guidance and affection which a child received from a deceased parent. The only claim it allows is a claim from a child for the loss of services of a mother, which is based on the notional cost of hiring a nanny. In the matter of *Hva and Another v Hughes*¹⁶, an action was brought for damages where children were deprived of their mother's services in caring for them after a car accident. The Judge said that the two infants were injured by the death of their mother which falls within the wording of The Fatal Accident Act, 1846, The Judge stated thus:

16 (1975) 1 ALL ER 257

“In the present case Mr and Mrs Hya’s children doubtless suffered grievously in the variety of ways in consequence of their parents’ death in the accident which has occasioned this action. They have lost the benefits and happiness it was to be expected they would derive as they grew up from the companionship of their father and mother. They have lost parental love. They have lost the joys of a happy home. These losses cannot be assessed in monetary terms and so cannot support a claim for damages.”

29. In essence therefore, United Kingdom has no claim for damages in respect of loss of love, guidance and affection which a child was receiving from a deceased parent.

Australia:

30. The position In Australia mirrors that of the UK. In the matter of *Lincoll v Gravel*¹⁷ Dickson J stated as follows:

“The word ‘pecuniary’ in the above quotations is not used in a narrow or technical sense. It is used in conjunction with loss or gain to connote the loss or gain of material benefits as distinct from emotional or non-material benefits such as love or companionship. ”

31. A statutory provision for damages in Australia is based on Lord Campbell’s Act, which is the equivalent of the Fatal Accident Act 1846 of UK in Sections 12 to 15 of the Common Law Practice Act 1867 (Q). Damages for the death of a deceased relative can be claimed in terms of Lord Campbell’s Act. Lord Halding, in the matter

17 (1954) HCA 24

of Taffvale Railway Company V Jenkins¹⁸ stated the following:

“The basis (of action) is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss.”

Canadian Law:

32. Canada has legislation that makes it possible for a child (and certain other relatives) to claim for loss of a parent's love, guidance and affection caused by the wrongful/negligent death of that parent. These provisions are contained in the following Canadian Statutes namely: Family Compensation Act¹⁹ and the Fatal Accident Act.²⁰ These statutes, are accepted by most Courts in Canada as the basis for action to claim loss of love, guidance and affection which damages can be in the form of pecuniary loss. Section 6(2) of the Fatal Accidents Act provides: “(2) The damages awarded under subsection (1) may include an amount to compensate for the loss of care, guidance and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred.” This was illustrated in the matter of Garami-Balmer v Hrehirchuk.²¹ The Court is also of the opinion in this case that the interest in terms of the Court Order Interest Act, is payable on an award of damages to an infant claimant under the Family Compensation Act for example, for the loss of the claimant's father's love, guidance and affection. In a settlement reached out of Court, the amount of this loss was quantified at \$30,000 Canadian Dollars for both past and future loss. The Court in that case came to the conclusion that the loss of love,

18 SBC 1996, c 126

19 RSNL 1990 Chapter F-6.

20 RSNL 1990 Chapter F-6.

21 1998 CAN L II 3984 (BCSC).

guidance and affection was a pecuniary loss and that interest is payable on the amount.

33. In the case of *St Lawrence and Ottawa Railway Company v Lett*,²² the Supreme Court of Canada differentiated between sentimental loss and substantial loss, the last of which is recoverable. The Plaintiff was awarded an amount of \$5,800 Canadian Dollars damages of which \$1,500 was apportioned to the husband and the balance divided among the children. The Court stated that: "Although on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother."

34. In the matter of *Peacock (Guardian Ad Litem of)*,²³ an action was brought in terms of the Family Compensation Act whose claim was under four headings, the first of which was a claim for loss of guidance. The Court held that depending on the circumstances of every case, the award for loss of guidance may be increased or decreased.

35. The Courts in Canada have accepted that the definition of the word "injury" includes substantial loss such as loss of care, guidance and affection and is recoverable in being a pecuniary loss interest and payable in terms of a Court order.

United States of America:

²² 11, SCR 422,
²³ 1999 Can L II 5720 (BCSC)

36. In the United States of America (USA) a child can sue for the wrongful death of a parent and receive compensatory damages for loss of parental nurturing. The ways in which the Courts measure the value of parental nurture is that they consider the impact that the father/mother's nurturing would have had on the future monetary success of the children. In the case of *Tilley v Hudson Reeva* RR²⁴, the Court speculated that a mother's nurturing will not only prepare a child for the next world, but will aid a child's worldly prospects and pecuniary interests and that parental nurturing has the purpose of providing for a child's temporal welfare.

37. In the case of *Mascuilli v United States*.²⁵ the Court stated as follows:

"A child whose father has been killed is entitled to compensation for the loss of care, training, advice, guidance and education insofar as these matters are susceptible to money valuation."

38. In *Roqow v United States*²⁶ the Court considered with approval the question whether a child suffers a pecuniary loss in losing a loving and devoted father.

Similarly, in the case of *Spangler v Helms* NY

- *PGH. M Express*²⁷ the Court stated thus:

"The fact that there is no mathematical formula whereby compassionately bestowed benefits can be converted into a precise number of bank notes does not mean that the Tortfeasor will be excused from making suitable reimbursement for the loss.

²⁴ 29 NY 252, 285 (1864)

²⁵ 343 F. Supp. 439 - Dist. Court, ED Pennsylvania, 1972

²⁶ 173 F. Supp. 547 (1959)

²⁷ 396 PA 482 (1959)

39. In the case of Michigan Central Railroad Company, PLFF. In Err. v Daniel B Vreeland²⁸, the Court stated the following:

“That, the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, in that the child has been actually deprived of such advantages.”

40. The approach of the USA Courts is that each case will be considered on its merits where evidence regarding the role played by the parent in nurturing the child is presented.²⁹

41. Most of the states in the USA have statutory provisions which allow for damages for loss of parental nurture, as pecuniary loss. In some states, the statutory provisions are wide enough to allow parents to sue for the wrongful death of their children as well as the children suing for wrongful death of their parents. The claims range from economic loss, which would be the equivalent of loss of support in South Africa, to compensation for grief, loss of services or companionship. In the case of children in particular, it will be loss of parental nurturing.

THE DEFENDANT'S CONTENTION

42. The essence of the Defendant's contention is that compensation for loss of

28 227 US 59 (1913)

29 See further in this regard: Moore - McCormack Lines, Inc. v Richardson 295, F - D 583 (1961) and Shu- Tao Lin v McDonnell Corp. 574 F. Supp. 1407 (1983).

support includes the damages referred to by the Plaintiffs as constitutional damages. It is further argued that the compensation paid by the defendant as loss of support is adequate award to include parental care. In support of this view, the Defendant sought to rely on dicta by Justice O' Regan, who, writing for the Constitutional Court in the Fose case³⁰, expressed the view that the competitive assessment of the remedies granted in other jurisdictions for the breach of a constitutional right indicated that in most cases there were "public law" remedies independent of those available under private tort law. By contrast, continued Justice O' Regan, South African Private Law of Delict was flexible and, under Section 35(3) of the Interim Constitution, should be developed by the Courts with due regard to the spirit, purport and objects of Chapter 3. In many cases the common law would be broad enough to provide all the relief that would be appropriate for a breach of a constitutional right.

43. I am of the opinion that this case does not fall within the instances covered by the views expressed by the Learned Justice O' Regan as stated in the preceding paragraph. In South Africa the right of a child to family care or parental care is a constitutional right which is also expressed in a statute, the Children's Act. In my view, the future protection, enforcement and development of these rights will find expression out of the interpretation of these statutes. The child's need for maintenance and care (or support) is now part of the rights stated in section 28(1) of the Constitution and repeated in the Children's Act. Section 15 of the Maintenance Act 99 of 1998³¹ describes the duty of the parent to support the child as arising

30 P819 para 58

31 Maintenance Act was assented to 19 November 1998 and commenced in November 1999

from common law. I am of the further view that the provisions of this section³² are antiquated and are superseded by section 28(1) of the Constitution and the Children's Act. The duty of a parent to maintain his/her child arises out of, and is now governed by statute and no longer common law. As it was stated by Mr Acting Justice Patel (as he then was) in *Heystek v Heystek*:³³ "The Constitutional notion of parental care and the paramountcy of the best interest of the child require an attitudinal shift from an antiquated Germanic parent and child relationship, which formed the substratum of the common law, to the rights of the child which includes parental care and family care. Common law needs to be aligned to serve the constitutional imperatives of a child in a heterogeneous democratic society."

44. The development of the concept of loss of support will thus have to be effected also within the context of the rights of the child as stated in section 28(1) of the Constitution and the Children's Act. The award for compensation under loss of support refers mainly and almost exclusively to the extent of the contribution which the deceased made to defray the day to day family expenses. These would include payment toward items such as nutrition, medical care, accommodation, social services (section 28(1)(b)) and education (Section 29) of the Constitution. The Defendant's contention that compensation for a child's loss of support includes award for loss of parental care cannot, in my view, be supported. It is not one of those instances where common law can be developed as stated in the *Fose* case.

32 which is part of a statute that, as a matter of interest, was promulgated after the Constitution of 1996,

33 [2002] 2 All SA 401 (T) at p404f-g

DETERMINING COMPENSATION FOR LOSS OF PARENTAL CARE

45. Experts have developed the scope and mathematical formulae to calculate the payment of loss of support to minors whose parent/s have died as a result of the wrongful conduct of a third party, see *Nochomowitz v Santam Insurance*³⁴ and *Dieppenaar v Shield Insurance*³⁵ These calculations are made by experts in actuarial science. Factors such as the deceased's earnings (past and future) as well his contribution to the expenses in the household are the bases of such calculations.

46. In the Court Order granted to the parties on 18 April 2013, compensation awards are made to the First Plaintiff and the two minors for loss of support. The amounts awarded were determined on the basis of the actuarial report by Mr. Gerald Jacobson.³⁶ The award is calculated on what the deceased would have financially contributed to the expenses of the family as part of maintaining the children. His income as well as the ages of the children at the time of his death is the two most important factors in this mathematical equation.

47. As demonstrated by the foreign jurisprudence, compensation for the pecuniary loss of the right to parental nurturing is recognised and enforced as part of the protection of the rights of a child. The issue that is now the subject of debate in these jurisdictions is how the awards should be calculated. In the matter of *Garami-Balmer v Hrehirchuk*,³⁷ the Supreme Court of British Columbia grappled with the vexed question of quantifying the awards for loss of parental guidance rights. The

³⁴ 1972 (3) SA 640

³⁵ 1979(2) SA 904 (A).

³⁶ The full actuarial report is attached to the court documents and shows the tables applied to determine the amounts.

³⁷ 1998 Canll 3984 (BC SC),

Honourable Mr. Justice Burnyeat referred, in paragraph 18 of his opinion, to Cooper-Stevenson, *Personal Injury Damages in Canada*, 2nd Edition, Carswell, 1996 who wrote: “Claims by children for the loss of parental work go beyond mere housekeeping to include the numerous job inevitability associated with child-rearing. In some cases, one or two of these jobs are separately itemized and specific amounts allocated to each of them, based again *prima facie* on the costs of substitutes. Usually, however, the more appropriate solution is a composite replacement, such as a nanny, or in the old language, a nurse or governess. ”

48. The Court went on to identify the costs of housekeeping or parental care and guidance as essentially pecuniary, capable of evaluation under replacement costs or catalogue of services. In South Africa it will include, in my view, the costs of a guardian and/or helper, depending on the age(s) of the child/children. Reference to a guardian in this instance excludes a curator ad litem or curator bonis, whose functions and services are certainly not a replacement of child-rearing or parenting duties within the meaning of parental care.

49. The calculating of the amount of the award differs from case to case as illustrated in the foreign courts cases. For example in the case of *McKay v New England Dredging Company*³⁸ the Supreme Judicial Court of Maine concluded that a child received “actual and commercial value” from parental training and education because nurture helps the child “obtain an income or estate”. Two years later the same Court in the case of *Oakes v Maine Cent RR* ³⁹ held that a jury assessing

38 43 A 29 (Me.1999)

39 49 A 418, 419 (ME 1901)

damages for loss of parental nurture could consider the loss of the mother's training that would have made the decadence child "a better man and capable of acquiring more money'. It seems to me that in the United States most of the cases quoted above grapple with the mathematical formula of calculating the damages in actions of this nature, on the basis of the value that parental care/nurturing would have on the future fortunes of the child. Stated otherwise, parent nurturing seems to be valued on the basis of the foundations it lays for the child's success in future⁴⁰.

50. In the 1995 Volume 52 Issue 1 and Article 10 of the Washington and Lee Law Review, Talcott J. Franklin in his publication, "Calculating Damages For Loss of Parental Nurture Through Multiple Regression Analysis" presents a method of calculating these damages. He recommends a mathematical formula which, through "multiple regression analysis, can estimate parental nurture's pecuniary value in terms of the child's future income,..." at p320.

51. In the case of loss of parental nurturing the most important factors to be alleged and proved will be the ages of the children at the time of death of the parent, nature of the relationship between the child and the parent, the role which the parent played in the child's development, time spend together⁴¹ and the general financial contribution by the deceased in the upbringing of the child. Some cases also distinguish between the instances where one parent survives the other, in which case the award would be substantially less than in the instance where both parents

40 See also

41 In **De Centeno v Gulf Fleet Crews 798 F.2d 138 (5th Circuit 1986)** evidence showed that the deceased had worked 12 months a year and it could thus not be proved that he spent adequate time with his children. The award was substantially reduced as a result.

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parish. Further arguments have also been raised in some cases, concerning the prospects of re-marriage, with a view to bring in a partner who would otherwise replace the lost parental services.⁴² The latter applies more in jurisdictions whose statutes provides for claims for loss of companionship by spouses. The claim for loss of parental care goes further than that of the loss of support. However, in my view, the child cannot claim for both loss of support and deprivation of parental care separately as the former is part of the latter. Such claim would amount to duplication and undue enrichment.

52. Our Constitution provides for the constitutional right to family care or parental care. The Children's Act has provided a wider meaning to child care in section 1. In terms of this definition and as a general concept, parental care will thus include the provisions of section 28(1)(b),(c) and(d) of the Constitution. These rights, like all other rights, deserve constitutional protection and enforcement. An infringement of these rights by third parties, where it results in damages, should be compensated for.

53. It seems to me that any claim for damages on behalf of a child, arising out of an infringement of that child's rights, must be based on the provisions of section 28 of the Constitution read with the relevant provisions of the Children's Act. A party intending to claim damages on behalf of a child, for loss of parental care as a result of the unlawful death of a parent, should also base such claim in terms of section 28 of the Constitution read with the relevant provisions of the Children's Act, depending on which specific right or rights is alleged to have been infringed. The cause of

⁴² See *Vana v Tosta* 1968 RCS 71 and *Skelding v Skelding* 1992, CanLII 1959 (BCSC) and *Ruiz v Bouaziz*, 2001 BCCA 207.

action for these constitutional damages should be stated in terms of section 15⁴³ of the Children's Act, as appropriate relief, in the form of a claim for compensation arising out of loss of parental care. These provisions will serve as a legal basis for the claim. The law of South African, unlike that of the USA and Canada, does not have a statute providing for compensation in respect of any child damages consequent to unlawful death of a parent at the hands of a third party.

COURT'S FINDING

7. I am therefore of the view that the Plaintiffs have a right to claim constitutional damages on behalf of their children, for unlawful deprivation of their father's care, as a result of the proven unlawful conduct of the members of the Defendant.

MERITS AND QUANTUM

8. The statement of facts submitted by the parties to the Court was for the purposes of determining whether the Plaintiffs had the right to sue, on behalf of their children, for loss of their father's parental care. The Defendant does not concede the question of liability.

“(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.” The persons who may approach the court are listed in subsection 2.

9. It is also clear from the manner in which the amount in the claims is pleaded, that the Plaintiff had a difficulty with attaching values to the constitutional damages arising out of the breach of the children's right to parental care. No evidence was placed before me to prove these constitutional damages. It will therefore be appropriate to refer the proof of the damages to trial.

43 Section 15 of the Children's Act provides:

10. In the premises, I am of the opinion that the Plaintiffs' right to claim should succeed and the Plaintiffs minors must be compensated for proven constitutional damages suffered as a result of unlawful deprivation of parental care by the Defendant's conduct.

COURT ORDER

11. I therefore make the following order:

11.1 The Plaintiffs' right to claim for constitutional damages lodged on behalf of the minor children of the deceased, succeeds;

58.2 The Defendant is liable to compensate the minor children of the deceased for proven constitutional damages arising out of the unlawful deprivation of their father's parental care;

58.3 The Defendant is also ordered to pay the costs of these proceedings; and

58.4 The action is referred to trial for evidence on quantum.

S P MOTHLE

Judge of the High Court

Pretoria

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