

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: 38991/2010

In the matter between : -

DELETE WHICHEVER IS NOT APPLICABLE	
<u>MPULA EVA MAWELA</u>	(1) REPORTABLE: YES /NO. First Plaintiff
<u>AUGUST KGADI MAWELA</u>	(2) OF INTEREST TO OTHER JUDGES: YES /NO. Second Plaintiff
<u>LUCAS PATTIE MAWELA</u>	(3) REVISED. Third Plaintiff
<u>BOETIE ALPHEUS MAWELA</u>	Fourth Plaintiff
<u>ONICCAH MMATSIE MAWELA</u>	Fifth Plaintiff

4.8.2013
DATE

16/8/2013

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

[1] The plaintiffs' issued summons against the Road Accident Fund ("the Fund") for the payment of damages in respect of loss of support they suffered as a consequence of the death of Johannes Mawela ("the deceased").

[2] At the inception of the trial, I was informed by Mr Manala, counsel appearing on behalf of the plaintiffs, that the third to fifth plaintiffs are not proceeding with their claim against the Fund. Consequently, it is only the first and second plaintiffs' claim against the Fund that needs to be considered.

[3] The parties have agreed that the Fund is liable for any damage proven by the first and second plaintiffs.

[4] In the premises, the only point in dispute between the parties at this stage, is whether the first and second plaintiffs were dependant on the deceased for maintenance.

FACTS:

[5] The claim arises out of the untimely death of the deceased in a motor vehicle collision that occurred on 16 July 2008 at Randfontein. The deceased was 23 years old at the time.

[6] The first and second plaintiffs instituted action in their capacity as the parents of the deceased.

[7] It is common cause that:

- a) the deceased was employed by the South African National Defence Force (SANDF) at the time of his death;
- b) the deceased was not married and had no children.
- c) the deceased had a duty to maintain his parents, but such a duty depended on their need for maintenance.

EVIDENCE:

First Plaintiff:

- [8] The first plaintiff is the mother of the deceased.
- [9] The first plaintiff testified that she had four children and that the deceased was her third child.
- [10] At the time of the deceased's death, the eldest two children generated an income by selling sandwiches at a school. The first plaintiff was not aware of the exact amount of profit they made, but stated that they assisted her financially at the time.
- [11] The exact amount received from the two eldest children monthly is not clear, but the first plaintiff testified that she bought food and contributed towards a burial society from the contribution she received from them.

- [12] The family's residence is situated in a rural area and although they had electricity during 2008, they had no running water or ablution facilities.
- [13] The closest town to their village is Bela-Bela (Warmbaths) and she utilises a taxi to commute to the town. She pays R 27, 00 for a single trip.
- [14] She was not employed during 2008, but she has an ironing and washing job at present in Johannesburg. She works two days a week.
- [15] The plaintiff was born on 21 January 1964 and was prior to 2008, employed at a factory for three years. She lost her employment, because the factory closed down.
- [16] She earned a salary of R 22 per week, which resulted in an income of R 88 per month. This was the only time she had been employed prior to the deceased's death.
- [17] The first plaintiff presently resides with her aunt in Tembisa during the week and pays R 50, 00 per day towards transport. She earns a salary of R 1 200, 00 per month. Her taxi fare from Tembisa to her home is R 85,00 for a single trip.

- [18] During cross-examination, the first plaintiff confirmed that the deceased had a girlfriend at the time of his death.
- [19] The first plaintiff testified that the deceased was appointed at the SANDF on 1 January 2007 and was unemployed prior to his appointment.
- [20] The deceased contributed R 500, 00 per month to the household and also bought groceries at the end of the month. The first plaintiff confirmed that the deceased was still living in his parental home.
- [21] The first plaintiff testified that she has been doing washing and ironing work since August 2012. She can only work two days per week due to poor health. The first plaintiff suffers from asthma and is HIV positive.
- [22] The first plaintiff stated that her husband was not employed prior to July 2008.
- [23] On a question as to how the family of two adults and four children survived over the years, the first plaintiff testified that the second plaintiff renders assistance to community members as a herdsman and that he sells wood. He is still doing this work at present.

[24] The first plaintiff confirmed that she was not sure how much profit her eldest two children made from their business and stated that both are married at present. They both have children and do not contribute to the paternal household anymore.

[25] On a question whether the deceased would not also have married in future, moved out of the paternal home and provided for his own family financially the first plaintiff stated that he was still a child and that she cannot see into the future.

[26] She testified that the youngest son, Lucas, was still at school in 2008 and that he is currently unemployed.

Second Plaintiff:

[27] The second plaintiff largely confirmed the evidence of the first plaintiff, but stated that he was informally employed until 1994, when he was retrenched.

[28] Until his retrenchment he earned R 1 800, 00 per month.

[29] He confirmed that his means of income after 1994 was the herding of cattle and selling of wood. He testified that the eldest two children presently

provide financial assistance if things got "tough" at home. The first plaintiff obtained a "piece job" in August 2012 to help sustain the family.

[30] During cross-examination the second plaintiff stated that he was always able to provide for his family.

[31] The second plaintiff earns R 50, 00 per week as a herdsman and receives R 75, 00 for a wheelbarrow load of wood. It is not clear exactly how much the second plaintiff earns per month.

[32] The second plaintiff testified that he was in a position to take care of his family until the deceased obtained employment. Upon obtaining employment, the deceased told him sit back and relax as he would provide financial assistance in future.

[33] Notwithstanding the aforesaid, the second plaintiff chose to carry on working and he is still earning the same amount of money as he had over the past twenty years.

[34] Upon a question whether the second plaintiff would have expected the deceased to continue contributing after he got married and had his own family, the second plaintiff testified that he would not have expected him to and that it would have depended entirely on the deceased.

[35] That concludes the evidence on behalf of the plaintiffs.

LEGAL POSITION

[36] In order to be entitled to maintenance from a child, a parent needs to show that he/she is in need of a financial contribution from the child in order to provide for basic necessities.

[37] Mr Manala referred me to the test laid down in *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 C, in which the court held that a parent will be entitled to maintenance from a child if the parent is indigent, in that the parent must show that he/she is in want of necessities. At 631 H, the court held that:

"In order to prove indigence, a stringent criterion of need has to be established."

[38] Mr Manala argued that the *"stringent criterion"* test applied in the *Smith* matter should, in view of the basic right to housing, food and healthcare guaranteed in the Constitution of the Republic of South Africa, 1996, be interpreted more liberally and/or flexible. Even if parents have an income, they may still be in need of a financial contribution to cater for their basic necessities.

[39] In support of this submission, Mr Manala referred me to two unreported decisions, to wit *Nzame & Another v Minister of Safety & Security* [2008] JOL 22587 (D) and *Sokhewu & Another v Minister of Police* [2002] JOL9424 (Tk).

[40] I agree and proceed to apply the aforementioned principle to the facts of this matter.

[41] Save for slight contradictions between the evidence of the first and second plaintiffs, their evidence is not in dispute.

[42] Perusing the evidence, I have difficulty in establishing the exact monthly expenses of the plaintiffs. The first plaintiff earns R 1 200, 00 per month. She works two days a week and spends in total a R 100,00 per week to get to work. That amounts to R 400, 00 per month.

[43] According to the first plaintiff's evidence she goes home every second week. Her taxi fare for a trip home is R 170, 00. This amounts to R 340 ,00 per month.

[44] R 740, 00 of the first plaintiff's salary is, therefore, spent on transport, leaving her with R 460, 00 per month for food and other basic necessities.

[45] This amount is supplemented by the second plaintiff's income. If the second plaintiff is herding full time, he earns R 200, 00 per month from this source of income. It is not clear how many loads of wood the second plaintiff sells per month.

[46] I do not know whether the plaintiffs pay anything in respect of accommodation and/or water and electricity. Neither plaintiffs gave evidence in respect of their monthly grocery bill.

[47] The evidence of the second plaintiff does not support a need for maintenance. The second plaintiff is clearly a man of integrity for whom it is of utmost importance to be able to maintain his family. He testified that nothing has changed in regards to his earning ability and/or his monthly income for the past 20 years.

[48] I am concerned about the fact that the first plaintiff, who has health problems, has to work away from home. The fact of the matter is, however, that the first plaintiff only obtained employment some four years after the death of the deceased. I do not know what changed in the plaintiffs' financial position to necessitate her obtaining employment.

[49] Although I have a lot of sympathy for the plaintiffs, there is simply not enough evidence placed before me to satisfy the onus of proof that rests on the plaintiffs.

[50] The plaintiffs have not proved that they are in need of or want of a contribution from the deceased to enable them to obtain the basic necessities of life.

ORDER:

The claim is dismissed with costs.



N. van Nieuwenhuizen

Acting Judge of the North Gauteng High Court, South Africa

Attorneys for plaintiff:

Dikgale attorneys

Counsel: Adv. E.M. Manala

Attorneys for Defendant:

Sekati Monyane and Partners

Counsel: Adv. JHP Hattingh