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**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, (MAIN SEAT)**

Case No.: 4636/2022

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

DATE: 10 June 2024

SIGNATURE

In the application between:

PATRICIA SANNIE MOKOENA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10:00 on 10 June 2024.

JUDGMENT

MOLELEKI AJ:

[1] This is an action for loss of support arising from a motor vehicle collision which occurred on 6 December 2020 on the R536 Mkhuhlu Road, Mpumalanga Province. Mr. Bonginkosi Tie Mokoena (the deceased) was a

passenger in a motor vehicle with registration numbers J[...] 1[...] M[...] driven by Mr Richardo Hlophe (the insured driver).

- [2] The deceased was killed when the insured driver lost control of the vehicle in which they were travelling, resulting in the deceased sustaining fatal bodily injuries, in consequence of which he died at Matikwane hospital.
- [3] The deceased was 20 years old at the time of the accident.
- [4] The plaintiff is the mother of the deceased. She lodged a claim for compensation in terms of the 17 of the Road Accident Fund Act, 56 of 1996 (the Act), both in her personal capacity as the deceased's mother as well as in her representative capacity, as mother and natural guardian of her two minor children. The two minor children were the deceased's younger siblings.
- [5] The defendant is the statutory body established in terms of section 2 of the Act to administer compensation fund. Section 17 of the Act provides compensation to dependants who have a legally enforceable right of support and who suffer harm caused by or arising from the insured driver's negligence or wrongful driving of a motor vehicle.
- [6] Common cause facts between the parties:
 - [1] That the plaintiff has the necessary *locus standi in iudicio*;
 - [2] That the court has jurisdiction to entertain the matter;
 - [3] Negligence on the part of the driver was conceded on the basis that the plaintiff is liable for 100% of the plaintiff's proven or agreed damages, subject to the issues in dispute set out below;
 - [4] That the deceased was the biological child of the plaintiff;

- [5] The quantum of the plaintiff's loss of support, if a finding is made in favour of the plaintiff on the issues in dispute, as calculated by the actuary in an actuarial report dated 8 August 2023;
- [6] That the actuarial report be admitted into evidence by way of affidavit, without the necessity of calling the actuary, Mr Johan Potgieter, as a witness;
- [7] Issues in dispute are the following:
- [1] Whether the deceased earned an income as recorded by the actuary;
- [2] Whether the deceased had a legal duty to maintain the plaintiff and the minor children; and
- [3] The appropriate contingency deduction applicable to the loss of support.
- [8] Evidence of four witnesses was adduced in support of the plaintiff's claim from which an assessment of the deceased's earnings and duty to support would be made. The plaintiff testified and called three witnesses, namely, Ms. Sheila Nokwanda Mondlane; Mr. Sandlane Venter Ngomane and Ms Thabi Friedah Mondlane.
- [9] The plaintiff testified that the deceased, her first born child was employed at Big Joe, a company that manufactures tissue paper. The deceased was earning R600 per week. He would save the weekly earnings and at the end of the month would withdraw the sum of R1 500 and give it to her. With the money given to her by the deceased, the plaintiff would buy electricity, food, give pocket-money to the minor children, buy them clothing when needed, at least twice a year. During cross-examination the plaintiff stated that she would at times buy high blood medication for herself.

- [10] The evidence of the three witnesses is substantially the same. They all were informed by the plaintiff that the deceased was assisting by giving her money which she used for the necessities. Based on what the plaintiff told them, they testified that the deceased was supporting the plaintiff and the minor children.
- [11] No evidence was adduced on behalf of the defendant. However, the defendant brought an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, seeking the court to consider and rule on the admissibility of hearsay evidence. The basis for the application was that the deceased's cousin, Ms Tretjie Sesinyana Mavimbela had deposed to an affidavit in support of the plaintiff's claim but had since passed on. Accordingly, I ruled that it is in the interest of justice to receive the statement into evidence under section 3(1)(c) of the Law of Evidence Amendment Act. In this affidavit Ms Mavimbela stated that the deceased supported the plaintiff. She went further to state that the father of the plaintiff's children was unknown.
- [12] 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.
- [13] The plaintiff's evidence is that the deceased was employed. However, she could not produce any record of his earnings. Although an affidavit by the alleged employer of the deceased was discovered, the author thereof was not called to testify. Likewise, an application in terms of Uniform Rule 38(2) was not brought to have the affidavit admitted into evidence whereas the plaintiff sought to rely on the contents of the affidavit.

¹ *Union Government v Warneke* 1911 AD 657

- [14] The actuary, Mr. J Potgieter relied on information provided to him in an affidavit by the deceased's employer, Mr. Joseph Nyalungu dated 4 November 2021. The actuary examined all the permutations based on this information. In this affidavit, the deponent merely states that the deceased was temporarily employed by him prior the accident earning R600 per week, he goes on to state that he did not issue any salary advice. The period for which the deceased had been employed by Mr Nyalungu is not stated.
- [15] As stated, all that the court has is what the plaintiff says the deceased earned. Nothing was presented in the form of a contract of employment or bank statements. These are some of the documents that would have given a clear indication regarding the deceased's income, thus giving credence to the plaintiff's testimony. That is so, even though the plaintiff in her testimony stated that the deceased had a bank account. The plaintiff, therefore, remains the only source of information.
- [16] It is trite law that if evidence is not led to prove the authenticity and originality of documentary evidence, such evidence will only qualify as hearsay evidence.
- [17] Section 3(4) of the Law of Evidence Amendment Act defines hearsay evidence as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. Hearsay evidence is only admissible in very limited circumstances.
- [18] In order to claim compensation for patrimonial loss, the plaintiff must discharge the onus of proving, on a balance of probabilities that such loss occurred. That does not mean the plaintiff is required to prove the loss with a mathematical precision. However, the plaintiff is required to place before the court all the evidence reasonably available to enable the court to qualify the damages and make an appropriate award in his favour.²

² *Bridgman NO v Road Accident Fund* 2002(1) ALLSA 1 (CPD).

[19] It is required of the plaintiff to place enough evidence before the court from which the court can be able to make a proper assessment of what is fair to be awarded. The court should not assess damages based on incomplete information or inadequate factual basis. This more so, where the evidence is available to the plaintiff, which she has not produced. Where evidence is available to the plaintiff, it must be produced to assist the court in quantifying damages. Failure to do so, makes it difficult for the court to carry out proper assessment.

[20] There is no evidence to gainsay the plaintiff's evidence that the deceased was employed by Big Joe at the time of the accident. Be that as it may, the plaintiff has not presented enough evidence to confirm the deceased's income.

[21] For this court to attach weight to an expert opinion, the facts on which it is based must be proven. In *Ndlovu v RAF*³ it was stated that "*A court's decision cannot be based on speculation or reservations gathered from documents which, although placed before it, were not admitted as to truth of content; nor were they used in the present case to test the veracity of of the plaintiff's testimony and the author was not called to testify*".

[22] On a conspectus of all the evidence presented, I am of the view that the plaintiff has failed to establish the facts in support of her case to the satisfaction of the court.

[23] In the result the following order is made:

[1] Absolution from the instance is granted.

[2] The plaintiff is ordered to pay the defendant's costs.

MOLELEKI AJ

³ *Ndlovu v RAF* 2014(1) SA 415 at par 70

JUDGE OF HIGH COURT

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Matter heard on 22, 24 & 25 April 2024

Judgment delivered on 10 June 2024