



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No:1043/2024

In the matter between:

S[...] I[...] S[...]

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

Neutral citation: *S[...] I[...] S[...] v Road Accident Fund* (1043/2024) [2026] ZASCA
72 (19 May 2026)

Coram: Mocumie, Makgoka, Schippers and Smith JJA and Chili AJA

Heard: 21 November 2025

Delivered: 19 May 2026

Summary: Delict – breadwinner fatally injured – claim for loss of support – deceased supported partner and minor child – whether deceased’s source of income illegal – not pleaded – child’s best interests required by s 28 of the Constitution not considered – matter remitted to high court to determine quantum afresh.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Mashile J), sitting as court of first instance:

- 1 The appeal is upheld to the extent set out in paragraphs 2 and 3 hereinbelow.
 - 2 The matter is remitted to the high court (differently constituted) to consider the quantum.
 - 3 The respondent is to pay the costs of the appeal.
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JUDGMENT

Chili AJA (Mocumie, Makgoka, Schippers and Smith JJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Mpumalanga Division of the High Court, Mbombela (the high court), dismissing the appellant's claim for loss of support against the respondent. The appeal is with the leave of the high court.

[2] The appellant, Ms S[...] I[...] S[...] (the plaintiff), instituted an action against the respondent, the Road Accident Fund (the Fund), both in her personal and representative capacity, as mother and natural guardian of the minor child, SM (the minor child) born on 18 March 2013. The claim arose out of a motor vehicle collision, which occurred on 14 August 2018 along the R40 Highway in Mpumalanga, during which Mr N[...] M[...] (the deceased), who was a passenger in the motor vehicle, sustained serious injuries from which he later died. It was common cause that the collision occurred as a result of the negligent driving by Mr E B Lekwane, the insured driver.

[3] In her particulars of claim, the plaintiff averred that during his life-time, the deceased was obliged to support her and the minor child, and in fact did so,

because: (a) she and the deceased were married to each other; and (b) the deceased was the father and natural guardian of the minor child. Although the Fund initially pleaded a bald denial of these allegations, it later conceded that the deceased was the father of the minor child and was thus, obliged to support him. Thus, it was conceded that the child had suffered damages in the form of loss of support as a result of the deceased's death. All that remained to determine in respect to the minor child's claim was the quantum of such loss.

[4] However, regarding the plaintiff's claim in her personal capacity, the Fund persisted in its denial that she and the deceased were married, and thus no duty of support arose. When addressing the court before and during the trial, the parties narrowed the issue further to whether the deceased had a spousal duty to maintain the plaintiff during his lifetime that entitled her to a claim from the Fund for loss of support.

[5] The issues for determination having thus been identified before the high court, the evidence led at the trial focused squarely on establishing the existence of a marriage between the plaintiff and the deceased. This is clear from the record:

'[Counsel for the Fund] My Lord, at paragraph 10.1.

"At all relevant times the deceased was married to the plaintiff."

We are disputing the marriage there My Lord. Why did they not, amend that paragraph and just claim for dependants from the word go My Lord? Then we would not have to now – I would not have to call a witness to dispute the issue of marriage, because even from day 1 we said it from the defendant's side, the issue is marriage. They did not claim just dependants. They stated that there is marriage My Lord.'

[6] Consistent with the defence, the record shows that the plaintiff's evidence in chief and the cross-examination was confined to the issue of marriage. There is no hint of the Fund not being liable for loss of support, because the deceased's income was from an illegal source.

[7] On the issue of marriage, the plaintiff, her sister, Ms A[...] S[...], her uncle, Mr C[...] S[...], and Mr M[...]’s friend and neighbour, Mr Walter American Nkuna, testified. On behalf of the plaintiff, an actuarial report compiled by Mr Johan

Potgieter, a consulting actuary of GRS Actuarial Consulting, was tendered in evidence. Mr P[...] N[...], the deceased's elder brother, testified on behalf of the Fund.

[8] The upshot of the evidence on behalf of the plaintiff was that she and the deceased were customarily married to each other. The plaintiff testified that she lived with the deceased and the minor child in Sabie. On behalf of the Fund, Mr N[...] testified that the deceased was never married, and had not lived in Sabie since 2010, when he moved back to Bushbuckridge. He denied any knowledge of a relationship, let alone a marriage, between the deceased and the plaintiff.

[9] During her evidence, the plaintiff testified that the deceased used to lend money to people, from which he generated up to R4 500 per month. The court asked the plaintiff whether this activity was 'a loan shark business' and whether 'it was registered.' The plaintiff answered that 'it was not registered.' Mr N[...], who testified on behalf of the fund, stated that the deceased was self-employed as a motor mechanic in Bushbuckridge, and earned income from that business. None of these issues were investigated further in the high court, either by the parties' legal representatives or the court.

[10] After the evidence was concluded, the high court requested that the parties submit heads of argument. In its heads of argument, the fund contended, among other things, that the plaintiff's claims, both in her personal capacity and on behalf of the minor child, had to fail because the deceased's income was earned through unlawful means. This was based solely on the evidence of the plaintiff when, in answer to the court's question, she mentioned that the deceased's money lending business was 'not registered'.

[11] In its judgment, the high court found that the plaintiff failed to prove that she was married to the deceased. Despite this finding, the high court nevertheless proceeded to enquire 'whether during his lifetime, the deceased owed the plaintiff any duty of support', despite them not being married to each other. The high court answered that question in the affirmative. But it went further to enquire about a question which it framed in the following terms:

‘While [the Fund] did not defend this claim, it raised a very pertinent legal issue which should become the central focus of this whole matter. The issue is whether the income that the deceased earned from his unregistered “loan shark” business can be claimed by his dependents regardless of the apparent unlawful way the deceased acquired it.’

[12] The high court went on to consider certain sections of the National Credit Act 34 of 2005 (the NCA), which seek to declare unlawful credit agreements concluded with an unregistered credit provider and prescribe criminal penalties in respect of such transactions. It concluded that since the deceased’s money-lending business was not registered, it was illegal, and so was the income earned from it. The high court relied on this Court’s decisions in *Dhlamini v Protea Assurance (Dhlamini)*¹ and *Santam v Ferguson (Santam)*.² The essence of these two decisions is that a claim for loss of income is not competent where the income was derived from unlawful activity. In *Dhlamini* this Court did not limit the prohibition only to income from immoral or criminal activity but extended it to income from activity that is not enforceable because of invalidity. In that case, a street hawker was injured in a motor collision. Her claim for loss of income was dismissed because she did not have a hawking licence. This Court observed that trading without a licence was not only punishable but, because of important considerations of public policy, the results of such trading also ought not to be legally valid.

[13] *Dhlamini* was affirmed and applied in *Santam*. There, the deceased, a panelbeater, had carried on at all relevant times prior to his death in a motor accident the business of panelbeating without a licence in Cape Town under circumstances where he could not obtain a licence. This Court held that the carrying on of his business as a panelbeater was not only unlawful but also that the income he acquired thereby was not legal. Accordingly, dependant’s claim for damages for loss of support was dismissed on the basis that the deceased had supported her out of an unlawful income.

[14] For the reason that the deceased’s money-lending business was not registered, the high court concluded that both the plaintiff’s and the minor child’s claims for

¹ *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A).

² *Santam Insurance Ltd v Ferguson* 1985 (4) SA 843 (A).

damages resulting from the deceased's death were not enforceable against the Fund. It accordingly dismissed their claims with costs.

[15] Before us, the plaintiff contended that it was impermissible for the high court to extend its inquiry to issues that were not before it. The illegality or otherwise, of the deceased's income, so it was contended, was never an issue during trial and the high court erred in pronouncing on it. The plaintiff further contended that the high court erred in failing to recognise her claim for loss of support solely on the basis that she had failed to demonstrate that the deceased earned any income from lawful sources. On the other hand, it was contended on behalf of the Fund that the issue pertaining to the deceased's source of income was purely a legal issue, not a factual one, and could thus be raised by the court on its own accord. I deal with these contentions in turn.

The appeal

[16] It is common cause that the issue of the illegality of the deceased's income was not canvassed at the trial, as the focus was on the existence of a marriage between the plaintiff and the deceased. Regarding the deceased's source of income, both the plaintiff and Mr Nkuna testified that the deceased was a 'loan shark', the business of loaning money to people at unregulated interest rates. In addition, Mr N[...] testified that the deceased was a mechanic operating from his place of residence and the taxi rank. Except for one question by the court, 'whether the deceased's loan shark business was registered', it was never suggested to the appellant or Mr Nkuna that the deceased's money lending business was illegal. Neither was it pleaded by the Fund. The failure to plead the illegality of the deceased's source of income, or, at the very least, raise it at the trial, deprived the appellant of the opportunity to exercise her constitutional right to a fair hearing.

[17] Both this Court and the Constitutional Court have cautioned against deciding a matter on issues neither pleaded nor canvassed with the parties. In *South African Police Service v Solidarity obo Barnard*,³ the Constitutional Court held as follows:

³ *South African Police Service v Solidarity obo Barnard (Barnard)* [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) paras 202 and 204.

'It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution.

...

[T]he purpose of the pleadings is to define and inform the court of first instance about the issues between the parties and also warn the other parties of the case they are required to meet, so as to give them the opportunity to present factual material and legal argument to meet that case.'

[18] In *Fischer and Another v Ramahlele and Others*,⁴ this Court held that it is not for the court to raise new issues not traversed in the pleadings or affidavits. In *Four Wheel Drive Accessory Distributors CC v Rattan NO*⁵ this Court, after referring to *Fischer*, cautioned that deciding a matter on unpleaded issues carries a risk of an apprehension of bias, in that '[the court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality.'

[19] This Court in *Fischer* recognised, however, that there might be instances where the court may, of its own accord, raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. An important caveat is that its consideration does not cause prejudice or unfairness to the other party against whom it is directed.⁶

[20] In the present case, the legality of the deceased's business was referred to fleetingly by the court during the plaintiff's testimony. The high court did not alert the parties' legal representatives that it was minded to determine the matter solely on that basis and thus invite them to make submissions on it. Importantly, had the parties been so alerted, the plaintiff would have considered her position. It was only

⁴ *Fischer and Another v Ramahlele and Others (Fischer)* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 14; also see *Four Wheel Drive Accessory Distributors CC v Rattan NO (Four Wheel Drive)* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) paras 21-24.

⁵ *Four Wheel Drive* fn 4 ZASCA 124; 2019 (3) SA 451 (SCA).

⁶ *Molusi and Others v Voges NO and Others (Molusi)* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 28. See also *Cusa v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC) para 68; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 39.

when the judgment was delivered that it emerged that the high court determined the case on the issue. As mentioned, the issue was neither pleaded nor canvassed with the parties. The prejudice to the plaintiff and the minor child is self-evident. It was thus impermissible for the high court, of its own accord, to extend its enquiry to an issue that had neither been pleaded nor traversed at the trial.

[21] The plaintiff had not been called upon to meet the case that the deceased's source of income was illegal. The facts distinctly show that she had no reason to expect to meet that case. It was common cause that the Fund had settled a separate loss of support claim involving the deceased's other minor child, without raising the legality of the deceased's income. Had it not been for a glaring disparity between the amount claimed in the present appeal and the settlement amount in a separate claim, the minor child's claim would have been settled.

[22] In rejecting both the plaintiff's and the minor child's claims, the high court completely lost sight of the fact that it had endorsed a pretrial arrangement between the parties that the minor child's loss of support claim was not in issue. This acceptance implicitly included that the legality of the deceased's income was not in dispute. This makes sense as the Fund had settled another case involving the deceased's other minor child with a different mother. Thus, the Fund could not tenably dispute the legality of the deceased's income, having accepted it in another case. This would potentially implicate s 9 of the Constitution, which guarantees equality before the law and the right to equal protection and benefit of the law. This underscores the need for a court to avoid raising issues not pleaded by the parties.

[23] In its engagement with counsel for the Fund, the high court remarked: 'the minor child will be entitled to support . . . whether the parents are married or not'. This was confirmed by counsel, who reiterated that it was not in dispute that the deceased had a duty to support the minor child. The high court's failure to consider (a) its own factual findings, (b) an agreement between the parties, and (c) a concession made by counsel regarding the minor child's claim, amounted to a misdirection.

[24] Counsel for the Fund urged this Court to pronounce on the legal status of the deceased's money lending business based on the general principle that courts are not expected to endorse illegality.⁷ I am not persuaded that sufficient facts exist to justify engaging in that exercise. The high court's only basis for its conclusion that the deceased's money lending business was illegal is the plaintiff's fleeting answer to the court's question that the deceased's money lending business was not registered. The issue was not investigated further as to what the plaintiff understood by the business being registered. The issue was simply left hanging. One would have expected the court to address this issue, particularly because it was asked to make an order for maintenance of a child who has a fundamental right to maintenance and family care or parental care, nutrition and shelter, in terms of s 28(1) of the Constitution.

[25] In addition, the high court failed to give due consideration to the constitutional paramountcy of the child's best interests entrenched in s 28(2) of the Constitution⁸. As the Constitutional Court emphasised in *AB and Another v Pridwin Preparatory School and Others*⁹ 'children are individual right-bearers and not "mere extensions of [their] parents, umbilically destined to sink or swim with them"'.¹⁰ In the present case, the question that should have occupied the mind of the high court is how the perceived illegality of the deceased's income impacted on the minor child's right to support, which, it is common cause, the deceased was obliged to provide, and in fact, did so.

[26] The high court made no reference to the interests of the minor child in its judgment. As mentioned, it relied on this Court's pre-constitution jurisprudence in *Dhlamini* and *Santam*. The high court did so without considering whether, given the constitutional values that underpin our jurisprudence, those authorities still hold good. Those authorities were underpinned by policy considerations and values prevalent during that era. It is not at all clear that those policy considerations would

⁷ *Merifon (Pty) Ltd v Greater Letaba Municipality and Another* [2021] ZASCA 50; [2021] 4 All SA 356 (SCA); 2023 (1) SA 408 (SCA) para 26.

⁸ The supremacy of the child's best interests is enshrined in s 28(2) of the Constitution which enjoins a court to give paramountcy to the best interests of the child '**in every matter concerning the child**'. See also *Bannatyne v Bannatyne (Commissioner for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) para 17.

⁹ *AB and Another v Pridwin Preparatory School (Pridwin)* 2020 (5) SA 327 (CC).

¹⁰ *Pridwin* fn 9 para 234.

prevail in the current constitutional dispensation. However, it is not necessary to determine this issue in the present appeal.

[27] Counsel for the Fund pressed us to grant the claim in the plaintiff's favour in accordance with the draft order premised on Mr Potgieter's actuarial report. This submission was premised on the high court's finding that, during his lifetime, the deceased was a breadwinner supporting both the plaintiff and the minor child, and that he owed both the plaintiff and the minor child a duty of support. I do not consider this appropriate, given the nature of the misdirection committed by the high court which clearly undermines the principles of a fair trial. At best, the matter should be remitted to the high court for consideration of the quantum, taking into account the deceased's other source(s) of income, as the fund seems to have accepted.

Costs

[28] Costs should follow the result.¹¹ It is not in issue that the appellant was substantially successful and that she should be entitled to costs. The only issue is whether there is any justification for the costs of two counsel. In my view, there is not. As correctly contended, the appeal before us is a straightforward matter that does not warrant the award of costs of two counsel.

Order

[29] The following order is granted:

- 1 The appeal is upheld to the extent set out in paragraphs 2 and 3 hereinbelow.
- 2 The matter is remitted to the high court (differently constituted) to consider the quantum.
- 3 The respondent is to pay the costs of the appeal.

N E CHILI

¹¹ *Kobusch and Others v Whitehead* [2025] ZASCA 24; 2025 (3) SA 403 (SCA) para 24.

ACTING JUDGE OF APPEAL

Appearances

For the appellant:

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Instructed by:

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