

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 35933/12

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

.....
SIGNATURE

.....
DATE

In the matter between:

Z. M. M.

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MALULEKE AJ

1. In this case the Plaintiff instituted a claim for damages against the Defendant following the death of her late husband S. P. M.. It is common cause between the parties that an accident occurred on 6 November 2009 at or near the R104 public road near Riama Park, Bronkhorstspuit between a motor vehicle driven by Carel Lebo Tholo, bearing Registration number [.....], a motor vehicle bearing Registration number [.....], driven by one Mapanyela Klaas and a vehicle bearing Registration number [.....] driven by the deceased. It is further common cause that the deceased died as a result of the injuries he suffered in at motor vehicle accident.

2. For fear of making this judgment unnecessarily long I have decided not to regurgitate the facts which appear to be common cause between the parties in this matter. Suffice it to say that at commence of these proceedings I was informed by Counsel for the Plaintiff that three different claims were instituted in this Division against the Defendant for loss of support resulting from the death of S. P. M. ("the deceased") under three different case numbers. For the sake of convenience these are the claim of the Plaintiff under the present case number, the second claim was instituted by the deceased's son Z. C. M. under case number 63789/13 and the third claim was instituted on behalf of one minor child N. G. M. under case number 63790/13 who is the grandchild of the deceased. I was reliably informed that during March 2014 the three matters were set down for hearing in respect of the merits; and that although the matters were heard together they were never consolidated into one. It appears that my sister the Honourable Justice Jansen, then made an order on

the merits in respect of all three claims. She ordered that the Plaintiffs are entitled to 100% of all damages that they can prove against the Defendant and to which they are entitled in terms of the Road Accident Fund, Act 56 of 1996 read with the Constitution; and that the Defendant is to pay the costs of the hearing related to the merits of the action dealing with negligence. Accordingly there exist no dispute between the Plaintiffs and the Defendant in respect of the merits of all three cases.

3. The bone of contention between the parties therefore remains the question of the quantum of damages claimed by the respective Plaintiffs in the matters referred to above. Before I could make any finding with respect to the issue of quantum, I am required to decide whether the deceased had a legally enforceable duty to financially support N. G. M. ("Gift"). This is based on the allegation that during his life the deceased financially supported his grandchild, Gift who has now lost the said support as a result of the death of the deceased. It was never alleged that Gift was at any stage adopted by the deceased and/or his surviving spouse who is also the Plaintiffs in the present matter. The Defendant contends that the deceased voluntarily supported Gift. That there was no legal duty on the part of the deceased to financially support Gift and that the Fund was as a result not liable to compensate Gift for loss of support. This was on the basis that although Gift's biological father had passed on, his mother was still alive and employed and therefore bore the duty to legally support him.
4. In order to decide this issue I am required to have regard to the evidence which was presented to this Court. The Plaintiff, Z. M. M. ("Zodwa"), who is the surviving spouse of the deceased was called as a witness to give

evidence in this regard. She testified that she was married to the deceased who died on 6 November 2009 as alleged in her Particulars of Claim, that two children were born of her marriage to the deceased namely, N. C. M. ("N.") and Z. N. C. M. ("C."). She further testified that the deceased supported her and their son C. and that as a result of the deceased's death she and C. lost the said financial support. She confirmed that a loss of support claim was made on behalf of Gift against the Defendant on the basis that the deceased supported Gift financially. She told the Court that Gift was her first grandchild and that N. was Gift's mother and that one Titus Masango ("Titus") who is now deceased, was the father of Gift. She testified that Gift was born on the [.....] and that he was five years old when the deceased died. It was her testimony further that Gift's father, Titus Masango, died when Gift was two and a half years old. She told the Court that she, her late husband, their son C. as well as N. their daughter, lived together. She testified that from his date of birth, Gift and his mother N., stayed with her and the deceased. She informed the court that Gift's father Titus Masango lived in Pretoria and that she did not know exactly where he resided. She testified that Titus occasionally visited but that he did not look after Gift and that the deceased was always financially responsible for him. She also testified that her daughter, N., received no financial support from Titus either. She testified that N. was employed as a casual worker working twice a week at Fashion World and that she did not earn enough money that is why the deceased continued to financially support Gift. It was her evidence that she was employed at PEP Stores since 1982 up to the time when Gift was born and that she continues to be so employed. She also testified that N. got a job at PEP Home during August 2009 in Nelspruit where she later relocated to in order to be closer to her place of

work. She confirmed that when N. relocated to Nelspruit Gift remained with them (i.e. Z. and the deceased) with the latter still supporting Gift financially. She told the Court that her daughter N. had another child who is now seven years old by the name of Khethelo and that this child was born before the deceased's death. She testified that the father of the said child was one Doctor who was in Nelspruit together with N.. She said that N., her daughter, used her wages to look after Khethelo and that Doctor never supported Gift as Gift was not his child. She told the court that the relationship between N. and Doctor did not work out and as a result N. had returned home in Bronkhorstspuit together with her other child, Khethelo to join Gift and Zodwa. It was her testimony that N. is now working at PEP in Bronkhorstspuit and that N., Zinhle, Gift, Khethelo and herself are staying together in Bronkhorstspuit. She told the Court that N. was earning around R3,500.00 per month. She testified that she was financially supporting Gift and that N. was with her assistance supporting Khethelo who was not receiving maintenance from his father Doctor. During cross examination she told the Court that she did not know how Titus died and that Titus' parents informed her that he was sick. When asked to give examples of how the deceased supported Gift, she mentioned that from the moment when Gift was born he supported her financially with regard to fees related to his medical requirements, food, crèche, pre-school and the like. She testified that she knows that Doctor is not supporting Khethelo because N. told her so as they discuss these matters as mother and daughter. It was put to her that in the assessment report of the expert N. stated that Doctor supported Khethelo financially to which she responded that she did not know. She was also

asked what portion of her salary went to support Gift and she requested the Court to break it down as follows:

School fees R500.00 per month, transport to and from school R250.00 per month, lunch box R500.00 per month and that she bought school uniform for Gift twice a year, during winter and summer and that it cost her R600.00 to buy the summer school uniform and about R800.00 to buy winter uniform because of items like jersey, jacket and scarf. She also testified that N. does not contribute anything towards Gift because she is supporting Khethelo. She testified that she was standing by her earlier statement that Doctor does not support Khethelo even though the assessment report of the industrial psychologist stated that N. said that Doctor was financially supporting Khethelo.

5. Counsel for the Plaintiff contended that Zodwa's financial support and/or Doctor's financial support to Khethelo was irrelevant for purposes of the decision that this Court needed to make. He contended that Khethelo was not a Plaintiff before this court and requested the Court to make a finding that the deceased supported Gift. He contended that should be so because no evidence which disputed this fact was put before the Court. He submitted that the Plaintiff testified that the mother of Gift, N. did not support the child financially and that his father, Titus had passed away and as such could not support the minor child financially. Counsel referred me to case law in support of his contention that the deceased had a legally enforceable duty to financially support the minor child (See **J T v RAF 2015 (1) A 609 (GJ)**). It

was his submission that on the facts supported by case law Gift has an unassailable case for loss of support resulting from the death of the deceased.

6. However it was contended by Counsel for the Defendant that cases to which Counsel for the Plaintiff referred this Court were distinguishable in that either the parent or the uncle of the person claiming loss of support were deceased or had deserted the minor child in question. He argued that in the present case Gift's mother is alive and is permanently employed since the death of the deceased and that for the loss of support claim of Gift to succeed there must be a legal duty to support him by the deceased and that on the facts the deceased was not under a legally enforceable duty to do so. He equally referred me to case law in support of his argument and concluded by saying that there was a duty on Gift's mother, N., to support the child unless she was unable to do so and that on the basis of N.'s evidence as contained in the assessment report that Khethelo was supported by Doctor, N. should be able to support Gift (See **Evans v Shield Insurance Co Ltd 1980 (2) A 814 (AD)**; **Santam Beperk v Henery 1999 (3) SA 421 (SCA)**). Counsel argued further that N. was not called to give evidence today and she would have been in a much better position as a mother of this minor child to assist the Court in this regard. The Court was informed that N. could not attend the Court today due to ill health. That notwithstanding, Counsel argued that the Court should draw a negative inference on the fact that she was not called to give evidence in these proceedings. This Court was referred to page 15 of the bundles relating to the pre-trial minutes in particular para 5 where it was recorded that:

“the Defendant records that it admits the locus standi of Z.Maria Mnguni as well as the deceased’s duty to maintain her. The defendant does not admit the locus standi of the further two plaintiffs nor the deceased’s duty to maintain the said individuals”.

Counsel for the Defendant contended that the Plaintiff should have known that N. being Gift’s mother, is a necessary witness and should have been called to come and testify before this Court and that a failure to do so by the Plaintiff should result in a negative inference drawn by this Court.

7. Counsel for the Plaintiff resisted this contention by submitting that the failure to call an available witness should result in a negative inference in certain qualified instances. He stated that no contrary version was put to the witness which was in turn rebutted. He argued that it was also not put to the witness that evidence will be led to contradict the version that the witness had put before this Court. As such the contention that the Court should make an adverse finding in favour of the Defendant for the Plaintiff’s failure to call N. as a witness is not to be supported. In this regard the Court was referred to page 96 of the court bundle, to an affidavit deposed to by N. where she states under oath that the deceased was the grandfather and a natural guardian of Gift. He therefore begged the Court to find that the deceased supported Gift and that he had a legally enforceable duty to do so.

8. I shall now turn to the law applicable to circumstances under which a person has a legally enforceable duty to maintain or support another. It is trite that only dependant to whom the deceased was under a legal duty to provide

maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of a bread winner. That the instances in which such a duty of support is recognised has evolved over time. Currently there are different kinds of relationships giving rise to a cause of action for damages suffered due to loss of maintenance as a result of the death of a bread winner, for example that of a spouse, that of a blood relation of appropriate closeness, partners in same sex unions and life partners. It is trite that at common law a child had a duty to support a parent if the parent was indigent or, given the parent's "station in life", supplementation of support was necessary. Sutherland J in the case of **JT v RAF 2015 (1) SA 609 (GJ)** at page 613 said that:

"the scope for the recognition of a duty of support premised on factors other than the traditional grounds, i.e. parenthood or marriage, has received considerable judicial attention".

He referred to Grogan AJ's obiter dictum in a reported case of **Jacobs v Road Accident Fund 2010 (3) SA 263 (SE)** in which he said:

"There is a further consideration. It would in my view be invidious were this court to rule that the deceased had no duty to support his father when he had voluntarily assumed that obligation. In my view this undertaking gave the Plaintiff a reasonable expectation that his maintenance contributions would continue. A duty of support between family members is one of those areas in which the law gives expression to the moral views of society. In the present case the Plaintiff did not have to enforce his right to maintenance from the deceased. The deceased voluntarily assumed that obligation. In my view this

is sufficient in itself to warrant a finding that the Plaintiff had acquired a right to maintenance from his own son which was enforceable against the insured and, by law, against the Defendant”.

9. I agree with Sutherland J in his view that Grogan AJ seems to imply that indigence might not be a necessary precondition for a successful claim of loss of support and that the issue of indigence will be of no moment in regard to a minor. That the voluntary assumption of such a role could ground the existence of such right. It is true that morality of society endorses the idea that a family member ought to support another family member. In para 18 of his judgment Sutherland J stated that the judgment of Grogan AJ in **Jacobs v RAF** supra and that of Dlodlo J in **Fosi v Road Accident Fund and Another 2008 (3) SA 560 (C)** impacted the morality of society about supporting a parent in need and the voluntary assumption of support was emphasised as relevant to the duty arising and being enforceable against third parties.
10. In another case of **Metiso v Padongeluksfonds 2001 (3) SA 1142 (T)** at 1150G-H, Bertelsmann J found in favour of claimants who had lodged a claim for loss of support against RAF arising from the death of an uncle of certain children whom he had supported. He found that a de facto adoption should be acknowledged and that the formal defects be overlooked and, secondly that a binding offer to support the children were sufficient to ground a duty of support because to do so was consistent with the morality of society.
11. Sutherland J in **JT v RAF** supra at page 616 at para 26 held authoritatively as follows:

*“It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of “family”, constituted as being a network of relationships of reciprocal nature and support, informs the common law’s appetite to embrace , as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in a relationship akin to that of a family. This norm is not parochial but rather is likely to be universal, it is certainly consonant both with the norms derived from the Roman-Dutch tradition, as alluded to by Cachalia J in *Paixao v RAF supra* and, no less, from the norms derived from African tradition, not least of all exemplified by the spirit of Ubuntu, as mentioned by Dlodlo J in *Fosi v RAF supra*”.*

12. In the present case it appears to me that N. who is Gift’s mother surrendered her son from the moment of birth to the care and support of her mother and father who is now deceased and this I assume she did with the best interest of Gift in mind. Gift as was testified appears to have, for all intents and purposes, been a de facto child of Z. and the deceased growing up in their presence and being financially dependent on them. There was no evidence presented before me which pointed to the contrary. In fact it is undisputed that deceased financially supported Gift. Based on the above case law I see no compelling distinguishing factor that warrants me to depart from a seemingly widely held view that voluntary assumption of support is important and sufficient to ground a duty of support which is legally enforceable against the ensured and by law, against the Defendant in this case.

13. I reject the contention by the Defendant that due to the fact that Gift's mother N. is alive and employed, the deceased had no legally enforceable duty to support Gift unless it can be shown that she is unable to do so. I am inclined to borrow the words of Sutherland J in **JT v RAF** supra in this regard when said that Gorgan AJ seems to imply that indigence might not be a necessary precondition to ground a right to support and that self- evidently, in regard to a minor, the issue of indigence dose not arise. This matter should therefore not be treated differently. From the above mentioned case law it is clear that the voluntary assumption of support is emphasised as relevant to the duty arising and being enforceable against third parties. The voluntary assumption of support by the deceased created an expectation of its continuation and his untimely death resulted in such support being lost by Gift. Accordingly it is my view that this is a case where the law must clearly express the morals of society and for the common law to resonate with modern day life expectations of society as will be reflected in the order that I make in this regard.

ORDER

I make the following ruling:

1. By voluntarily assuming an obligation to support Gift, the deceased conferred on him a legally enforceable duty of support;
2. The Defendant is liable to compensate the Plaintiff in respect of the loss of support suffered as a result of the death of Sprinkaan Petros Mnguni and shall pay the amount of damages occasioned thereby;

3. The costs of this trial shall be for the defendant;
4. That I may be approached to make an order if required by the parties to amplify other aspects of the case upon which an agreement has been reached in respect of the quantum.

MALULEKE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 20 August 2015

Representation for Plaintiff:

Counsel : A A Voster
Instructed by : Gildenhuys Malatji Incorporated

Representation for the Defendant:

Counsel : M Rabaney
Instructed by : Maponya Incorporated

