IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 72756/19
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED
DATE: 5 June 2024
SIGNATURE

In the matter between:

D. B. S. obo MINOR PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

SUMMARY: *Civil Proceedings-Claim for loss of support by minor- Onus on the plaintiff to prove the defendant's liability on the merit and quantum of damages.*

ORDER

HELD: *The plaintiff's claim is dismissed. No cost order is granted.*

JUDGMENT

N. MNCUBE, AJ:

INTRODUCTION:

[1] The plaintiff instituted action in her representative capacity as the aunt of the minor child and claimed damages for the loss of support in the sum of two million (R2 000 000) against the defendant. The defendant is a statutory body established in terms of section 2 of the Road Accident Fund Act 56 of 1996 as amended.

FACTUAL BACKGROUND:

[2] The salient facts are that on 2 March 2019 at 6h35 along N2 Main Harding road in Boboyi at Port Shepstone, the deceased, Mr Z[...] M[...] C[...] who was the biological father of two minors was knocked down by a vehicle driven by the insured driver Mr Erick Sthembiso Hlophe and killed. At the time of his death the deceased was employed as a general worker at Senzakonke Environmental Planner earning R4000 per month. The plaintiff acting in a representative capacity issued summons against the defendant for the loss of support which according to the particulars of claim the damages were a sum of two million rand. On 21 February 2019 the plaintiff on behalf of the minor entered into a contingency fee agreement. The parties held a pre - trial conference on 07 March 2023 in which locus standi of the plaintiff and liability were put in dispute. The plaintiff applied in terms of Rule 38 (2) of the Uniform Rules to lead evidence by way of affidavits which was granted.

ISSUES FOR DETERMINATION:

[3] The issues for determination are –

(i) Whether or not the defendant was liable on the basis of the alleged negligence of the insured driver; and

(ii) The amount of damages suffered by the minor child for the loss of support.

SUMMARY OF THE EXPERT'S OPINION:

[4] The plaintiff has placed reliance on the actuarial calculations to prove the loss of support. The actuary **Wim Loots** postulates the following-

1. The calculations were based on the earnings of the deceased until retirement.

2. On the information that the mother of the minor child died, the assumption was that the deceased was the sole provider for the minor child.

3. The assumption was that the total earnings of the deceased would have been apportioned two parts to himself and one part to each child.

4. The children's dependency was assumed to be until age of 18 or 21 years.

5. The earnings were projected forwards making allowances for inflation and tax.

6. The actuarial calculations took into account mortality, inflation and taxation and adjustment for unforeseen factors.

7. No merit apportionment was applied to the loss.

8. The annual losses did not exceed the Cap which was equal to R279 994 (two hundred and seventy nine thousand nine hundred and ninety four rand) at the time of death.

9. The calculation of loss of support where the dependency by the child(ren) would have been to the age of 18 years (table 1) was R203 940 (two hundred and three thousand nine hundred and forty rand).

10. The calculation of loss of support where the dependency by the child(ren) would have been to the age of 21 years (table 2) was R286 498 (two hundred and eighty six thousand four hundred and ninety eight rand).

SUBMISSIONS MADE:

[5] The submissions (both written and oral) were considered. The contention made in the written heads of argument referred to the accident report form together with the statement made by the police officer who attended the scene who also made a sketch plan. The contention was that the merits be conceded 100% in favour

of the plaintiff. The submission in respect of the quantum was that the deceased who was employed as a general worker supported his two minor children. The contention was that the actuarial calculation on the quantum of damages for loss of support was R 202 640, 35 (two hundred and two thousand six hundred and forty rand thirty five cents).

[6] Counsel in his oral submission contended that the claim was for loss of support which required the plaintiff to only prove 1% negligence. The defendant should be held responsible 100% in favour of the plaintiff and that there were damages suffered on the basis that the deceased was employed as a general worker and earned four thousand rand.

APPLICABLE LEGAL PRINCIPLES:

[7] The plaintiff was required to prove on the balance of probabilities that the insured driver was negligent as alleged in the particulars of claim. The defendant's liability is on condition that the injury or damages suffered by a party or claimant was the result of the negligence of the in sured driver as contemplated by section 17 (1) of the RAF Act 56 of 1996 as amended. The locus classicus test for negligence formulated by Holmes JA in **Kruger v Coetzee 1966(2) SA 428(A)** still finds application in cases of negligence.

[8] This meant that the plaintiff had to prove that the insured driver's conduct was not in line with a diligent and reasonable driver facing the same circumstances. The act of the insured driver must have been wrongful and negligent and caused the loss suffered. Wrongfulness is an element of delictual liability which involves the breach of a legal duty. The test for factual causation is whether the act or omissions of the defendant has been proved to have caused the harm suffered.[1] There can be no question of liability if it is not proved that the wrongdoer caused the damage.[2]

[9] In determining the causal link between the negligent driving and the damages suffered, two enquiries arise- (a) the first enquiry is a factual one which is whether or not the defendant's wrongful act was the cause of the harm suffered by

[1] See AN v MEC for Health, Eastern Cape [2019] 4 All SA 1 (SCA) para [4].
[2] See Grove v RAF (974/10) [2011] ZASCA 55 (31 March 2011 para [7].

the plaintiff (the so called 'but for' element) and (b) the second enquiry is whether the wrongful act is closely linked to the damages or loss suffered (the so called conditio sine qua non). An objective test is applied to test for negligence.[3]

[10] In **CHECKERS SUPERMARKET v LINDSAY (123/2008) [2009] ZASCA 26** (23 March 2009) para [5], the Supreme Court of Appeal held *'In our law liability for negligence arises if it is foreseen that there is a reasonable possibility of conduct causing harm to an innocent third party and where there is an omission or failure to take reasonable steps to guard against such occurrence.'*

[11] In respect of a claim for loss of support the claimant must prove that he or she was financially supported by the deceased who had a duty to support. A duty of support is established from the fact-specific circumstances of the relationship from which it can be shown that a binding duty of support has been assumed.[4] A claim for loss of support is subject to the RAF limitation which was brought about by the amendment of the RAF Act 56 of 1996 (as amended) as contemplated by section 17 which came into operation on 1 August 2008. This amendment introduced various limitations on the RAF's liability. One of the limitation in section 17 (4) (c) of RAF Act 56 of 1996 was to put a cap or limit on the annual loss payable by the defendant.

[12] Section 17 (4) (b) of RAF Act 56 of 1996 (as amended) provides-

> *'In respect of any claim for the loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice prior to the date on which the cause of action arose.'*

[13] The purpose of the Cap is to limit the sum to be paid.[5] For claims of loss of support the calculation of the measure of damages was held in **Lambrakis v Santam Ltd (412/00) [2002] ZASCA 16** (26 March 2002 para [12] '*The measure of damage for loss of support is, usually, the difference between the position of the*

[3] See Jones v Santam Bpk 1965 (2) SA 542 (A) where it was stated" a person is guilty of culpa if his conduct falls short of that of the standard of the diligens paterfamilias- a standard that is always objective and which varies only in regard to the exigencies arising in any particular circumstances. It is a standard which is one and the same for everybody under the same circumstances";
[4] See Kekana obo Motshwaede v RAF (2019/26724)[2023] ZAGPJHC 495 (16 May 2023) para[13].
[5] See Sil & Others v RAF 2013 (3) SA 402 (GSJ) paras 13- 15.

dependant as a result of the loss of support and the position he or she could reasonably have expected to be in had the deceased not died.'

[14] In **Paixao and Another v RAF 2012 (6) SA 377 (SCA)** para [12] it was held '*A claim for maintenance and loss of support suffered as a result of a breadwinner's death is recognised at common law as a 'dependant's action'. The object of the remedy is to place the dependants of the deceased in the same position as regards maintenance, as they would have been had the deceased not been killed. The remedy had been described as 'anomalous, peculiar and sui generis' because the dependant derives her right not through the deceased or his estate but from the fact that she suffered loss by the death of the deceased for which the defendant is liable. However, only a dependant to whom the deceased, whilst alive, owed a legally enforceable duty to maintain and support may sue in such an action. Put differently the dependant must have a right, which is worthy of the law's protection, to claim such support.'*

EVALUATION:

[15] I have deemed it prudent to address the aspect of locus standi first. During the pre-trial conference, the defendant refused to concede whether or not the plaintiff has locus standi and reserved its rights. As trite, it is for the parties to outline the issues for determination by a Court[6]. During the hearing, in the absence of the defendant, the plaintiff as *dominis litis* opted to deal with the main claim which was the liability of the defendant and the damages suffered by the minor child. I therefore have opted not to pronounce on the issue of locus standi on the basis that it was not placed as an issue calling upon this court to pronounce upon it. Secondly, I deemed it to be improper to raise the issue *mero motu* as I was of the view that to do so would be descending into the arena since the party that raised it was in default and the plaintiff opted not to raise it thereby expecting this court to pronounce upon it.

[16] The onus of proving the merits as well as the damages suffered as a result of the death of the deceased was upon the plaintiff. This meant that the plaintiff had to prove that the insured driver was negligent by proving –

[6] See Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) paras [13]-[14].

(a) That a reasonable person in the position of the defendant could have foreseen the harm and

(b) The reasonable person would have taken reasonable steps to prevent the harm suffered.[7]

[17] On the absence or default of the defendant, the provisions of Rule 39 (1) of the Uniform Rules found application which provides-

'If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden.'

[18] The plaintiff gave notice to the defendant which was served that she intended to make an application that 'all the evidence in casu be given by way of affidavit'. This meant that the plaintiff was reliant to prove her claim in respect of both the liability and the quantum of the damages.

[19] On the RAF 1 form, in clause 12 which called for details on witnesses to the accident, what was written was 'to follow'. What was recorded was that the deceased entered the road and was knocked down. This being a claim for loss of support by a minor, all that the plaintiff needed to prove was 1% negligence. It is trite that a litigant who fails to adduce evidence about a fact in dispute runs a risk that the opponent's version be believed. See **Brand v Minister of Justice 1959 (4) SA 712 (A).** This meant that the plaintiff needed to show that the wrongful conduct which gave rise to a delictual claim fell squarely on the insured driver thus attracting liability on the defendant. Counsel placed reliance on the accident report in which constable Khuzwayo gave a brief description of the information he obtained regarding the accident. Rather than cementing the plaintiff's claim, the accident report was destructive to the plaintiff's case.

[7] See v Kruger v Coetzee supra.

[20] In that accident report form, what was glaring was the fact that the deceased jumped into the road. This did not prove that the insured driver was automatically negligent. More was required from the plaintiff to prove that the insured driver's conduct fell short of the standard of a diligent and reasonable driver in the same circumstances. Put differently, the mere fact that the deceased was knocked by the insured driver did not automatically give rise to a factual finding that the insured driver was negligent.

[21] In the particulars of claim, the plaintiff made these averments to substantiate a factual finding of negligence by proving that the sole cause of the accident was the negligence of the insured driver in the following respects-

a) That he failed to keep a proper look out thereby causing the accident: There was no evidence to prove this averment. The onus was on the plaintiff to prove that indeed the insured driver failed to keep a proper look out. Rather than proving this, accepting the accident report what was glaring was that the deceased jumped into the road. There was no evidence led to prove or substantiate this averment.

b) That he failed to avoid the accident while by exercise of reasonable care and skill he should and could have done so: There was no evidence to prove this allegation. The plaintiff had to prove that the insured driver could have avoided the accident but failed to do so.

c) That he drove the insured vehicle at a high speed in the circumstances: There was no expert evidence led (such as an accident reconstruction expert) to prove on a balance of probabilities that indeed the insured driver was driving at a high speed. In fact, there was no evidence to prove the speed limit on the particular road. This averment was not proved.

d) That he failed to apply brakes timeously or at all: There was no evidence to prove this averment. The statement from the insured driver did not advance the plaintiff's claim in any manner.

e) That he failed to pay due regard to the safety of the other road-users: It was insufficient to merely make an allegation. What was required from the plaintiff was credible evidence on which a factual finding could be made or a reasonable inference could be drawn. There was no evidence to prove this allegation.

f) That he moved into the incorrect lane of travel: Similarly there was no evidence that this took place. This appeared that this was just a generic averment not supported by any credible evidence. There was no evidence led of any eye witness to support this averment. The plaintiff failed to prove this allegation.

g) That he executed a turn while not safe and too dangerous under the circumstances: There was no evidence to support this averment. As indicated above, it appeared to have been a generic averment made on the particulars of claim which was not supported by any credible evidence (either direct or circumstantial).

h) That he failed to maintain any, alternative sufficient control over the insured vehicle: The plaintiff did not place any credible evidence on which an inference could be drawn that the insured driver failed to either maintain or control the vehicle. Once more, this appeared to have been a generic averment made without any evidence to prove.

i) That he omitted to drive with skill, diligence, caution and or circumspection: One would have expected expert evidence to substantiate this averment-taking into account factors such as the weather, road surface, the speed that the insured driver was driving at etc. This list is not exhaustive. To make an allegation that the insured driver failed to drive with skill must be proved on a balance of probabilities. Once more, the plaintiff failed to prove this averment with credible evidence.

j) That he allowed his vehicle to leave its path of travel: As indicated above, there was no evidence to prove this averment. This appeared to have been a

generic averment not supported by any evidence. When looking at the sketch drawn by constable Khuzwayo, it was hard to comprehend how this led to the accident. I made this remark on the basis that the report made on the accident report was that the accident took place because the deceased jumped into the road not that the insured driver left the path of travel thereby knocked the deceased. There was no evidence to prove this averment.

[22] It is trite that a driver is required to exercise reasonable care and vigilance towards road users. In the same manner, there is a duty on a pedestrian who intends to cross a road to do so at an opportune moment by exercising reasonable care. Pittman J in **Pearce v Taylor 1934 EDL** stated *'A foot-passenger must take reasonable precautions to see that at the moment of crossing he is not in immediate danger of being run over, but he need not be constantly looking back to see if he is being pursued by a tram.'*

[23] During the pre -trial conference the defendant placed liability as an issue for determination at trial. The mere fact that the hearing was conducted in default of the defendant did not equate to an automatic finding of negligence or to a finding that there was no longer an onus on the plaintiff to prove the merits of the claim. This was especially crucial where liability was placed as an issue. It would be a different matter in instances where the merits or liability has been conceded.

[24] To sum up- as correctly contended by Counsel, what was required was for the plaintiff by credible evidence to prove that there was 1% negligence on the part of the defendant.[8] In her affidavit, the plaintiff made averments which were only relevant to substantiate the claim for loss of support but failed on the aspect of liability wherein she stated as follows-

'I wish to state that I'm the biological sister of the late N.S. id no (. .) and I confirm that she had a child with the late Z[...] C[...] who died as a result of car accident. The name of the child is K.S id no (. .) and the father Z[...] C[...] was supporting him. I've

[8] See A.D.C and Others v RAF (2018/027323) [2023] ZAGPJHC 350 (18 April 2023) para [13].

attached both death certificates. I'm claiming for a compensation against RAF through the lawyer.'

[25] The only information relevant in relation to the circumstances under which the deceased died is contained in the Accident Report form that was compiled by constable C.P. Khuzwayo on 2 March 2019. Under the heading 'Brief description of the accident' it is noted as follows-

'It is alleged that driver A was coming driving on N2 main Harding Rd, when this person was crossing the road he did not stop on the pavement he just jumped on the road that how he got hit by the car.'

[26] Constable Khuzwayo subsequently compiled an affidavit to the effect that he attended to the scene where he found the deceased on the road and spoke the driver of the ambulance who made a report and thereafter obtained the insured driver's details. This affidavit, with respect did not take the plaintiff's case any further other in proving defendant's liability. There was another affidavit compiled by Stephanus C. Weber detailing what he did with the exhibits. This affidavit also did not take the plaintiff's case any further. T.P.N who is the biological sister of the deceased deposed to two affidavits (one such affidavit was in relation to the relationship between the minor child and the deceased and another affidavit clarifying the different surname that the deceased was using) which also did not take the plaintiff's case.

[27] The contention made on behalf of the plaintiff was that merits should be conceded 100% in favour of the plaintiff. This submission it seemed operated on the misconceived notion that there was no requirement on the part of the plaintiff to prove her claim. This submission was with respect incorrect.

CONCLUSION:

[28] In conclusion, after assessing all of the evidence, regrettably I was unable to find facts in which an inference of negligence could be made. It followed that the plaintiff failed to prove the defendant's negligence it followed that the claim must be

dismissed. There was no necessity to consider the issue of the damages allegedly suffered.

COSTS:

[29] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially. The trite position is that the costs follow the cause. However, on the facts of this matter taking into account that the plaintiff instituted proceedings in a representative capacity for the benefit of a minor which would be unjust to burden with a cost order. No cost order is granted

Order:

[30] In the circumstances the following order is made:

1. The plaintiff's claim is dismissed. No cost order is granted.

MNCUBE, AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Plaintiff	: Mr N.T. Mabale
Instructed by	: Kotlolo Attorneys
	: 154 Pine Street
	: Arcadia
On behalf of the Defendant	: No Appearance.
Date of Hearing	: 02 May 2024
Date of Judgment	: 05 June 2024