

In the South Gauteng High Court

Johannesburg

Case 2007/19277

In the matter between

Makhuvela, NA on behalf of B H

Plaintiff

and

The Road Accident Fund

Defendant

Judgment

Malan J:

[1] This is an action in which the plaintiff claims in his capacity as legal guardian of his grandson, B H, damages suffered as a result of the death of the child's father in a motor vehicle collision on 18 September 2004. The parties have agreed on certain facts and asked for a decision on a limited issue.

[2] The child was born on 5 June 1999. His mother died on 4 December 2002 prior to the collision due to unrelated causes. The grandparents of the child are 'foster parents' who have been appointed by court. The grandmother receives a 'foster child grant' and an old age grant. The first payment of the foster child grant was received in August 2005.

[3] It is common cause that the past and future loss of support suffered by the child as a result of the collision is the amount of R 260 720-65. The past and future value of the foster child grant is R 71 630-99. In agreeing to these figures the parties have taken into account contingencies. The only issue I have to decide is whether the amount of the foster child grant should be deducted from the amount agreed on for loss of support. This raises the question whether payment of the foster child grant to the child's grandmother should be regarded as *res inter alios acta*. The parties have agreed that the amount determined be paid to a trust to be formed on behalf of the child.

[4] In *Zysset and Others v Santam Ltd*¹ Scott J said:

'The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. ... Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action,

¹ 1996 (1) SA 273 (C) 277 H – 279 C. This judgment has been followed frequently. See the cases cited by WA Joubert (founding editor) *The Law of South Africa* 2ed Vol 8 Part 1 'Delict' by JR Midgley and JC van der Walt at para 156. The older literature is collected by PQR Boberg *The Law of Delict Volume 1 Aquilian Liability* (1984) 577 ff, 609 ff. Critical discussions of the problem are those of Pieter Pauw '*Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A)' 1979 *TSAR* 256 and CFC van der Walt 'Die voordeeltorekeningsreël – knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding' 1980 (43) *THRHR* 1. For a discussion of the deductibility of social security benefits in English law, see Harvey McGregor *McGregor on Damages* (2003) paras 35-135 ff.

any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action.

Notwithstanding the foregoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff. Nor, it would seem, are these the only benefits which are to be treated as *res inter alios actae*. In *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) it was held, for example, that a military pension which was in the nature of a *solatium* for the plaintiff's non-patrimonial loss was not to be deducted. ...

It is doubtful whether the distinction between a benefit which is deductible and one which is not can be justified on the basis of a single jurisprudential principle. In the past the distinction has been determined by adopting essentially a casuistic approach and it is this that has resulted in a number of apparently conflicting decisions. ... But whatever the true rationale may be, if indeed there is one, it would seem clear that the inquiry must inevitably involve to some extent, at least, considerations of public policy, reasonableness and justice ... This in turn must necessarily involve, I think, a weighing up of mainly two conflicting considerations in the light of what is considered to be fair and just in all the circumstances of the case. The one is that a plaintiff should not receive double compensation. The other is that a wrongdoer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party.'

[5] The Social Assistance Act 13 of 2004 provides for the rendering of social assistance to persons and seeks to give effect to the constitutional right of access to social security by providing for 'effective, transparent, accountable and coherent

government in respect of social security'.² The purpose of the Act is among others to provide for the administration of social assistance and the payment of social grants.³

The preamble states that it is enacted since the Constitution provides that

'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance, and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.'

The purpose of the Act is thus not only to secure the support of foster children and other groups of people but also to ensure equality and the realisation of the rights of the child under the Constitution.⁴

² Section 27 of the Constitution provides: 'Health care, food, water and social security.— (1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.'

³ Section 3.

⁴ Section 28 of the Constitution provides: 'Children.— (1) Every child has the right — (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that — (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be — (i) kept separately from detained persons over the age of 18 years;

[6] A 'foster parent' is eligible for a 'foster child grant' for a child 'for as long as that child needs such care if (a) the foster child is in need of care; and (b) he or she satisfies the requirements of the Child Care Act, 1983...'.⁵ A 'child in need of care' is widely defined but includes a child without parents or a guardian.⁶ A 'foster parent' is defined as 'person, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law, or a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 ...'. A 'foster child' is

'a child who has been placed in the custody of –

(a) a foster parent in terms of –

(i) Chapter 3 or 6 of the Child Care Act, 1983 (Act 74 of 1983); or

(ii) section 290 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or

and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. (3) In this section "child" means a person under the age of 18 years.' See MP Olivier, N Smit and ER Kalula *Social Security A Legal Analysis* (2003) 377 ff.

⁵ Section 8. In addition, the Regulations published in RG 31356 of 22 August 2008 stipulate that a foster parent is eligible for a foster grant if the child remains in his or her custody and the foster parent is a South African citizen, a permanent resident or a refugee. However, a foster parent is not eligible for a foster child grant 'for more than six children if the children are not his or her siblings or blood relatives' (reg 7).

⁶ Section 14(4)(a) of the Child Care Act 74 of 1983. Sections 33 ff contain specific provisions dealing with foster children.

(b) a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965)'.

[7] In section 5 the criteria for the different grants under the Act are specified.⁷ In addition, the financial criteria for grants have been determined by the Minister: the income of a foster parent is irrelevant in deciding whether or not to make a foster parent grant.⁸ The beneficiary of a foster parent grant must remain in the Republic and the grant may be suspended in certain circumstances should he or she leave the Republic.⁹ Where a grant has been abused the matter may be investigated,¹⁰ and payment of the grant may be suspended where the beneficiary is convicted of abuse or neglect of the child in question or is found to be incapable of using the grant for the benefit of the child.¹¹ A person may also be appointed to receive the grant pending the substitution of the beneficiary.¹² A grant may not be transferred or encumbered except with the written consent of the Minister.¹³ A beneficiary must receive the full amount of a grant without limitation before any person may exercise any rights in respect of it.¹⁴ The amount of a grant may not be attached or subjected to any form of execution; nor does it form part of the insolvent estate of the

⁷ A foster child grant amounts to R 650 per month (GN 1243 in GG 31630 of 21 November 2008).

⁸ Regulation 18 and Annexure C to it. Para (2) of the Annexure provides: 'A foster parent qualifies for a foster child grant regardless of such foster parent's income.' See Olivier, Smit and Kalula para 12.3.2 at 384-5: 'The foster-child grant is – strictly speaking – not a means-tested grant, as only the means of the foster-child are considered and not those of the foster-parent as well.'

⁹ Section 16.

¹⁰ Section 19.

¹¹ Section 19(3).

¹² Section 19(3)(b).

¹³ Section 20(1).

¹⁴ Section 20(3).

beneficiary.¹⁵ A foster child grant lapses on the last day of the month in which the child dies; or on the day on which the last living foster parent dies; or on the last day of the month in which the foster child is no longer in the custody of the foster parent; or at the end of the calendar year in which the foster child attains the age of 18 years; or with effect from the first day of the month following the month in which the foster child leaves school.¹⁶

[8] A foster child grant is given to the *foster parent and not to the child* itself. It is given to the foster parent to enable him or her to comply with his or her obligations to the child. The point of departure in the Act is the 'family' which is 'assumed to shoulder the primary responsibility for the care of children'.¹⁷

'The state, however, must provide active support to those families whose ability to care for children is impaired, as well as to those children without family support structures.'

A foster child grant may obviously be used to support the child but its primary purpose is the realisation of the constitutional rights of the child through the intervention of the foster child parent. It is given to the foster parent who may spend the whole or part of it on the foster child. Foster child grants are financed through moneys appropriated by Parliament.¹⁸ The Road Accident Fund is similarly funded by public moneys.¹⁹

¹⁵ Section 20(5).

¹⁶ Regulation 28(3).

¹⁷ Olivier, Smit and Kalula 378.

¹⁸ Section 2(4) of the Act.

¹⁹ Section 5 of the Road Accident Fund Act 56 of 1996 deals with the financing of the fund and provides: (1) The Fund shall procure the funds it requires to perform its functions — (a) by way of a Road Accident Fund levy as contemplated in the Customs and Excise Act, 1964; and (b) by raising

[9] The child's foster parents were appointed by court. There may well be some or other connection between their appointment and the death of the child's father. That is not decisive of the case. The grant is payable to the foster parent and not to the child. It is paid to enable the foster parents to comply with their constitutional and other obligations to the child. The child never has and will never have a claim to it. In these circumstances the foster parent grant is indeed *res inter alios acta*.

[10] The following order is made:

[a] The defendant is ordered to pay the amount of R 260 720-65 to the plaintiff with interest at the rate of 15,5 % per annum from date of judgment and costs of suit;

[b] The said amount of R 260 720-65 and interest is to be paid to the plaintiff's attorneys in trust for a trust to be formed on behalf of the child the terms of which have to be approved by a judge in chambers..

Malan J:

Judge of the High Court

Counsel for plaintiff: JC Prinsloo

Plaintiff's attorneys: De Vries Inc

Counsel for defendant: A Louw

Defendant's attorneys: MF Jassat Dhlamini Inc

Date of hearing: 20 May 2009

loans. (2) The Road Accident Fund levy paid into the National Revenue Fund in terms of the provisions of section 47 (1) of the Customs and Excise Act, 1964, less any amount of such levy refunded under that Act, is a direct charge against the National Revenue Fund for the credit of the Fund.'

Date of judgment; 26 May 2009