

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION

CASE NO: 2014/34463

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
_____ DATE	_____ SIGNATURE

In the matter between:

JERMIMAH TUTUBALA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE J:

- [1] Thato Christian Tutubala (hereinafter “the deceased”) was fatally injured in a motor vehicle collision on 8 June 2013. This is an action in which the Plaintiff, the mother of the deceased, in her personal capacity sues the Defendant in terms of the Road Accident Fund Act No. 56 of 1996 for damages for loss of support sustained by her as a result of the death of the deceased.
- [2] The matter therefore involves the determination of the indigence of the Plaintiff as a parent of the deceased. If indigent, this court must decide whether the deceased owed her a legal duty of support at the time of his death. If the answer to both questions is in the affirmative, the court must then proceed to assess and make an appropriate award to the Plaintiff.
- [3] The matter came before this court with a concession of merits by the Defendant and an arrangement that it would be liable for 100% of the Plaintiff’s proven damages. The Plaintiff’s success to do so would be dependent on whether she is able to demonstrate on a balance of probabilities that she was indigent and was therefore legally entitled to receive financial support for the basic necessities of life from the deceased.
- [4] The Plaintiff was the only witness who testified and her evidence largely accords with the common cause background facts from which this matter emanated, which is that:

4.1 She will be turning [.....] in November this year. She resides in a house that she formerly rented from the old municipality under the apartheid system. Registration of transfer of the property has since been effected into her name. She lived in the house together with the deceased, her

divorced daughter and two grandchildren. She continues to house her daughter and the two grandchildren to date;

4.2 She lost her formal employment with the Department of Education in 1999 and to date remains unemployed. After leaving formal employment, she worked as a hawker selling food and other items from home. In consequence of severe competition, she ceased all operations of her informal business in 2010;

4.3 In late 2010, she became eligible to receive old age pension for which she applied and received in early 2011. Her initial old pension amount has since soared to the present R1 350.00;

4.4 She testified that she requires roughly R1 850.00 per month, which amount is made up as follows:

4.4.1 Approximately R350.00 for rates and water;

4.4.2 R450.00 for electricity;

4.4.3 R800.00 for food and

4.4.4 R250.00 for clothing.

4.4 At the time of his death, the deceased was employed as a corporal in the South African National Defense Force earning a gross amount of R15 901.50 per month. His net salary amounted in all to R11 219.73 from which he contributed R2 500.00 per month to the Plaintiff;

4.5 It was not contested that the amount of R2 500.00 was for the deceased's rental, food and services he received whilst residing with the Plaintiff.

4.6 The Plaintiff received in excess of R200 000.00 as an inheritance from the deceased estate. Of the aforesaid amount, she invested R150 000.00 from which she earns an interest amount of R600.00 per month.

[5] The Defendant challenges the Plaintiff's claim of indigence and in the event that the court finds that she is indigent, it contends that the Plaintiff is able to meet the costs of her necessities of life, which it argues, amount to no more than R500.00 per month. That amount is constituted by the difference between R1 850.00 per month and R1 350.00 that she receives as an old age pension.

[6] The Plaintiff on the other hand has relied on Section 1(1) and (2) of the Assessment of Damages Act 9 of 1969 , which provides:

- “1 Insurance moneys, pensions and certain benefits not to be taken into account in the assessment of damages for loss of support**
- (1) When in any action, the cause of which arose after the commencement of this Act, damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.
- (2) For the purposes of subsection (1)-
- 'benefit'** means any payment by a friendly society or trade union for the relief or maintenance of a member's dependents;
- 'insurance money'** includes a refund of premiums and any payment of interest on such premiums;
- 'pension'** includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment.”

[7] His submission is that the R200 000.00 that the Plaintiff inherited from the estate of the deceased constitutes the proceeds of a retirement annuity which cannot be taken into account when evaluating her income. Any interest income derived from

the amount invested by the Plaintiff similarly cannot be considered.

[8] The above argument is in justification of the exclusion of the amount of R600.00 from the Plaintiff's income, which she testified she earns from the R150 000.00 that she has invested. I will return to this argument later in this judgment.

[9] It is trite that children generally have a legal duty to support their indigent parents. That general principle is not without qualification though. The parent concerned must not only show that she or he received aid but must in addition allege and prove that the person from whom support is claimed has a legal duty to do so because a need exists. See **Oosthuizen v Stanley** 1938 AD 322.

[10] Defendant's Counsel referred this court to the case of **Smith v Mutual & Federal Insurance Co Ltd** 1998 (4) SA 626 (C) where the court referred to the **Oosthuizen** case *supra* and stated that in order to prove indigence, a stringent criterion of need has to be established.

[11] When the **Smith** case *supra* held as it did, it was following in the footsteps of **Volkenborn v Volkenborn** 1946 NPD 76 where the court held that parents must exhaust all their capital resources before looking to their children. Of great significance is the court's pronouncement that a parent who owns immovable property may be illiquid but is not indigent.

[12] It is also instructive to refer to the unreported case of **Fosi v Road Accident Fund** Case No. 1934/2005 ECD delivered on 21 February 2007 where the court drew from African Customary Law and stated with regard to children's obligation to support their parents:

“...customarily the child who is financially able to do so, is under an obligation to maintain his **needy** parent.”

[13] No doubt should exist that the deceased, as the Plaintiff's son, would have owed the Plaintiff a legal duty of support provided the need for him to do so existed. In all the cases to which I have referred above, demonstration of need whether in customary law or not is significant and required. Thus, Dlodlo J's statement quoted above is consistent with the other cases in particular, the Smith case *supra* where it was said that in order to prove indigence a stringent criterion of need must be established. Customary law in this respect is therefore no different from common law.

[14] The Plaintiff's Counsel referred this court to the matter of **Wigham v British Traders Insurance Co Ltd** 1963 (3) SA 151 (W) where this court held that:

“[I]n order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received a contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed...The aim and object is to place the dependents in as good as position as regards maintenance as they would have been if the deceased had not been killed, to which end material losses as well as benefits and other prospects must be considered.”

[15] The correctness of the **Wigham** case *supra* cannot be doubted. The statement does not, however, suggest that the establishment of need is dispensed with. If a particular parent was accustomed to a life of superfluity prior to the death of a child, the parent will still be expected and required to prove the existence of need post the death.

[16] The evidence of the Plaintiff is that both prior and after the deceased's demise, she required R1 850.00 per month for her own support and that of the other members of her family being her daughter and two grandchildren. She receives R1 350.00 plus R600.00 per month. She is over what she needs on monthly basis by an amount of R100.00. She does not therefore need any additional financial support according to her own testimony.

[17] While on this I might as well address the Plaintiff's argument pertaining to the monthly interest of R600.00 that she earns. Plaintiff's Counsel submitted that the

court should not take this into account because it stems from a retirement annuity that accrued to the deceased's estate, which the Plaintiff inherited and invested. This assertion should be disregarded because, as Counsel for the Defendant pointed out, no evidence was led to establish that the amount was a retirement annuity and therefore not to be taken into account when assessing the Plaintiff's income as per Section 1 of the Assessment of Damages Act No. 9 of 1969.

[18] Plaintiff's Counsel also made reference to the matter of **Khan and Another v Padayachy** 1971 (3) SA 877 (W). He believes that the facts in the **Kahn** case *supra* are very similar to this case. I disagree because the conclusion was that the parents and their sickly daughter were indigent and they needed support from the deceased. I have just demonstrated above that the Plaintiff's income is more than what she needs by R100.00. Another distinguishing feature is of course that the sister of the deceased was sickly and unable to work. This is not the situation in this case because the evidence is that the Plaintiff's daughter is healthy and fit and does from time to time obtain transient work.

[19] In the circumstances the Plaintiff has on a balance of probabilities failed to show that she was indigent and received additional income from the deceased because she needed it. In the light of that finding, the action cannot succeed and I make the following order:

1. The claim is dismissed with costs.

B. A. MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Adv B. Anderson

Instructed by: Mokoduo Inc

Counsel for the Defendant: Adv N. Mayet-Beukes

Instructed by: Nozuko Nxusani Incorporated

Trial proceedings took place on 19 June 2015

Date of delivery of Judgment: 23 July 2015