

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 70691/11

Date: 13 August 2014

In the matter between:

I[...] L[...] B[...]

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

Coram: HUGHES J

JUDGMENT

Delivered on: 8 August 2014

Heard on: 5 June 2014

HUGHES J

1. In this action the plaintiff, I[...] L[...] B[...], claims loss of support from the defendant, the Road Accident (“RAF”), on behalf of her minor child, M[...] C[...] B[...] (“M[...]”), born on 14 February 2004.

2. This claim arises from the death of plaintiff’s father, K[...] E[...] B[...] (“the deceased”) who died because of a motor vehicle collision on 15 August 2010. At the time of his demises, the deceased worked as a petrol attendant for Coco Cola earning a monthly salary of about R7000.00 prior to his death. The plaintiff claims that the deceased supported M[...] from her birth until his death.

3. In the plaintiff’s particulars of claim the plaintiff set out her claims as follows:

3.1 Funeral expenses R10150.00

3.2 Past loss of support R 44 210.00

3.3 Future loss of support R485 074.00.

4. The RAF conceded merits on 5 June 2014 being the date that the trial commenced. The Fund also made an offer to pay the funeral expense portion of the plaintiff's claim to the tune of R9 107.75, duly accepted by the plaintiff. The issue that requires determination by this court is whether the M[...] is entitled to claim past and future loss of support from her maternal grandfather.

5. The plaintiff was the only witness that testified. Briefly, she is the biological mother of M[...] who was conceived whilst she was in standard eight. She states that she returned to school after giving birth and the deceased mother took care of M[...]. On her return to school the following year, she failed and sought employment as a domestic worker.

6. Plaintiff testified that while she worked as a domestic the minor child was financially supported by the deceased, until his death. Her mother, passed on earlier in 2007 also looked after the child. The biological father, O[...] N[...], did not assist financially at all. In fact, she states that she could not find him. The plaintiff's evidence is that he and his parents did not assist in the support, financially and otherwise, of the child from the birth. She obtains a monthly government social grant, currently at R280.00 per month that has assisted her support the child.

7. Currently, the plaintiff lives in an RDP, which she states, belonged to her grandmother. Presently she is living in this home with N[...], her unemployed brother, M[...] and her two-year-old child from N[...]. N[...] moved in with the plaintiff in 2010 after the deceased's death. Plaintiff also earns an amount of R300.00 per week from selling chips, sweets and ice cream from home. This together with her social grant she receives for M[...] is all she has to rear her with since the deceased died. N[...] assist her when he can but he also has other child outside of their relationship.

8. Plaintiff testified that since 2012 N[...] has been employed as a driver earning an amount of R5 000.00 per month with the benefit of using the company vehicle to and from work. Plaintiff still runs her business from home and in addition collects the social grant for both the children.

9. The defendant's counsel suggested to the plaintiff that she in fact earned R600.00 per month from working as a domestic, this she emphatically denied. He suggested further that she and N[...], with the salaries they earned together with the social grant were able to take care of M[...]. As such, they did not require the support of the deceased for M[...]’s entire life as she contends. This she denied saying that she could not support M[...] and neither could Ngomade and that is why she would have required the deceased to support M[...] until she became self-supporting.

10. As part of the quantum documents a report of Educational Psychologist, Andria Grobler, was on hand, this is very informative. She conducted an interview with the plaintiff and M[...] on 6 March and 17 April 2013. At that stage, M[...] was 9 years and 9 years 2 months respectively.

11. For easy reference, I intend to quote relevant extracts from this experts consultation with the plaintiff and M[...]:

“4 RELEVANT BACKGROUND INFORMATION

4.1 Family History and Social Background

4.1.1 M[...] is a 9-year-old Zulu-speaking girl who has been a Grade 4 learner at the time of the assessment. The girl has been residing with her mother, her father (Mr O[...] N[...]) and her maternal uncle in a two bedroom RDP house with all amenities in Extension 1 M[...] in M[...]. Her mother stated that she has been sleeping in on a single bed that has been standing in the dining room, but she has still been calling for and sleeping with her mother and father during the night. Her parents have never been married and her father had reportedly been staying with the family since 2010. Prior to that he had reportedly residing in M[...] Extension 4, but according to the mother he had had regular contact with the girl. The family has reportedly been living from the combined income of Mr N[...] (father) who has been earning approximately R2900-00 as well as Ms B[...] who has been earning approximately R600-00 per month. The family has also been receiving a social grant of R280-00 per month for M[...].

4.1.2 Ms I[...] B[...] (27), M[...]’s mother; has been employed as a domestic worker and she has been working approximately 3 days per week, earning R1000-00 per day. She indicated that she terminated her schooling career upon completion of her grade 10 year due to financial constraints. She stated that she would like to complete her schooling one day in the future. Ms B[...] stated that she failed Grade 5 during her schooling career. The girl’s mother explained that she and her family were originally from Tzaneen, but they had reportedly relocated initially to W[...] and later to M[...] in approximately 1999.

4.1.3 M[...]’s father; Mr O[...] N[...] (34), had reportedly obtained a senior certificate and he has been employed a driver at a company in M[...]. Ms B[...] explained that she and Mr N[...] had met after she had relocated from Tzaneen as he been raised in M[...].

4.1.4 M[...] has been the only child of Mr N[...] and Ms B[...]. Ms B[...] was expecting their second child in April 2013 and she said that M[...] has been very excited about the arrival of the new baby.

4.1.5 According to Ms B[...], Mr N[...] has other children, but she was not able to provide any detail in this regard although M[...] has had contact with them when they she has visited her parental grandmother and she had seen the children there on occasion.

4.1.6 Ms B[...] explained that when M[...] had been 1 year old she had gone to live her maternal grandparents in Witbank during which time she had visited her daughter over weekends or sometime her parents had visited with her in M[...]. In 2007 Ms B[...]’s mother passed away, and M[...] has been residing with her in M[...] since then.

4.3 Educational History

4.3.1 Pre-school

4.3.1.1 M[...] had never attended a creche and she had been cared for by her maternal grandparents until 2007 after which her mother had taken care of her until she had started Grade R in 2009

4.3.1.1 Her mother explained that she had been enrolled as a Grade R learner in M[...] Primary School in M[...] in M[...]. This had been the closest school to their home.

4.3.1 Primary school

4.3.2.1 In 2010 the girl was enrolled as a Grade 1 learner at M[...] Primary School...

“ 4.4 Routine

4.4.1 M[...] has been woken at 06:00 by her mother after which she has been taking a shower and dressing independently. Her mother has been giving her some breakfast and she has also been taking a lunchbox to school. She has been leaving for school at approximately 06:45. The school has reportedly not been far from their house and the girl has been reaching school after a 15-minute walk. School has ended at 14:00 and the girl has been arriving home at approximately 14:30. Her mother stated that she had been working from 07:00 until 13:00 the days she has been going to work and she has been taking care of the girl during the afternoons.

4.4.2 The girl has been changing her clothes and eating some lunch after which she has been doing her homework. After her homework has been completed she would go and play with her friends or watch some television. The family has been eating supper at 20:00 and M[...] has reportedly explained that the girl’s father has been arriving at 20:00 and the family has been

waiting for him before they have dinner.

4.4.3 Over weekends the girl has been spending her time watching television and playing with her friends and she has been attending church on Sundays with her aunt.

“4.6 Habits

4.6.1 The girl has been drinking one or two cups of tea per day, but she has preferred drinking fruit juice. They have not been buying Coca-Cola, but she has been eating a chocolate bar approximately once a week.

9 FINDINGS AND CONCLUSION

“9.2 ... M[...] had achieved normal development milestones according to her mother. She was brought up in poor socio-economic circumstances and she had reportedly resided with her grandmother from 2005 until 2007 when her grandmother had reportedly passed away due to natural causes...

...M[...] had reportedly not attended a crèche and she had been enrolled as a Grade R learner at M[...] Primary School in 2009. She has been attending this school up to date and she was a Grade 4 learner at the time of the interview...

9.3 With regard to M[...]’s biological background, it should be noted that M[...]’s mother; Ms I[...] B[...], had obtained Grade 10, having failed Grade 5 during her schooling career she had reportedly left school due to financial constraints, but she had voiced her desire to complete her schooling career sometime in the future. Ms B[...] indicated that she had been employed as a domestic worker at the time of the assessment. The girl’s father, Mr O[...] N[...], has reportedly been employed as a driver and had obtained a senior certificate according to Ms B[...]. Mapule’s parents have been expecting their second baby in April 2013 and Ms B[...] indicated that she has no other children. Mr N[...] was reported to have had children from previous relationships, but Ms B[...] did not have any details regarding their highest levels of education or academic performance.

12. What I gather from the information advanced to the expert by plaintiff is that she stayed in extension 7 M[...] in M[...] and when M[...] was a year old that is in 2005 she took her to live with her maternal grandparent in W[...]. During this period, she visited on weekends and her parent came with the child to see her when they could. After her mother died in 2007, she removed M[...] from the deceased’s home and lived with her in M[...]. The reality is that M[...] only stayed with her maternal grandparents for two year.

13. The plaintiff pointed out that the deceased was responsible for paying M[...]’s crèche fees, transport, clothing and food. However the reports states otherwise, at no stage did M[...] attend at a crèche. The plaintiff told the expert that she looked after her on her own until she attended grade R in 2009 at M[...] Primary M[...] in M[...]. This school was close to their home.

14. Before 2010, the report states that M[...]’s father had regular contact with his daughter as he lived in the same area that is M[...] extension 4 in M[...]. In 2010, N[...] moved in with plaintiff, M[...] was attending grade 1, and staying with both her parents. The expert makes mention that she was informed that the family lived off the combined income of N[...], who earned at that time R2 900.00 per month and the plaintiff who earned R600.00 per month. In addition, a supplement of the social grant of R280.00 received on behalf of M[...].

15. *“The duty to support between parent and child is but an instance of the more general rule that there is a reciprocal duty of support between ascendants and descendants **ad infinitum**”.* See **Van Heerden et al Boberg’s LAW OF Persons and the Family (1999) 2nd Edition at 252-254**. This is subject to the nearer relatives being responsible to support first, unless they are unable to do so because of their circumstances of the case, their station in life and indigency. See **Miller v Miller 1940 CPD 466 AT 469** and **Caney J in Lloyd v Menzies NO 1956 (2) SA 97 (D) at 102** which states that the priorities (omitting the husbands) are: first, parents (or their estate); and, secondly, grandparents (their estates) - with a reciprocal duty owed by grandchildren towards grandparents.

16. The facts of each case must be examined carefully and the merit therein. A blanket rule in my view in loss of support matters cannot be applicable. What must also come to the fore is the fact that indeed the duty to support does exist and collateral information must be evident to prove same.

17. When I examine the evidence in its totality, on the one hand you have the plaintiff evidence that she testified at the hearing, and on the other hand, you have what she reported to her own expert that appears in her experts report. The latter encompasses an account from the plaintiff herself and M[...] given to the experts employed to substantiate her loss of support claim. I have examined both of these versions and it is clear to me that these versions differ in the extreme.

18. On the one hand, we have the plaintiff stating that she was unable to support her child and as such, the deceased assumed this role and would have done so until the child reached majority. She also testified that she received no support from N[...], but for the support, he has given after the death of the deceased. In addition, she was not able to hold down a steady job thus has never been in permanent employment

19. Then we have what appears in the report of the expert that M[...] corroborates to the said expert. If I

examine this evidence then M[...] only stayed with her grandparents from when she was one year old to the year that the grandmother died, that being a total of two year. It emerged that the child did not attend a crèche as testified by the plaintiff in the trial. This being one of the responsibilities that plaintiff testified the deceased had to pay for on behalf of the child. Another aspect is the fact that the biological father had contact with his child. When the plaintiff was questioned by the defendants counsel and the court on this specific aspect she disputed this fact. In fact, her evidence was to the effect that she could not find him to attain support, but as we are now aware, it transpires that they lived in the same township though in different extensions. The cherry on the top is the fact that N[...] moved in with the plaintiff and they jointly supported the child from their salaries earned and the social grant received on M[...]’s behalf as a supplement.

20. From the above the plaintiff has not taken this court into her confidence and has not provided this court with evidence that the deceased supported M[...] from her birth to his death. It might be that he assisted the plaintiff when M[...] stayed with the deceased and his wife for that two-year period but thereafter the plaintiff on her own report to the expert took M[...] to live with her and she worked and support her child. Thus, when the deceased died he was not the responsible person for the support of M[...]. In fact, it was M[...]’s parents who were the responsible persons for her support. As such, she has suffered no loss of support whatsoever from the death of the deceased as her parents were supporting her at the time that the deceased met his demise and still do to date.

21. In the circumstances following order is made:

21.1 The plaintiff’s claim for funeral expenses succeeds in the amount of R9 107.75 as agreed; and

21.2 The plaintiffs claim for past and future loss of support on behalf of M[...] C[...] B[...] is dismissed with costs.

W. Hughes Judge of the High Court

Delivered on: 8 August 2014

Heard on: 5 June 2014

22. On 8 August 2014 I handed down my judgment in this matter and delivered my order. That very same day I was approached by both counsel who drew to my attention that I had erred in the following respects:

22.1 both counsel confirmed that they had settled the issue of past loss of support by way of an offer and acceptance to the tune of R91 071.75;

22.2 that the funeral expenses claim had not been settled at R9 107.75 and in fact still has not been settled to date.

23. I was advised that these facts were placed on record prior to the commencement of the trial. I checked my notes but they appear differently so a transcript of the record was sought. This transcript was received on 12 August 2014 and this is why I perused same and attend to this matter today on 13 August 2014.

24. The mistake that I made was that I took the settlement of the past loss of support as settlement of the funeral expense claim but excluded the figure, one (1) after the seven (7) to read R9 107.75.

25. In addressing the funeral expenses claim I am satisfied that I erred by recording in my judgment that this aspect had been settled at the amount of R9 107.75. I ought to have awarded no compensation for funeral expenses as the parties undertook to settle this aspect on their own.

26. Having been approached by both counsel the aspect of past loss of support was conceded by the defendant, an offer made to the plaintiff and an acceptance was received. Both counsel persist that this aspect of the claim has been settled by the parties, was recorded as such prior to the trial proceeding and is evident from the transcript of the record. I have perused the record of the proceedings and indeed the aspect of past loss of support was recorded as settled in the amount of R91 071.75. I therefore concede that I erred in not recording that this aspect of past loss of support had been settled by the parties.

27. The defendant's counsel persistence of the settlement of past loss of support abandons the defendant's success in respect of this specific head of damages. In the result as agreed and settled by the parties the plaintiff is awarded an amount of R91 071.75 for past loss of support.

28. I am satisfied that I had erred and in the circumstances the paragraph 4 of my judgment is struck off and is amended to now read "The RAF conceded merits on 5 June 2014 being the date that the trial commenced. The RAF made a settlement offer for Past Loss of Support in the amount of R91 071.75 which was accepted by the plaintiff. The parties undertook to settle funeral expenses between themselves. The aspect that this court needs to determine is that of future loss of support from M[...]’s maternal grandfather"

29. Subject to the variations I reinstate my order which now reads as follows:

29.1 The agreement between the plaintiff and the defendant in respect of past loss of support is made an order of court;

29.2 The defendant will pay to the plaintiff an amount of R91 071.75 for past loss of support as agreed;

29.3 The plaintiff's claim for future loss of support on behalf of M[...] C[...] B[...] is dismissed with costs.

W. Hughes Judge of the High Court

Attorney for the Plaintiff:

JOUBERT ATTORNEYS

22 Viljoen Street, Riviera

PRETORIA

Tel: 012 329 6130

Ref: joubert/mh/jb0137/8

Attorney for the Defendant:

AP LEDWABA INC

867 Church Street, Arcadia

PRETORIA

Tel: 012 342 0900

Ref: MS DICHABE/FS/RAF 23666