

**IN THE HIGH COURT OF SOUTH AFRICA**

(GAUTENG DIVISION, PRETORIA)

CASE NO: 61958/2012

In the matter between:

**R[...] F[...]**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**FOURIE, J:**

[1] The question to be decided is whether the plaintiff's foster child has a claim against the Road Accident Fund for loss of support. On 14 March 2003 the child was placed in the foster care of the plaintiff and her husband pursuant to an order of the Children's Court which had been issued in terms of section 15(1)(b) of the old Child Care Act No 74 of 1983. The child was then one year old. This order was extended on several occasions for the duration of two years at a time.

[2] On 10 March 2012 the plaintiff's husband (and foster parent of the child) was fatally injured in a motor vehicle accident. Thereafter, on 17 April 2012, the foster care order was extended ( with reference to the plaintiff only) to 14 March 2013 in terms of section 159(1) of the Children's Act No 38 of 2005. The plaintiff issued summons in her personal and representative capacity on behalf of the child for the payment of damages suffered as a result of the death of her husband. The merits (save for the question referred to above) have already been conceded in favour of the plaintiff.

### **STATUTORY FRAMEWORK**

[3] Section 17 of the Road Accident Fund Act No 56 of 1996 recognises claims of third parties against the Fund as a result of the death of a third party's breadwinner. To the extent that it is relevant, subsection (1) provides that the Fund shall be obliged to compensate any person for any loss or damage suffered as a result of "the death of or any bodily injury to any other person" caused by or arising from the driving of a motor vehicle, if the injury or death is due to the negligence of the driver or of the owner of the motor vehicle. Section 19(a) provides that the Fund shall not be obliged to compensate any person for any loss or damage for which neither the driver nor the owner of the motor vehicle would have been liable but for section 21. The effect of this provision is that the Fund is only liable under circumstances where the driver or the owner would have been liable in terms of the law of delict.

[4] The Child Care Act No 74 of 1983 was still in operation when the child was placed in the foster care of the plaintiff and her husband. In terms of

section 41(1) thereof any person who has received a child placed in the custody of that person shall, subject to the provisions of subsection (2) “maintain and care for that child”. In terms of subsection (2) this liability would cease under certain circumstances, but also “if any grant or contribution payable by the Minister towards the maintenance of the child is discontinued”.

[5] The Child Care Act has been repealed and replaced by the Children’s Act No 38 of 2005. This Act came into operation on 1 April 2010 (unless otherwise indicated). Chapter 12 deals specifically with foster care. In terms of section 1 “foster care” means care of a child as described in section 180(1). The word “care” in relation to a child, includes providing the child with a suitable place to live, living conditions that are conducive to the child’s health and “the necessary financial support” (section 1).

[6] Section 188 sets out the responsibilities and rights of a foster parent. To the extent that subsection (1) is relevant, it provides that the foster parent has those parental responsibilities and rights in respect of the child as set out in “any applicable provisions of this Act”. The words “this Act” includes any regulation made in terms of the Children’s Act. Part 1 of Chapter 13 of the General Regulations regarding children sets out the rights and responsibilities of foster parents. In terms of Regulation 65(1) a foster parent “has the responsibility of providing for the day-to-day needs of a foster child” in accordance with the definition of “care” in section 1 of the Act, except if the special needs of that child or any other child in the household require otherwise.

## **DISCUSSION**

[7] The common law action for damages for loss of maintenance resulting from the death of a breadwinner is *sui generis*. This action has been described by Holmes JA in Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A) at 614E-F as follows:

*“The remedy relates to material loss ‘caused to the dependants of the deceased man by his death’. It aims at placing them in as good a position, as regards maintenance, as there would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and sui generis – but it is effective.”*

[8] Only a 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 the death of the breadwinner. (Evans v Shield Insurance Co Ltd 1980 (2) SA 814 (AD) at 838A. The instances in which such a duty of support is recognised have evolved over time. Currently there are different kinds of relationships giving rise to a cause of action for damage suffered due to loss of maintenance as a result of the death of a breadwinner, for example that of a spouse, that of a blood relation of appropriate closeness, partners in same-sex unions and life partners (*cf* Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA) at 370 and further).

[9] The issue in this matter is, therefore, whether there was a legally enforceable duty of support on the part of the deceased with regard to this child. Put differently, the child must have a right, which is worthy of the law's protection, to claim such support (*cf* Santam Beperk v Henery 1999 (3) SA 421 (SCA) at 429C-D). The existence of a dependant's right to claim support and the breadwinner's corresponding duty of support, is essentially a judicial determination that a Court must make.

[10] In our law "maintenance" or "support" not only includes food, clothing and shelter, but also medical care and, in respect of children, education (Joubert *et al*, Family Law Service, Maintenance, p 1). The repealed Child Care Act provided in section 41(1) thereof that a person, who has received a child under this Act, shall maintain and care for that child. This provision, as it was then formulated, appears to be peremptory. According to the definition of a foster parent and foster child in section 1 of this Act, the provisions of section 41 were also applicable to such a child and parent. It therefore appears that in terms of the old Child Care Act a foster parent had a statutory duty to support (maintain and care for) a foster child who was placed in his or her custody.

[11] On the date when the plaintiff's husband and the child's foster parent was killed, the Children's Act was already in operation. As stated in the long title, the Act aims, *inter alia*, to give effect to certain rights of children as contained in the Constitution, to provide for parental care of children and also for foster care. In the preamble reference is again made to the Constitution, more specifically the rights of children as set out in section 28 thereof. The

State's responsibility is emphasised in that part of the preamble which declares that the State must respect, protect, promote and fulfil the rights contained in section 28. Section 2 sets out the objects of the Act. The objects are, *inter alia*, to give effect to certain constitutional rights of children such as family care, or appropriate alternative care when removed from the family environment and social services. As far as foster care is concerned, section 181 provides that one of the purposes of foster care is to protect and nurture children by providing a safe and healthy environment with positive support. The central advantage of a well-functioned foster care arrangement is to enable a foster child to live as part of a family, albeit not his own. That is why, in my view, Regulation 65(1)(k) provides that a foster parent has the responsibility to ensure that the foster child is treated in a manner substantially similar to other children living in the same household.

[12] It was argued on behalf of the defendant that foster care is generally not considered to be a permanent placement option under the South African law and therefore the duty of support with regard to these children rests upon the State. This is also evident from the fact that foster parents are entitled to a grant. Therefore, so it was argued, a child in foster care is not entitled to claim compensation from the Road Accident Fund due to the death of a foster parent. I do not agree with this submission. First, foster care is not necessarily a short term temporary arrangement. A flexible system has been developed and is reflected in the Children's Act. This includes orders to extend the duration of foster care until the child reaches adulthood (section 186). In any event, the duration of foster care cannot be a determining factor to qualify or

negate the rights of children as entrenched in the Bill of Rights or as stipulated in the Children's Act. Second, the State is not alone responsible to protect and fulfil the rights of children who have been placed in foster care. The primary obligation to care for a foster child rests upon the foster parent who has, in terms of section 188(1) of the Children's Act, certain "parental responsibilities". Third, a foster child grant referred to in section 8 of the Social Assistance Act, No 13 of 2004 is a form of financial assistance to supplement and not to replace the financial support for which a foster parent is responsible.

[13] To determine the responsibilities of a foster parent one has to take into consideration the provisions of section 188, Regulation 65 as well as the definition of "care" as it appears in section 1 of the Act. First, it should be pointed out that a foster parent has certain "parental responsibilities" in respect of the child (section 188). If not prescribed, for instance by an order of Court, it will be those parental responsibilities as set out in any applicable provision of the Act. Regulation 65(1) explicitly provides that a foster parent has the responsibility of providing for the day-to-day needs of a foster child in accordance with the definition of "care" in section 1 of the Act. Providing for the day-to-day needs of a child includes (according to the definition of "care") a suitable place to live, living conditions that are conducive to the child's health, wellbeing and development as well as the necessary financial support. This appears to be a wide formulation of parental responsibilities which, no doubt, calls for a corresponding right on the part of the child. Second, in considering this issue one should also take into account the provisions of section 28 of the Bill of Rights. In terms of section 28(1) the right of alternative care includes the

right to foster care. Furthermore, in terms of section 28(2) a child's best interests are of paramount importance in every matter concerning the child. Having regard to all these considerations it appears to me that in terms of the Children's Act a foster parent has a statutory duty to provide maintenance and support for a foster child. Put differently, this child has a right, which is worthy of the law's protection, to claim such support. I therefore conclude that the child concerned has a claim against the defendant for loss of support as a result of the death of his foster parent.

### **ORDER**

In the result the following order is made:

1. It is declared that the minor child referred to in paragraph 1 of the particulars of claim has a claim against the defendant for loss of support as a result of the death of his foster parent who died on 10 March 2012;
2. The defendant is ordered to pay the plaintiff's party and party costs to date hereof.

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**D S FOURIE**  
JUDGE OF THE HIGH COURT  
PRETORIA

Date: 18 September 2014