IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 7205/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

29/1/16 DATE

SIGNATURE

29/1/16

In the matter between:

REBECCA MOHOHLO PLAINTIFF

and

THE ROAD ACCIDENT FUND DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] On 2 July 2011, Letshufi Otshepeng (the deceased), died as a result of a motor vehicle collision. The plaintiff, Rebecca Mohohlo (Rebecca), the maternal aunt of the deceased, has instituted a claim for loss of support.

[2] The plaintiff contends that she raised and supported the deceased until he was self-supporting. When he was self-supporting he in turn supported and / or contributed to supporting her financially.

[3] The parties state that the defendant has conceded negligence and the only issue to be determined is that of *quantum*. As regards *quantum*, only the issue of funeral expenses has been settled

[4] The dispute is limited to two issues, whether the deceased had the legal duty to support the plaintiff, in a nut shell the plaintiff's *locus standi* to claim for loss of support from the defendant, and whether the plaintiff was indigent.

[5] The defendant argued that in terms of section 17(1) of the Road Accident Fund Act 56 of 1996 (the Act) the fund was not obliged to compensate the plaintiff for loss of support as no legal duty existed between the deceased and the plaintiff support each other as he had not been adopted by the plaintiff.

[6] Section 17 (1) reads as follows :

"The Fund or an agent shall-

(1) (a)
subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
(b)

subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum."

[7] The plaintiff was the only person who testified in this action and in these circumstances her evidence stands uncontested. However, at this juncture I would like to reiterate, that which, is now established law that unchallenged evidence is not automatically accepted as the truth and does not discharge a litigant's *onus*. See *Stiffmen v Kriel 1909 TS at 538* where Innes CJ sounds the following warning:

"It does not follow that because evidence is uncontradicted, that therefore it is fine . The story told by the persons on whom the onus rest may be improbable as not to discharge it."

[8] The plaintiff testified that she was the eldest of her siblings. She was married and had no children when the deceased was born. The mother of the deceased is her younger sister and the father had disputed paternity of the deceased. The deceased's biological mother was very young when she gave birth to the deceased. The plaintiff's parents were still alive at time and it was resolved by the family of the plaintiff that she would take care of the deceased and rear him as her own. The deceased was three months old when the plaintiff and her late husband took charge of the deceased.

[9] Incidentally the plaintiff also took charge and care of her brother's daughter who was born after the deceased. The plaintiff testified that both these children were not formally adopted by her and her late husband.

[10] Her testimony is that she cared for the deceased as her own as she had no children. She worked and supported the deceased until he was self-sufficient. At the time of his death the deceased was employed at Old Mutual. For the four years that he had been employed prior to his death he supported the plaintiff. She testified that she did not have to request assistance from the deceased as he did so on his own accord. Her reasoning for him doing so was that the deceased appreciated that the plaintiff had done him a favour by raising him.

[11] In his short lifetime the deceased lived with the plaintiff. The deceased biological mother obtained a career, got married, had children and led a separate life with her husband and children. From the time that the deceased was placed in the plaintiff's care she never took an interest in the deceased till his demise.

[12] The plaintiff's evidence is that the deceased called her '*mamma*' and she considered their relationship to be that of mother and son and not aunt and nephew. The deceased supported her by buying clothes, her medication and the necessities in life. He did this whist she was employed and when she became unemployed.

[13] When questioned why she and her husband had not adopted the children that they took charge of the plaintiff replied that in her custom and culture there was no such thing as adoption.

[14] It is trite that for the plaintiff to succeed she must demonstrate that a legal duty to support existed between her and the deceased and that this right was worthy of the law's protection. See *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening 1999 (4) SA 1319 (SCA) at para [6] to [8].*

[15] In establishing whether a duty to support did in fact exist between the plaintiff and the deceased, Adv. Pienaar, for the plaintiff, argued that a tacit agreement was created between the plaintiff and deceased when she undertook to support him and likewise when was self-sufficient. That agreement, so the argument goes, confers the legal duty between the parties.

[16] On the other hand, Adv. Strydom, for the defendant, argues that if the plaintiff needed to be maintained this could be claimed from other family members. Further, the mother of the deceased is still alive taking care of her other children from her marriage, she or any other member of the plaintiff's family could have assisted to maintain the plaintiff. He stated that there was also the consideration of African customary law that provides that it is not the plaintiff whom suffers the loss but rather the plaintiff's entire family who suffer the loss of support from the deceased. Thus, the plaintiff has no *locus standi* to claim for loss of support.

[17] In *Amod supra* it was stated that it is unclear what the scope of the plaintiff's action should entail. However, the old Roman-Dutch jurist made it clear that the legal obligation to support *"extends it to 'those whom the deceased was accustomed to aliment ex officio'...the action was competent at the instance of any dependant within his broad family whom he in fact supported whether he was obliged to do so or not but this is unclear."* At *para [7]* of *Amod* and reiterated in *Paixão v Road Accident Fund 2012 (6) SA 377 at para [15]:*

"[15] However, as this court observed in *Amod*, the old authorities appeared to be anxious to recognise the existence of a dependants' action for the 'family' members of the deceased.[15] But it cannot be stated conclusively that they intended only relationships by blood or marriage to fall within

its ambit.[16] And given the *sui generis* character of the remedy there seems to be no proper reason to restrict it only to family or blood relationships when social changes no longer require this."

[18] In these circumstances, it is clear that the plaintiff, when called upon by her family, took charge of the deceased whilst he was a mere three month old child. She supported him until he was self-sufficient and when the deceased became self-sufficient he in turn supported the plaintiff, without even being requested to do so, but merely reciprocated the duty. Though there is no written agreement between the plaintiff and the deceased, in my view, on an examination of their conduct and the surrounding circumstances, it is apparent to me that a tacit agreement came to the fore between the plaintiff and the deceased.

[19] The inquiry does not end here though as "... the mere fact that the parties had a binding agreement *inter se* does not mean that it was enforceable against third parties such as the fund. Put another way the appellants had to establish not only that they had an enforceable agreement against the deceased but that the obligations created by the nature of their relationship were worthy of the law's protection.[31] As I have said this must be determined by reference to the *boni mores* criterion." See *Paixão v RAF supra at para [23]*.

[20] In addressing the aforesaid issue, Adv. Pienaar argued that the *boni mores* as well as African custom ought to be considered in order to elevate the right arising from the agreement between the deceased and plaintiff to enjoy the protection of the law. To this end I was referred to the cases of *Metiso v Padongelukfonds 2001 (3) SA 1142 (T), Fosi v Road Accident Fund and Another 2008 (3) SA 560 (C) and JT v Road Accident Fund 2015 (1) SA 609 (GJ)*. In all these cases the common law was developed in line with the *boni mores* at that time together with the cultural and customary values.

[21] In *Metiso supra* the children were adopted in customary law by the brother of the father of the children. The mother of the children had absolutely no contact with them. Even though the mother had not been notified of the adoption, as is required, Bertelsmann J held that it was irrational and against the interest of the children to let this fact stand in the way of a valid adoption. This would harm the interest of the children as it was considered to be *contra bonos mores*. The adoption even though

not complete was held to be a binding offer enforceable on behalf of the children and recognition of the duty to maintain resonated therefrom. It was held that this is reconcilable with the *boni mores* and even though it is not recognised by common law, it is a logical extension thereof.

[22] Staying on the topic of adoption, in *JT v RAF supra* this case involved a legal adoption by the grandparents of their granddaughter. The father of the child, due to the nature of his work, allowed his parents to adopt his daughter. The mother of the child opted to have nothing to do with the child shortly after the child was born. The surrounding circumstances were such that even though the child was adopted the father still played a role in the life of the child, as he assisted his parent's in supporting his child. Here the fund argued that his legal duty to support his daughter ended when the adoption took place. However, the court found that even so if one looks at the surrounding circumstances the duty to support between *de facto* family members had to give expression to the moral views of society.

[23] Sutherland J states the following in *JT v RAF at para [26]*:

"It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of 'family', constituted as being a network of relationships or reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in relationships akin to that of a family."

[24] The court in *Fosi v RAF and Another supra,* where a claim for compensation for the loss of support by a child to a parent was considered, it was held that the origin of the obligation for a child to support a parent resided in customary law. A child would lack *Ubuntu* were a child not to support a needy parent. *"The duty is inborn and the African child does not have to be told by anyone to honour that obligation"*.[Extracted from *para [16] of Fosi v RAF*]

[25] In the present case we have the deceased who, on his own accord, supported the plaintiff, having received such support from the plaintiff herself, until he was self-

sufficient. The relationship between the deceased and plaintiff was, in my view, a relationship of reciprocal nurture and support. This to my mind, dictates that it is worthy to be protected by our law as this is a norm both apparent in African culture, practised universally and accepted by others other than Africans, as well as having been entrenched as far back as the Roman-Dutch era. See *Paixão v RAF*.

[26] In conclusion I find that the plaintiff has successfully demonstrated that the nature of the relationship between the parties gave rise to a reciprocal duty of support, which the law must protect.

[27] The last issue is that of indigence of the plaintiff. The test goes back as far as *Oosthuizen v Stanley 1938 AD*, where Tindall JA wrote as follows at 327-8:

"There is no doubt on the authorities which are quoted in Waterson v Mayberry, 1934 T.P.D. 210, that the plaintiff had to prove not only that either Stephanus or Elsie contributed to his support but that there was a legal duty to contribute because his circumstances were such that he needed the contribution. The liability of children to support their parents, if these are indigent (inopes), is beyond question; See Voet, 25.3.8; Van Leeuwen, Censura Forensis, 1.10.4. the fact that a child is a minor does not absolve him from his duty, if he is able to provide or contribute to the required support; See In re Knoop, 10 SC 198. Support (alimenta) includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness; See Voet 25.3.4; Van Leeuwen, Censura Forensis, 1.10.5; Brunnemann, in A Codicern 5.25. Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent's income is a question of fact depending on the circumstances of each case. I find, in an old Scottish case quoted by Fraser, Parent and Child, 3rd ed. P.137, and in Green's Encyclopaedia of Scots Law, vol.1 p.300, that a widow having an annual income of £60 was held to be not entitled to claim additional aliment from a son who had an income of £1 500 a year. No doubt the higher value of money 80 years ago was an important factor in the failure of the parent's claim in that case. However, though each case must depend on its own peculiar circumstances, that decision supports the view, I think, that the parent must show that, considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities."

[28] On the evidence of the plaintiff, she supported herself, the deceased and her daughter (the niece) working as a domestic until 2004. Due to ill health she resigned and was receiving a disability grant. This was stopped as she was due to receive a state pension grant. To supplement her grant from time to time she makes *vetkoeks*

and her daughter goes out to sell these. This is not a permanent situation but rather dependant of customers. She also offers her services as a babysitting to supplement her income as well. Just of interest her daughter has two young children and is not employed.

[29] She testified that in 2007 she was 57years of age when the deceased started working. He provided her with R1 200.00 per month which she used to buy groceries and pay for her medication. These are the necessities that she states she utilised the money for which was given to her by the deceased.

[30] Adv. Pienaar argued that even though the plaintiff was trying to generate an income this was not consistent and she was struggling to survive. She stated that during the periods when her health deteriorated and she was hospitalised no income was forth coming. It was correctly argued by Adv. Pienaar that the question of whether the plaintiff was indigent or not was a question of facts depending on the circumstances of each case.

[31] In summing up the norm, this is whether the plaintiff is able to show that she was dependant on the deceased's contributions for the necessities in life. What constitutes these necessities will depend on the plaintiff's station in life. See *Jacobs v Road Accident Fund 2010 (3) SA 263 (SE) at para [20].*

[32] From my examination of the plaintiff's evidence it is telling that the contribution made to the plaintiff by the deceased assisted her to afford the necessary things in life and not the luxuries. Without this contribution the plaintiff states that she is experiencing hardship in making ends meet in attaining these necessities.

[33] My view is that it is correct that she is not just sitting on her hands and depending on the state grant system, she is actually attempting whatever possible to bridge the gap to attain what she had whilst the deceased was still alive and supporting her. In addition, she suffers from ill health and is not able to do the things she could have done to assist herself in attaining these necessities. The fact that the daughter can assist in supporting the plaintiff does not detract from the fact that the deceased did support her and she is legally entitled to claim for the loss of this support. See *Khan v Padayachy 1971 (3) SA 877 (W); Jacobs v RAF supra*

[34] I am satisfied that the plaintiff has demonstrated that what little income she is able to scrap together is not sufficient and adequate to help her attain the necessities in life since the death of the deceased. In my view, as the deceased had assumed the obligation to voluntarily support the plaintiff, it would be *'invidious'* and *contra bonos mores* of me to rule that there was no duty on the deceased to support her.

[35] Consequently the following order is made:

[35.1] The defendant, the Road Accident Fund, is liable to compensate the plaintiff, Rebecca Mohohlo, the amount of damages the plaintiff is able to prove.

[35.2] The defendant is ordered to pay the plaintiff's costs of this action.

W. Hughes
Judge of the High Court

Matter heard on	:	03 September 2015
Judgment reserved on	:	03 September 2015
Attorneys for the Plaintiff	:	Spruyt Incorporated
Attorneys for the Defendant	:	Fouriefisher Inc.