

**THE JUDICIARY
REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA**

12/4/2016

CASE NO: 2522/2014

Not reportable

Not of interest to other judges

Revised

In the matter between:

J W VAN DER MERWE OBO H BRANDT,
P J JOUBERT & S JOUBERT

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MSIBI AJ

[1] The plaintiff in this matter instituted an action against the Road Accident Fund in terms of section 17 (1) of Act 56 of 1996 for loss of maintenance and support, arising from the death of Mr Henrich Brandt, who died in a motorcycle accident on 26 July 2012.

1.2. Plaintiff and the deceased moved in together on January 2010.

1.3. Plaintiff was still in a process of divorcing her first husband, which was finalized on 2011.

- 1.4. Plaintiff had 2 children namely, P. J. Joubert and S. Joubert from her previous marriage. The children were living with their maternal grandmother since 2008.
- 1.5. Plaintiff was pregnant with the deceased's child at the time of the collision. She gave birth to his son almost a month thereafter on 26 July 2012.
- 1.6. Plaintiff is claiming damages for herself and her 3 children.
- 1.7. Defendant admits liability for the loss of maintenance and support of H. B. the deceased's only child.

The Facts

[2] The material evidence was given by the plaintiff.

[3] She was married, to the father of her first 2 children. She obtained a divorce order against him on 2011, including a settlement order that he maintains his children at R500 per month in respect of each child. Plaintiff abandoned the right to enforce the order. During this period, plaintiff was working as a Branch Manager for Le Morgan earning a monthly commission of about R30 000 to R40 000.

[4] The plaintiff's first 2 children were staying with their maternal grandparents since 2008, due to the fact that she worked long hours and was not in the position to properly care for them on a daily basis. The children visited her every second weekend and on school holidays. The arrangements continued even after deceased moved in with her.

[5] The deceased voluntarily contributed towards the maintenance of the children. This was initially against the wishes of the plaintiff. She carried the general responsibility that came with raising up her children. Deceased contributed R1000 to R2000 per month depending on the specific needs of the children.

[6] The 2 had planned to marry after she had given birth to their child. They had moved to a bigger house and had planned to bring the other 2 children to live with them in Rustenburg in 2013.

[7] Deceased was working as a Store Manager earning about R9 000 per month. In

preparation for the birth of her child and because of the long working hours at Le Morgan, Plaintiff resigned from her job to look for a "9 to 5" job after the birth of the child. It is during this period that deceased lost his life in the collision.

[8] After the death of the deceased she went to stay with her parents. Plaintiff is working again employed by J&D Group Rustenburg, earning an average salary of R10 000 per month.

[9] During cross examination by Counsel for defendant she conceded that she earned substantially higher than the deceased while she was living with him. They however contributed equally to their joint expenditures.

[10] The issues that I was called upon to adjudicate upon were the following.

- (1) Out of the 3 parties, (namely plaintiff and her 2 children) who is entitled to compensation for loss of support.
- (2) Deceased's future career potential
- (3) Plaintiff's income before and after the death of the deceased.

[11] Plaintiff lodged a claim against respondent for loss of support by reason of the fact that deceased had voluntarily assumed a duty to support her and her 2 children from her previous marriage.

[12] Although the natural father of the plaintiff's 2 children was still alive and had a duty to maintain his own children. Plaintiff mentions that she is not intending to pursue maintenance from him for the following reasons.

- (i) She did not know his whereabouts.
- (ii) Attempts to trace him will not yield any results, since he failed to pay R500 as ordered by court.
- (iii) Bringing him close to the children would upset the children, since he did not prove to be a responsible parent.
- (iv) The deceased on the other hand voluntarily contributed to the welfare of the children. Although she earned a higher income than the deceased, they combined their joint income towards their household expenditures.

[13] She conceded that she paid their monthly rentals while he bought groceries, paid for water and electricity. He could still afford to send money to plaintiff's 2 children. Counsel for the defendant put it to the plaintiff that it was impossible that deceased who earned about R9000 at that time would contribute more than her, bearing in mind that she had an average income of more than R20 000. On this fact Counsel further submitted that plaintiff was in actual fact sending her own money to her parents, for the children in the name of the deceased.

[14] Plaintiffs 3rd child H. B., was born on [...] 2012 almost a month after his father's death.

[15] Counsel for the plaintiff submits that deceased would have taken care and supported plaintiff and all her 3 children; while living with them in the same house as planned. Had it not being for the accident, plaintiff would have lived her dream.

[16] It is on this background that Counsel submits that deceased had established a duty of support in respect of the plaintiff and the 3 children.

[17] The Road Accident Fund is now; under the same duty of support towards plaintiff and her 3 children.

[18] In determining the nature and extent of financial support that is due to the plaintiff and the 3 children; the following reports were submitted.

(1) Medico-Legal report by the Industrial Psychologist, Elzette Keenan.

(2) Actuarial Report by the Consulting Actuary- George Swhalts.

The following aspect of the Medico-Legal report were brought to the fore by Counsel for defendant during cross examination and also conceded to by the plaintiff.

(1) That it was incorrect that the Industrial Psychologist had a personal meeting with the plaintiff, but a telephonic conversation.

(2) That it was incorrect that deceased paid their monthly rental as indicated in the report. This was plaintiff's responsibility.

(3) That it was incorrect that plaintiff and the deceased had been living together for 3 years at the time of his death as indicated on the report. Plaintiff conceded that the actual period was 2 1/2 years which was rounded off to 3 years.

- (4) That it was incorrect that the 2 children had permanently moved in to live with them 2 days before the accident. The true position was that they had visited them 2 days before the accident.

[19] On these facts the court is required to resolve the following:

- (1) Is the defendant legally liable to compensate the plaintiff and her first 2 children, for loss of support from the deceased?
- (2) Is the plaintiff and her 3 children entitled to judgment on the sum of R2 917 367 as claimed from the defendant?

[20] In terms of section 17 of the Road Accident Fund Act 56 of 1996, the defendant or an agent; subject to the provisions of the Act; is obliged to compensate any person for any loss or damage which that person has suffered arising out of the death of any person caused by a motor vehicle if that death is due to the negligence of a driver or owner of a motor vehicle. Section 19 (a) of the Act exempts the defendant from liability for loss or damage for which neither the driver nor the owner of the motor vehicle caused the deceased's death would have been liable at common law.

[21] In **SANTAM BPK VS HENERY 1999 (3) SA page 421 (SCA) para 425H-426A Nienhaber J A** in his judgment held as follows. *"(a) the claim for loss of support resulting from the unlawful killing of the deceased must establish that the deceased had a duty to support the defendants*

- (b) *It had to be a legally enforceable duty*
- (c) *The right of dependents to such support must be worthy of protection by law.*
- (d) *The preceeding elements had to be determined by the criterion of *bani mores*."*

The Duty to Support

[22] The duty to support as laid down in SANTAM BPK case is a common thread that runs throughout case law which assist the courts in establishing liability.

Counsel for plaintiff in the matter before me referred me to the case in **MARIA ANGELINA PAIXAO AND ANOTHER VS ROAD ACCIDENT FUND (64012011) [2012] ZA SCZ at p 130** stating that the facts of the case are similar to the matter before me, in

that the parties were not married, but were staying together with plaintiff's 2 children for several years. During their partnership the deceased assumed responsibility to maintain the plaintiff and her children. He died before they could get married. The Court of Appeal found in favour of the plaintiff; since deceased had established a legally enforceable duty to support the parties.

[23] At page 6 paragraph (12) of the Paixao case Cachalia J A held as follows: *"A claim for maintenance and loss of support suffered as a result of a bread winner's death is recognized in common law as a dependent's action". The object of the remedy is to place the dependents of the deceased in the same position as regards maintenance, as they would have been had the deceased not been killed. The remedy has been described as "ano ma lous", perculias and sui jeneris, because the defendant derives her right not through the deceased or his estate but from the fact that she has suffered loss by the death of the deceased for which defendant is liable. However, only a dependent to whom the deceased whilst alive owed a legally enforceable duty to maintain and support may sue in such an action. Put differently the defendant must have a right which is worthy of the law's protection, to claim such support."*

[24] In **Rita Sibanda v The Road Accident Fund [9098/2007] 2AGPHC 53** the facts are strikingly similar to the case before me. In the Sibanda case plaintiff had been living with the deceased at the time of the collision. She was also pregnant, expecting the deceased's child, at the time of the collision. She submitted that they had planned to marry the following year. In this case the Road Accident Fund did not dispute its liability to compensate plaintiff in respect of the child. It was submitted on behalf of the plaintiff in this matter that, the couple would have married in 2004 had the accident not occurred. The court held that although plaintiff could prove on a balance of probabilities that deceased would have married her, had he not been killed in the accident, the defendant was not liable to compensate her. The plaintiff also had conceded in her own words that she earned substantially higher salary than the deceased. It was found that plaintiff had not proved that the deceased had established a legally enforceable duty to maintain her, while he was alive. In the absence of this duty the defendant cannot be held liable for compensation.

[25] In **VERMAAK V RAF 2012 (2) SA 409** plaintiff and deceased had been living

together for many years. Deceased was a sole bread winner. Plaintiff was never employed. They had 2 children of their own. They had an agreement that plaintiff would look after the children and the household while deceased took full financial responsibility for them and the household. Everyone, including the deceased's relatives considered them as man and wife. Plaintiff was completely dependent on him. From the facts of the case, a duty to support was established and thus enforceable against the defendant.

[26] Counsel for the Plaintiff in the case before me submitted that the deceased voluntarily supported plaintiff and her first 2 children. Initially this was against her will. She however conceded during cross examination she was the one responsible for the financial needs of the children and deceased would assist whenever he could since she earned a salary that was higher than his.

[27] In this matter the children, had been living with their grandparents since 2008. Plaintiff testified that they were supposed to have joined her and the deceased on 2013. A startling aspect of this case is the fact that the natural father of the 2 children is still alive. A settlement order for the maintenance of the 2 children was obtained by the plaintiff but she never pursued, it nor enforced it. It was also her desire not to involve the natural father in the affairs of her 2 children since he did not prove to be a responsible parent. Attempts to involve himself were unwelcome. Deceased had not adopted the children.

[28] In the Paixao case, the father of the plaintiff's two daughters had passed away. The deceased lived with the plaintiff and her children for about 5 years in the same household. Deceased supported them financially, especially after the plaintiff had lost her job. He took full responsibility as a breadwinner. He paid for the school fees of the 2 children. He eventually paid for the wedding of the eldest daughter. He made a will wherein he bequeathed his estate to plaintiff and her children, referring to them as "our children". He had already made preparations for a wedding for him and the plaintiff in Portugal. A wedding date was set. The only obstacle to their wedding was the fact that deceased had to first divorce his wife. He eventually divorced her by Portuguese law and later by South African law. Their families and friends recognized them as man and wife. The intentions of the deceased was clear in this case. It was an intention to support plaintiff and her children for the rest of their lives.

[29] The same cannot be said of the deceased in this matter before me. Nothing hindered the parties from concluding a marriage. They had been living together for 2 years. Plaintiff testified that they had planned to have a wedding after the delivery of the baby. Her 2 children were also supposed to join them in 2013. In **Paixao case page 6, paragraph (12)- Cachalia J.A.** stated as follows "*... However only a defendant to whom the deceased whilst alive owed a legally enforced duty to maintain and support may sue in such an action ...*" It is clear that the duty must have been established by the deceased while alive; not in the future. His intention can be determined from his own actions not from, what was supposed to happen in the future.

[30] In the present matter before me can it be said that the conduct of the parties created a legally binding obligation on the deceased to support the plaintiff and her first 2 children?

The duty to support must be legally enforceable.

[31] The answer is in my view, in applying the *boni mores criterion* to both the two elements (a) and (b) as illustrated by Nienaber JA. In **SANTAM BPK V HENERY**. Both plaintiff's in Paixao, and Vermaak cases, there were permanent life partnerships that were known and recognized by those that knew them. The facts established that the parties were dependent on the deceased while they were alive. As a result who ever caused the death of the "bread winner" was legally liable to compensate his dependents. The plaintiff in this case, just as in the Sibanda case was not financially dependent on the deceased while he was alive. As he was not what society would call a breadwinner. I will not proceed to deal with the second and third issues that I was called to adjudicate upon.

Conclusion.

[33] Plaintiff has failed to prove that deceased had established a legally enforceable duty to maintain her and her first 2 children while he was alive.

[34] In the absence of this duty the defendant cannot be held liable for the damages

flowing out of loss of support as claimed.

[35] The claim in respect of plaintiff and her first 2 children must be excluded from the total amount claimed.

[36] Plaintiff shall be entitled to costs incurred in proving quantum in respect of Henrich Brandt.

The order:

- 1. The defendant is liable to compensate plaintiff only in respect of the loss of support suffered by the plaintiff in respect of the minor child H. B. as conceded by the defendant.**
- 2. Defendant shall pay the plaintiff the sum of R1.008.347.**
- 3. Defendant is liable to pay 30% of the plaintiff's costs which shall include qualifying fees of the industrial psychologist Elzette Keenan.**

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**ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA**