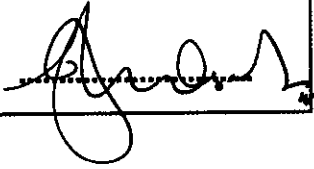


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 29505/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>10/06/2016</u>	
	

10/6/2016

In the matter between:

A J LATEGAN obo F

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

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JUDGMENT

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VAN DER WESTHUIZEN, A J

1. This matter concerns a claim for loss of support and loss of earnings against the Road Accident Fund.
2. The plaintiff claims in his personal capacity and in his representative capacity as father and natural guardian of his minor son.
3. The claim allegedly arose due to the untimely death of his wife and mother of the minor child as a result of the injuries she sustained in a collision that occurred on 17 September 2013.
4. The defendant has conceded the issue of negligence. The issues that remain relate to whether the defendant is liable in terms of the provisions of section 17(1)(a) of the Road Accident Fund Act, 56 of

1996 (the Act), for loss suffered by the plaintiff and the minor child and if so, the quantum of such loss.

5. The only issue argued before me related to the alleged liability of the defendant for loss suffered. In this regard the plaintiff seeks a declarator that:

*"As a result of the death of the deceased Louisa Sherman Lategan the defendant is liable to compensate both the minor Francois Lategan for loss of support and the plaintiff Albertus Jacobus Lategan for loss of income."*

6. The context in which the word "*liable*" is used in the passage quoted above is important. In that context the word "*liable*" is to be ascribed the meaning relating to the existence and the assessment or determination of the extent of the damages as applicable under the common law.<sup>1</sup> It does not bear the meaning of *culpa* under the common law.
7. Ms Vorster, assisted by Mr. Geach SC, appeared on behalf of the plaintiff and Mr. Thompson on behalf of the Fund. Ms Vorster presented the argument on behalf of the plaintiff.
8. No evidence was led by either party and counsel were content to argue the matter on the facts agreed between the parties that were contained in their respective heads of argument and in the report of the Industrial Psychologist, Ms Kotzé.
9. The relevant facts applicable can be summarised as follows:

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<sup>1</sup>Road Accident Fund v Krawa 2012(2) SA 346 (ECG) at par [21]

- (a) The plaintiff and the deceased were married at the time of the collision. They had one minor child, Francois, who was 12 years of age at the time of the collision;
- (b) The plaintiff had secured employment with Cater Care at the end of 2012 in Australia for a 4 year contract and at the time of the collision he was so employed;
- (c) The deceased together with the minor child remained in South Africa and she took care of and supported him. At the time of the collision, she was unemployed and did not contribute to the financial needs of the minor child or that of the plaintiff;
- (d) It was intended that the deceased and the minor child would, at the end of 2013 join the plaintiff in Australia. The deceased would there continue supporting and caring for the minor child as she had done in the Republic. She would not have taken up any employment in Australia;
- (e) Plaintiff alleges that he had no family or any support system in Australia and as a result of the death of his wife, he resigned his position with Cater Care and returned to the Republic to take care of the minor child;
- (f) Due to the age of the plaintiff (he was 55 years of age at the time of the collision) he is unable to secure employment in the Republic and remains unemployed.

10. In the Particulars of Claim the following is alleged in respect of the respective claims:

- "7. *On the date of the aforesaid collision the deceased:*
  - 7.1 *Was the mother of the Minor child;*
  - 7.2 *Was the wife of the Plaintiff;*
  - 7.3 *Had a duty to support the Plaintiff and the Minor child;*

*7.4 Complied with the aforesaid duty to support the Plaintiff and the Minor child from her earnings;*

*8. As a result of the foregoing, the Plaintiff in his aforesaid capacity suffered damages in the estimated amount of R4 154 055.00 made up as follows:*

*8.1.1 Past and future loss of support (estimated)  
R 4000.00*

*8.1.2 Loss of income R3 754 005.00"*

11. It is clear from the above allegations that the minor child's claim is premised upon the deceased's duty to support the minor child from her earnings.
12. It is common cause that the deceased did not support the minor child financially. In that regard the minor child was 100% dependent on his father, the plaintiff. It being further common cause that the deceased was unemployed at the time of the collision and that the plaintiff supported the deceased and the minor child financially, he being the breadwinner.
13. It follows that the minor child does not have a claim for loss of financial support against the defendant as a result of his mother's untimely death due to the collision.
14. In her heads of argument on behalf of the plaintiff, Ms Vorster submits that the claim is one for loss of support on behalf of the minor child as well as loss of income on behalf of the plaintiff himself, being damages arising out of the collision and the resultant death of his wife. She further submits that both claims represent patrimonial damages.
15. Ms Vorster, in her argument before court and in her heads of argument, defines the issue to be decided as:

*"Can the Road Accident Fund (the defendant) escape liability in the circumstances as set out above, taking into account the wording of Section 17 of the Road Accident Fund Act, No. 56 of 1996 (hereinafter referred to as "the Act")*

16. Counsel for the plaintiff premised her submissions primarily on the wording of section 17(1)(a) of the Act and with particular emphasis on the words *"for any loss or damage which the third party has suffered"*.
17. Ms Vorster submitted that the words *"any loss or damage"* should be interpreted broadly. In this regard she relied upon the judgment in *Pithey v Road Accident Fund* 2014(4) SA 112 (SCA) and in particular referred to paragraph [18] of that judgment where the following is said:

*"I pause to say something about the primary purpose and objectives of the Act. It has long been recognised in judgments of this and other courts that the Act and its predecessors represent 'social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle'.<sup>5</sup> Accordingly, in interpreting the provisions of the Act, courts are enjoined to bear this factor uppermost in their minds and to give effect to the laudable objectives of the Act. But, as the full court correctly pointed out, the Fund, which relies entirely on the fiscus for its funding, should be protected against illegitimate and fraudulent claims."*

18. It will be noted that the aforesaid passage referring to the granting of the widest protection and compensation is subject to a qualification, that the *fiscus* should be protected against illegitimate and fraudulent claims.

19. In the context that the word "*illegitimate*" is used in the above quoted passage, it simply means that a claim that has no foundation in law cannot be entertained.
20. The object of the Act is to be found in section 3 of the Act where it is stated that,

*"The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."*

21. The wrongfulness of the conduct is determined in terms of the common law, and in particular in terms of the *Lex Aquilia* as extended.<sup>2</sup>
22. It was repeated in *Road Accident Fund v Krawa*<sup>3</sup> that the right of a claimant to demand assistance was a right of property, the deprivation of which by the *culpa* of the actor would quite naturally found a claim for patrimonial damages and the failure to prove the existence of a legal duty of support, would therefor mean that there has not been an infringement of any of the property rights of the plaintiff.<sup>4</sup>
23. In the *Krawa*- matter, the liability of the Fund to compensate is explained as follows:

*"The object of the Act, like that of its predecessors, is to effectively cause the delictual remedies which exist at common law to be available against the Fund to the exclusion of the actual wrongdoer. The liability of the Fund to compensate, and*

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<sup>2</sup> *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 664 - 665

<sup>3</sup> 2012(2) SA 346 (ECD)

<sup>4</sup> At par [45] – [46]

*the concomitant right of the claimant (the third party) to claim compensation arises, not by reason of any wrongful act or omission on the part of the Fund, but only by reason of its statutory obligation to indemnify the third party, provided the requirements of s 17(1) of the Act have been complied with. On a reading of s 17(1), those requirements would, in the context of plaintiff's claim in the present matter be the following: (a) that the plaintiff has suffered loss or damage as a result of the death of the deceased; (b) that the death of the deceased was caused by or arose from the driving of a motor vehicle, and (c) that her death was due to the negligence or other wrongful act of the driver of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."*

24. The court went on to say that,

*"Although the liability of the Fund arises from statute, its liability is not wider than the common-law liability of the driver or the owner of the vehicle would have been."*<sup>5</sup>

25. A determination of (a) in the quoted passage would entail an enquiry as to whether there in fact was a loss or damage suffered.

26. It follows that the words "any loss or damage" in section 17(1)(a) of the Act cannot be interpreted beyond what is said above. The aforesaid submission by Counsel for the plaintiff accordingly has no merit for what follows.

27. On behalf of the plaintiff it is further submitted that the present claims are not "illegitimate or fraudulent". I have dealt with the concept "illegitimate" above.

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<sup>5</sup> At par [20]; cf. par [21], [38] – [40]

28. I have already dealt with the claim on behalf of the minor child directed at pecuniary compensation in respect of the duty upon the deceased to support the minor child financially. There has been no depravation of financial assistance from the deceased.
29. In essence the plaintiff's claim in his personal capacity and in his capacity of father and natural guardian of the minor child is one for loss of income suffered by the plaintiff personally. As a result of his wife's death due to the collision, he resigned his position with Cater Care in Australia and returned to the Republic to take care of the minor child. Due to his resignation, he suffered loss of earnings. He is unable to financially support the minor child in the manner the child enjoyed pre-morbid.
30. In this regard, pre-morbid, the minor child was 100% dependant upon his father, the plaintiff. The minor child post-morbid remains 100% dependant upon the plaintiff. The minor child's dependency upon the plaintiff arises from the legal duty upon the plaintiff to support his minor child. Such claim for support from his father is *ex lege*. It does not found a claim in terms of section 17(1)(a) of the Act against the defendant for loss of support.
31. It is common cause that the deceased did not contribute financially to the needs of the plaintiff. She was unemployed at the time of the collision. The plaintiff was the breadwinner. Any support that she may have rendered towards the plaintiff would be care giving and other non-financial support in respect of the minor child. The deceased did not support the plaintiff financially and he was not financially dependent upon the deceased.
32. In this regard, counsel for the plaintiff relied upon the *Warneke*-judgment. That reliance is misplaced.



33. The *Warneke*- judgment dealt with the circumstances where a father is obliged to increase his expenditure due to the death of his wife as a result of the accident, to enable him to provide the non-financial support the mother accorded the minor child. If there were such increase of expenditure, such would constitute patrimonial loss for which compensation could be claimed.<sup>6</sup> At most, the court in the *Warneke*- matter extended the common law to include a claim where a father is compelled to increase his expenditures to provide the non-financial support the deceased provided to the minor child.
34. It is clear from the particulars of claim that the plaintiff does not claim for an increase in his expenditure to provide the support in respect of the minor child as described in the *Warneke*- matter. Plaintiff's claim is simply for his personal loss of income.
35. It follows from the judgments in *Warneke* and *Krawa supra*, that absent a legal duty to support, which is dependent upon the facts supporting such legal duty, there is no infringement of any of the property rights of the plaintiff forming part of his or her patrimony and consequently the plaintiff's patrimony could not have been reduced.<sup>7</sup>
36. *In casu*, the plaintiff's claim for his person loss of income is premised upon his resignation from Cater Care to enable him to return to the Republic to take care of his minor child.

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<sup>6</sup> At pp. 662 - 663

<sup>7</sup> *Krawa, supra*, at par [44]- [46]

37. The reason offered for his decision to resign, relates to the absence of support from family or friends in Australia to assist in taking care of the minor child, should the minor child join the plaintiff there. There is no evidence that the plaintiff could not arrange for other assistance in Australia in that regard, neither in respect of assistance from family or friends in the Republic, which would allow him to continue his employment with Cater Care.
38. The position he finds himself in, is solely due to his voluntary decision to resign and return to South Africa. He remains able to obtain employment. This much appears from the report by Ms Kotzé. The plaintiff's earning capacity has not diminished. He was not financially dependent upon the deceased.
39. The plaintiff's claim as formulated in the particulars of claim does not fall within any of the acknowledged legal rights that would entitle him to claim patrimonial compensation from the defendant. To endorse such claim in the present matter would require an extension of the principles of the *Lex Aquilia* as had occurred in the *Warneke*-matter and in *Du Plessis v Road Accident Fund*.<sup>8</sup> In both those matters the principle was extended in respect of claims of loss of support where such legal duty existed.
40. The aforesaid judgments do not set a principle for extending the scope of the liability where no legal duty to support exists.
41. It follows that the scope of the words "*any loss or damage*" cannot be interpreted to include a claim as formulated in the present matter.

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<sup>8</sup> 2004(1) SA 359 (SCA)

42. Consequently it follows that the declarator prayed for cannot be granted.

I grant the following order.

1. The declarator is refused.
2. The plaintiff is ordered to pay the defendant's costs in respect of the declarator sought.

  
C J VAN DER WESTHUIZEN  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION

On behalf of Plaintiff:

B P Geach SC

A Vorster

Instructed by:

Van Niekerk Attorneys

On behalf of Defendant:

A Thompson

Instructed by:

Pule Inc.