IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/4/16,

Case No: 12555/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)REVISED
28/04/2016 ----------
DATE SIGNATURE

In the matter between.

SELEKA. G.L. Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

F. DIEDERICKS (A.J.)

[1] The Plaintiff in this matter has instituted action against Defendant in terms of the provisions of the Road Accident Fund Act, 1996, No. 56 of 1996 (as amended) for compensation of losses suffered by her as a result of the demise of her daughter, Masedi Seleka (born in 1989) in a motor vehicle accident between a motor vehicle with registration number […], then and there driven by one George Pitsoe, and her daughter, who was a pedestrian at the time. In the Particulars of Claim an estimated amount of

R500,000.00 was claimed for loss of support.

[2] The Plaintiff also claimed an amount of R12,550.00 in respect of funeral expenses, but this Court was informed that the Plaintiff would not pursue this claim by virtue of the fact that the funeral expenses of which proof was furnished in the amount of R12,550.00 was paid directly to the service provider by the Defendant.

[3] **COMMON CAUSE FACTS BETWEEN THE PARTIES:**

The following facts are common cause between the parties:

[3.1] That the Plaintiff has the necessary *locus standi in iudicio;*

(3.2] That the Court has jurisdiction to entertain the matter;

[3.3] That the applicable regulations pertaining to the claim, procedure and the periods prescribed by the regulations promulgated in terms of the Road Accident Fund Act, 1996, were duly complied with;

[3.4] Negligence on the part of the insured driver was conceded on the basis that Plaintiff is liable for 100% of Plaintiffs proven or agreed damages, subject to the issues in dispute set out below;

[3.5] That the demise of the deceased was caused by the negligent driving of the insured driver, i.e. that the death was causally linked to the accident in question;

[3.6] That the deceased was the biological child of the Plaintiff;

[3.7] The quantum of Plaintiff's loss of support, if a finding is made in favour of the Plaintiff on the issues in dispute as set out below, is the amount of R72,439.00 as calculated by the actuary, Mr. G.W. Whittaker, in an addendum actuarial report dated 25th of February 2016. The method of calculation, assumptions, contingencies and result as set out in the aforementioned actuarial report is not in issue (dispute) and the report may be handed in as evidence without the necessity of calling the actuary as a witness;

[3.8] The contents of the medico-legal report by Ms. E. Noble are admitted, save for the allegations relating to the duty of support by the deceased towards the Plaintiff as well as the income of the Plaintiff and her husband.

[4] **ISSUES IN DISPUTE:**

The following issues are in dispute between the parties:

[4.1] What the correct legal approach is in respect of a parent claiming for loss of support as a result of the demise of his or her biological child;

[4.2] Whether the "indigency" of a parent is still a requirement, and if so, what the appropriate approach and test is for a parent to prove indigency;

[4.3] Whether the customary or African law provides for a duty to support his/her parents and if so, whether it should be extended with particular reference to Tswana law and if not, whether the normal common law approach to the requirements for a claim for loss of support by a parent for the demise of his child should apply.

[5] **EVIDENCE:**

[5.1] Plaintiff and her husband were the only witnesses who testified in this matter. From the evidence the following salient facts emerged.

[5.2] Plaintiff attained Standard 5 as her highest qualification. She was intermittently employed as a domestic worker until she was diagnosed with diabetes and on advice of her medical practitioner ceased her employment. As domestic worker she only worked two days per week. The Plaintiff also testified that the diabetes that she suffered from necessitated her to inject herself on a daily basis with insulin. She also testified that on her own assessment *of* her body and ability to work, coupled with the fact that she had to inject herself on a daily basis, she could not ignore the medical advice received from the medical practitioner and therefore ceased her employment. This occurred some time prior to the demise of her daughter.

[5.3] The Plaintiff and her husband have been married for a considerable period. Plaintiff testified that they entered

into a civil marriage while her husband also added that prior to them entering into the civil marriage, they were also married in terms of Tswana custom. According to Plaintiffs husband they first entered into a Tswana customary union and thereafter concluded a civil marriage.

[5.4] It is clear from the evidence of both the Plaintiff and her husband that they live in the Bafokeng area in a settlement called "Phokeng", which was governed by the traditional Bafokeng Authority under the leadership of a chief. The name of their chief is Chief Lebone. The First Chief Lebone passed away and his son, Chief Lebone(Jnr), is the current chief of this tribal authority.

[5.5] According to the evidence of Plaintiffs husband, the Tswana customary laws and traditions were derived from Tswana culture. He, *inter alia,* testified that:

[5.5.1] they entered into a customary union before entering into a civil marriage;

[5.5.2] they arranged their family affairs and raised their children according to the Tswana custom;

[5.5.3] they lived by the laws and traditions of the Tswana custom and culture and adhered to all rules and regulations as laid down by the tribal authority and the chief. As example of one of these rules mention was made of the fact that the chief and tribal authority regulated the water extracted from the river in respect of each and every household and also determined the amount of money payable per household in respect of water so extracted;

[5.6] Plaintiff's husband, according to Plaintiff's evidence, received a Provident Fund lump sum payment when he went on pension some time prior to the demise of their daughter. The bulk of the money were utilised to build a three-bedroom brick and tile house for them, which comprised also of a kitchen, dining room and sitting room. The remainder of the Provident Fund payout was utilised to assist a family member with funeral expenses incurred by that family member and the lump sum was soon depleted;

[5.7] Plaintiffs husband, according to the Plaintiff, started receiving old age pension which is currently R1,500.00

per month. According to Plaintiff's husband's evidence he only started receiving his pension in November 2015;

[5.8] The uncontested evidence by Plaintiff was that the deceased resided with them in the house and contributed to the support of the Plaintiff in the approximate amount of R1,300.00 per month. The further uncontested evidence according to documentation shows that the deceased earned a salary of approximately R2,500.00 per month. This was dependent on how many hours overtime was worked in a particular month. Plaintiff testified that the R1,300.00 per month were needed in order to provide for the basic necessities of life, namely water, electricity and groceries;

[5.9] The evidence was not contradicted. It was not disputed that the payments made by the deceased terminated on her demise;

[5.10] It was also uncontested that Plaintiff and her husband did not have any other substantial assets from which they could provide for their own maintenance and support. On the evidence of Plaintiff, they rented out

three rooms at an amount of R450.00 each. These were rooms built outside their house on the same stand. This was done to supplement their income. This practice was subsequently terminated when it became clear to them that they were not allowed to rent out these premises. Plaintiff testified that the reason why they were not allowed to rent out these premises was on account thereof that the tribal authority would not grant permission to rent out the dwellings on account thereof that the people living in those dwellings did not contribute towards the water extracted from the river. Plaintiff's husband, however, testified that they rented out four rooms, one for the amount of R450.00, one for R350.00 and one for R300.00. The rental for the fourth room on Plaintiff's husband's evidence is not clear since he only mentioned the three different rates. His evidence in this regard differ from that of the Plaintiff in that he stated that they rented out the premises also prior to the demise of the deceased, whilst the Plaintiff testified that they so rented out the premises only after the demise of the deceased;

[5.11] Plaintiff ran the household and household finances. Plaintiff's husband is an illiterate person and cannot

read or write. Plaintiffs husband testified to this extent that by virtue of the fact that he could not read or write, he was never able to read his salary slip at the time that he was employed. He usually asked a colleague to read the salary slip and tell him how much pay he got. This also did not improve after he retired and he left the financial affairs completely in the hands of his wife due to his inability to read or write. This, in turn, led to quarrels between him and his wife (which according to this Court, happens in many households) due to the fact that he (the husband) could not understand what happened to all the money. He would then approach the children to assist him to reconcile their financial situation. In view of the above situation, this Court is of the view that the Plaintiffs account of the financial affairs of the family should be preferred as compared to her husband's views thereof;

[5.12] It must be noted that it was uncontested that the letting of rooms by the Plaintiff and her husband was not authorised by the tribal authority and therefore unlawful;

[5.13] Plaintiffs husband also testified that he attempted to supplement their income by selling Magau beer. He

testified that he sold on average between one and three crates of beer per month consisting of 15 cartons each. He sold each carton for R7.00 per carton. His costs to purchase a crate amounts to R85.20 per crate. His gross profit, according to him, was therefore R19.80 per crate. According to his evidence he also did not sell all the cartons in a crate due to the fact that some of the cartons became, as he called it, "fermented" and he had to throw them away. Manually calculated at the best for him, if he sells the full three crates per month, his gross profit could amount to approximately R59.40 per month. According to Plaintiff s evidence her husband would also drink some of these cartons. It also became clear that the Plaintiffs husband did not consider the costs of travelling to go and buy these cartons of Magau and bring them back to his home from where it was sold. It is therefore doubtful whether any meaningful profit was made by the selling of this Magau;

[5.14] Apart from the aforementioned, the Plaintiff and her husband had no other income prior to and after the demise of the deceased;

[5.15] Apart from the evidence tendered by the Plaintiff that her daughter factually maintained her parents, the Plaintiff also explained that the daughter so maintained them subsequent to a verbal contract entered into between herself and the deceased. This verbal contract was entered into at the time when the Plaintiff was no longer able and fit to work in the labour market as a domestic worker. The duration of this verbal agreement between mother and daughter was that the parties contemplated that this maintenance would only be payable by the deceased until such time that the Plaintiff would reach the age of 60, when she would become eligible to receive an old age pension from government. This evidence was never challenged during cross-examination.

[6] **THE DUTY OF A CHILD TO MAINTAIN HIS / HER PARENTS:**

ROMAN DUTCH LAW:

[6.1] ***Voet 25.3.8*** states the following:

" *Contrary wise needy parents also must be maintained by their children. This is* so *not only if they are of sound report and reputation, but even if the*

mother has made profit out of her body and has thus been daubed with the stain of infamy. So far does this go that even a very son who has been conceived from roving carnal intercourse of his mother can be forced to provide maintenance for her; and legitimate children are bound to feed an incestuous father and to furnish him with other things needful. That is so because such persons are still parents, though they are despised of the law and are impious."

[6.2] In ***Voet 25.3.11*** we find that the Roman Dutch Law also left to the discretion of the Judge the different classes of family members which may be liable for the maintenance of other family members. This would depend on the circumstances of each case.

[7] **DEVELOPMENT OF THE COMMON LAW IN SOUTH AFRICA:**

In the matter of ***Oosthuizen v. Stanley,*** *1938 AD 322,* which was an application for leave to appeal, the Learned Court stated that a Plaintiff who claims for loss of support for the death of his child must prove (a) that the child contributed towards his support; and (b) there was a legal duty to contribute because circumstances were such that he needed the contribution.

[8] In ***Law of Parent and Child,*** *4th edition, p. 403 by Irwin Spirow,* it is found that:

"The requisites of the duty of children to support their parents are mutatis mutandis the same as those of the corresponding duty of the parents namely the parent must be unable to support himself or herself, that is to say that lack of means is not sufficient if parents are able to maintain themselves by working and the child must be able to support his or her parents. The parent who claims to be entitled to maintenance must show that it has been said that he or she is in want of what should, considering his or her station in life, be regarded as coming under the law of necessity, but it is submitted that the concept of necessities, which really depends on all circumstances, must not be understood in a narrow sense and that generally the quantum of maintenance owed by children to their parents is mutatis mutandis the same as in the case of the duty of parents to support their children."

[9] It is trite law that a parent under the common law should prove indigency in order to claim maintenance from his child (apart from proving a duty to do so). In the case of ***Smith v. Mutual*** &

Federal Insurance Co Ltd, *1998(4) SA 626 (C)* the following was stated in this regard:

"To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Accordingly when the Plaintiff pleads indigence, it is not sufficient to show that the Plaintiff lives on very little or nothing (vide: World Book Dictionary). The Plaintiff must prove something more. The Plaintiff must prove that there is an extreme need or want for basic necessities of life."

[10] One fact that cannot be overlooked is that in South Africa we live in a country with much diversity with reference to its people and their languages, cultures and customs. This, in the view of this Court, begs the question whether a litigant being a member of one specific race or cultural group should mould his action into the requisites or requirements as set out in the laws applicable to other culture- or racegroups which are foreign to himself, in order to be successful in his action.

[11] In short, this question really entails whether a citizen of this country should not be entitled to pursue his case on the basis of the law applicable and well-known to his own race- and culturegroup as developed by his or her forefathers and thus became the

customary law, *in casu,* of particularly African people in this country.

[12] **AFRICAN CUSTOMARY LAW:**

This Court deems it necessary to look at the African customary law with specific reference to the question whether or not and under which circumstances a duty would rest upon a child to maintain his/her parents.

[13] In ***Native Law in South Africa,*** *Seymoure, 2nd edition, on p. 159,* the following is said in this regard:

"In return for his care and upkeep, a child is obliged to perform certain duties for his kraal head: boys between the ages of about seven and ten years herd small stock and calves, while those between the ages of eleven and fifteen herd large stock: older boys might help their father in ploughing; a father may lend the serevices of his son to a neighbour in return for which the son is kept free of charge until he is no longer required. In the case of girls, they help their mothers in their duties, according to strength and ability, and generally fit themselves to be wives in due course."

[14] Very similar wording on duties of children can be found in ***"A Handbook of Tswana Law and Custom",*** *I. Schapera (New*

Impression, 1977) on p. 179 where the author mentions the following:

"Children are expected from fairly early age to assist in the routine occupations of the household, their elders acting as their mentors. The girls are made to help their mothers by fetching water and wood, stamping corn and cooking, cleaning and repairing the homestead, and acting as nursemaids of the babies. These and the many other household duties pertaining to their sex, they carry on until they reach womanhood, when on marriage they assume for themselves the responsibility of housewives. Young boys must help their mother by going messages for her and performing any small menial tasks she sets them to do. Older boys must work for their father by herding and milking his cattle, going out hunting with him, helping him to build huts, plough and protect the family property, running errands, and so on."

[15] With particular reference to a duty to support, we find the following reference on *p.179 of the work of I. Schapera:*

" When a *child is grown up and able to earn a living by work, he must also support his parents, 'because they are old and have no more strength'. "**O busa dikotlô**: it is said:'* ***he repays them for***

his maintenance'. *Sons must give their fathers everything they obtained by hunting, gift, or purchase and nowadays also by work among the Europeans. This is known to the* ***Ngwato*** as *"**kgo šôma**". The father can take it all for himself, or may otherwise dispose of it as he thinks fit. But he is expected to consider the son, and see that he gets something out of what he has acquired."*

[16] According to the author, in Tswana customary law, this duty to maintain only refers to African males. It does not refer to a similar duty owed by a female to her parents. The obvious reason being that females are brought up to eventually become mothers and nurturers of children and to be homebound.

[17] It is well-known that over the past half century black females has entered the labour market firstly as domestic workers in European family households and later on in work environments previously reserved for their male counterparts. In modern day female African workers are to be found in every sphere of life competing on an even level with their male counterparts.

[18] There is therefore in this day and age no reason in law or logic that it cannot be said that a female African does not have a duty to maintain her parents if maintenance is needed by such parents.

[19] In this regard I am in agreement with His Lordship Mr. Justice Dlodlo where he dealt with these principles in the decision of ***Fosi v. Road Accident Fund & Another,*** *2008(3) SA 560 (C).* I agree with my Learned brother that the test as set out in the ***Smith-*** decision, *supra,* is more onerous and difficult to prove compared to pronouncements made in earlier decisions. He preferred the test as spelt out by Rabie JA in ***Van Vuuren v. Sam,*** *1972(2) SA 633 (A)* where it is stated:

"Dit is natuurlik waar ... dat noodsaaklike behoeftes en behoeftigheid relatiewe begrippe is, maar daar dien terselfdertyd op gelet te word dat die verlening van hulp beperk is tot wat as *die mens se basiese behoeftes beskou kan word, naamlik voedsel, klere, onderdak en geneesmiddels en versorging in tyd van siekte."*

[20] I fully agree with my brother Dlodlo J with the principles of South African customary law which places an obligation on a child who is financially able to do so to provide maintenance to his or her needy parents. I must, however, also add that as far as Tswana law and custom is concerned, this principle has in fact also developed from not only a duty by a son to maintain his parents, but also to include such duty on a daughter.

[21] **THE HOUSEHOLD INCOME:**

I have already alluded to the household income pre and post the demise of the Plaintiff's daughter.

[22] The household expenses before the demise of Plaintiff's daughter was the following:

[22.1]	Food and groceries	R2,000.00
[22.2]	Electricity	R 250.00
[22.3]	Water	R 180.00
[22.4]	Funeral policy	R 300.00
		R2,630.00

According to the evidence the deceased contributed R1,300.00 towards these expenditure, the balance of R1,330.00 came out of the pocket of her parents.

[23] The current household expenditure is as follows:

[23.1]	Food and groceries	R 800.00
[23.2]	Electricity	R 180.00
[23.3]	Water	R 150.00

[23.4]	Transport	R 150.00
[23.5	Funeral policy	R 300.00
		R1,650.00

[24] In my view this Court should consider also the fact that earlier the family was used to an income from the father's salary of R5,500.00 a month. It is also my duty not to overlook the status and general circumstances that prevailed in the past and are still prevailing at present.

[25] It is a well-known fact that the cost of living, with particular reference to consumables such as food and clothing are rising by the day whilst government pensions does not increase at the same rate as does inflation and the general cost of living.

[26] An amount of R800.00 is according to the above budget merely enough for two elderly people to survive on, having regard to the current cost of living. I observe that no provision is made in this budget for the cost of clothing which is also in my view a "bare necessity".

[27] Argument was forwarded on behalf of Defendant that the cost of living in rural areas are much lower than the cost of living in cities,

but no evidence to that effect was led and this Court can subsequently not accept it as a true reflection of the cost of living in rural areas as compared to same in city areas.

[28] I therefore have no doubt in my mind that these two elderly people are in fact Indigent.

[29] Apart from the above, I have already mentioned the fact that there is uncontested evidence that there was a contract between Plaintiff and her deceased daughter that the latter would maintain her parents by contributing an amount of R1,300.00 per month towards the household expenses, until such time that her mother would turn 60 years of age and thus eligible to receive a Government old age pension . This duty could no longer be fulfilled by the daughter as a result of her untimely death as a result of the accident in question.

[30] In the last instance I find that in terms of the Principles of the South African Customary law, as outlined above, the Plaintiff is entitled to be compensated for the losses suffered by her as a result of the demise of her daughter in the accident.

[31] The only aspect that remains is the Question of the Scale of costs that plaintiff is entitled to in view thereof that, so it was argued by Defendant, the Amount falls within the Jurisdiction of the Magistrates court and Plaintiff should therefore have pursued her action in that forum.

[32] In this regard I am of the view that the amount of the claim is not the only factor that should be considered by this court when considering an appropriate cost order.

[33] This case had components of complexities that justifies the decision of Plaintiff to institute action in the High Court and I therefore order that costs are awarded to Plaintiff on a High Court scale.

[34] The parties has, subject to the above findings of this court, prepared a Draft Court order and agreed that same should be made an order of court in the event that Defendant is found to be liable to pay Plaintiff's damages in the amount agreed upon.

The following order is hereby made:

A) The "DRAFT ORDER OF COURT" which I have marked "X" for identification purposes is hereby made an order of court.

DIEDERICKS, AJ
ACTING JUDGE OF THE HIGH COURT,
NORTH GAUTENG DIVISION.

Date Heard: 18-19th April 2016.
Date of Judgment: 29th April 2016.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

HELD AT PRETORIA ON THIS THE 22N° DAY OF APRIL 2016 AT COURT 4G BEFORE THE HONOURABLE JUSTICE DIEDERICKS (AJ)

CASE NO: 12555/15

In the matter between:

SELEKA, G L — Plaintiff

and

ROAD ACCIDENT FUND — Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and Defendant.

THE COURT GRANTS JUDGMENT in favour of the Plaintiff against the Defendant in the following terms:

1. The Defendant shall pay an amount of R72 439.00 (SEVENTY TWO THOUSAND FOUR HUNDRED AND THIRTY NINE RAND) to the Plaintiff in settlement of the Plaintiff's claim for past and future loss of support.

2. The aforementioned amount shall be payable by direct transfer into the trust account of Adams and Adams, details of which are as follows:

Nedbank
Account number: [1…]
Branch number: 198765
Pretoria
Ref :JPR/JLR/P1461

3. The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include, but not be limited to the following:-

3.1 The fees of Senior-Junior Counsel on the High Court Scale, inclusive of Counsel's full reasonable day fees for 18, 19 and 21 April 2016, and the reasonable costs in respect of the preparation of the Heads of Argument;

3.2 The reasonable taxable costs of obtaining all expert, medico-legal and actuarial reports from the Plaintiff's experts which were furnished to the Defendant;

3.3 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts of whom notice has been given, being:-

3.3.1 Ms Noble;
3.3.2 Mr Whittaker.

3.4 The costs of a consultation between the Plaintiff and her attorney to discuss the terms of this order;

3.5 The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the Plaintiff in attending all medico-legal consultations with the parties' experts, consultations with the legal representatives and the court proceedings, the quantum of which is subject to the discretion of the Taxing Master;

3.6 The costs of Ms SR Masondo (Sworn Translator) for her attendance at court on 18 and 19 April 2016 in the total sum of R4000.00;

3.7 It is recorded that there is no contingency fee agreement.

3.8 The above costs will also be paid into the aforementioned trust account.

4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

4.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

4.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the applicable rate per annum on the taxed or agreed costs from date of allocatur to date of final payment.

_____

BY ORDER OF THE COURT **ADAMS & ADAMS**

JPR/JLR/P1461

ON BEHALF OF THE PLAINTIFF: ADVOCATE P NEL

ON BEHALF OF THE DEFENDANT: ADVOCATE MAGAGULA