

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1421/2020

REPORTABLE: YES/~~NO~~

OF INTEREST TO OTHER JUDGES: YES/~~NO~~

REVISED

Date: 10/07/2023

In the matter between:

SEJABALEDI SOLOMON MASOGA OBO MINOR

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] On 12th August 2019 Boitumelo Hope Masoga (deceased) who was a pedestrian was knocked by the driver of the insured motor vehicle. The deceased died as a result of the injuries she sustained during the accident. At the time of the accident the deceased was still a student at Capricorn TVET College registered for a course in finance, economics and accounting. The deceased was doing level 2 and not employed. The deceased had also left a minor child. The plaintiff is the father of the deceased and has instituted a claim for loss of support against the defendant in a representative capacity as the grandfather and legal guardian of the deceased minor child.

[2] The defendant did not enter appearance to defend the plaintiff's action and the plaintiff proceeded to set down the matter for a default judgment. The plaintiff has employed the services of various experts and has filed their experts reports. Merits and quantum were in dispute. With regard to merits, it is not in dispute that the deceased was knocked by the insured vehicle whilst a pedestrian, sustained injuries and died as a result of those injuries. The defendant will therefore be held liable 100% for any proven or agreed damages for the loss of support which the minor child might have suffered.

[3] The question which this court has to decide is what loss of support had the minor child suffered since at the time of the accident the deceased was still a student who was also still dependant on her parents, whilst the minor child was supported by his grandparents. Counsel for the plaintiff has submitted that the minor child had suffered loss of support as a result of the negligent driving of the driver of the insured motor vehicle. That if the deceased would have lived and pursued a career in the financial studies as she was doing at the time of her death, she was going to gainfully get employment and be able to maintain or support her minor child. Now that the deceased had died, the minor child will never get an opportunity to be supported or maintained by his mother.

[4] Counsel for the plaintiff further submitted that the minor child falls or finds himself squarely within the ambit of section 17(1)(a) and (b) of the Road Accident Fund Act. That it was not the legislator's intention to exclude minors from claiming loss of support where the parent has lost his/her life as a result of a motor vehicle accident, especially where the parent was in pursuit of career development which could have enhanced his/her career. That future loss of earnings is potential on people who have not entered the job market due to either age or committal to career development such as furthering studies will be based on postulations as to what the particular person would have studied to become, and on what quartile level was he/she likely to have entered the job market.

[5] Counsel for the plaintiff further submitted that in cases where the court may make an award for future loss of earnings for minors who have not yet started any career development, the court must be in a position to award a claim for loss of

support where the deceased has lost his/her life whilst studying at tertiary level. That it was logical that the deceased could have entered the job market as soon as she had completed her grade, but opted to pursue a career in self-development by furthering her studies. That by negating the plaintiff's claim for loss of support on behalf of the minor child on the basis that the deceased mother was still a student at a college furthering her studies to enhance her career potential and also be a competent competitor on the job market is against the spirit of the object of the Road Accident Fund Act and further is a total abrogation of the courts' responsibility to safeguard the interest of the minor as the upper guardian of the minor children.

[6] The plaintiff has filed actuarial calculations by his expert. According to the expert's calculations, the minor child had suffered loss of support in the amount of R1 174 418.00. After applying the contingency deduction of 5% the total loss amounted to R1 115 697.00. Counsel for the plaintiff has submitted that the defendant should therefore be held liable to pay the plaintiff the amount of R1 115 697.00 as loss of support of the minor child.

[7] It is trite that payment for loss of support is payable to the child in order to compensate the child for patrimonial loss suffered by the loss of monetary contribution that the deceased parent would have made towards the support of the child. It forms part of the patrimony of the child. It amounts to an income replacement resulting from the death of the parent as a result of a motor vehicle accident. (See *Coughlan N.O v Road Accident Fund*¹).

[8] In a loss of support claim, the claimant has to prove that he/she was financially supported by the deceased at the time of death, and the deceased had an obligation or duty to support the claimant financially. In the case at hand, the deceased was still a student at a TVET college and was not employed. The deceased herself was still dependant financially on her parents. Even though the deceased had a duty or obligation to support her minor child, at the time of her death she was not supporting the minor child. The minor child was been supported by her grandparents who are still continuing to support him like they were doing before the deceased's death. The minor child financially is still in the same position he was before the death of the

¹ 2015 ZACC 9 at para 46

deceased. Patrimonial loss is the physical damage to a person and expressed in monetary value. In my view, since the minor child is still in the same position he was before the death of the deceased, the deceased was not employed and was not financially supporting the minor child, the plaintiff has failed prove the damage suffered by the minor child as a result of the death of the deceased.

[9] Counsel for the plaintiff has submitted that had the accident not occurred, the deceased would have completed her studies, get employed, support the minor child until he reaches his tertiary education. The plaintiff is seeking the defendant to be held liable based on postulations of what the deceased would have become after her studies and the likely job and level she would have entered the job market. What the plaintiff is seeking is for this court to develop common law in this regard.

[10] In *R K and Others v Minister of Basic Education and Others*² Leach JA said:

“...it is important to remember that s 39 of the Constitution prescribes that when it becomes necessary to develop the law, it should be done in the light of the ethos of the Constitution. However, courts should not attempt to develop the common law under the aegis of the Constitution unless it is necessary to do so, and that the major engine for law reform should be the legislature rather than courts – see *Carmichele v Minister of Safety and Security*. As the Constitutional Court further stated in *Fose v Minister of Safety and Security*, our common law of delict is flexible and will in many cases be broad enough to provide all the relief that would be appropriate for a breach of the constitutional right, depending of course on the circumstances of each particular case.

[11] Section 8(3) and 39(2) of the Constitution explicitly enjoin the courts to develop the common law to the extent that is necessary to make it consistent with the values enshrined in the Constitution, especially those explicitly mentioned in the Bill of Rights. The court is mindful of section 28(2) of the Constitution which relates to the best interest of the minor child.

² 2020 (2) SA 347 (SCA) at para 41

[12] In *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum*³ van der Westhuizen J said:

“Before a court proceeds to develop the common law, it must (a) determine exactly the common law position, (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.”

[13] Counsel for the plaintiff did not adequately address the steps to be taken before developing common law as formulated in the *Mighty Solutions* case. As I have already pointed out above, the minor child is still in the same position as he was before the death of the deceased. In a claim for loss of support, the defendant’s primary object is to place the minor child in the same position he would have been, but for the delict. The defendant is required to compensate the minor child for the loss related to his material needs. The minor child’s material needs have been taken care of and are still been taken care of by his grandparents. The minor child is not placed in worse position as a result of the death of the deceased. However, if the common law was to be developed in the manner as suggested by counsel for plaintiff, it will have far-reaching consequences which were not intended taking into consideration the limited resources the defendant is in. The plaintiff has failed to place sufficient facts showing in what way the rule offends the spirit, purport and object of the Bill of Rights and why it requires development.

[14] Under the circumstances, I am satisfied that the plaintiff has failed to prove that at the time of the deceased death, the deceased was supporting the minor child, and that the minor child was dependant of the deceased for support. The plaintiff has therefore failed to prove any damages suffered by the minor child which the defendant should be held liable. On quantum, the plaintiff’s claim stands to be dismissed.

[15] In the result the following order is made:

³ 2016 (1) SA 621 (CC) at para 38

15.1 The plaintiff is entitled to 100% of his proven or agreed damages

15.2 On quantum, the plaintiff's claim is dismissed

15.3 No order as to costs

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTHAFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	: MM Maelane
Instructed by	: TT Malahlela attorneys
For the defendant	: In default
Date heard	: 31st May 2023
Electronically circulated on	: 10th July 2023