THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 702/2013

Reportable

In the matter between:

The Road Accident Fund **APPELLANT**

and

Wayne Coughlan NO **RESPONDENT**

Neutral Citation: *RAF v Coughlan* 702/13 [2014] ZASCA 106 (3 September 2014)

Coram: Lewis, Theron, Pillay, Mbha JJA and Mathopo AJA

Heard: 15 August 2014

Delivered: 3 September 2014

Summary: Foster child grants made to the dependants of a deceased killed in a collision covered by the Road Accident Fund Act 56 of 1996 should, as a rule, be deducted from any award of damages for loss of support made by the Road Accident Fund.

ORDER

On appeal from: Western Cape High Court, Cape Town (Henney J sitting as court of first instance):

The appeal is upheld and the order of the high court is set aside and replaced with:

'The foster child grants are to be taken into account in assessing the damages to be awarded for loss of support, and, since these exceed the amount agreed to be payable as damages by the defendant, no order as to payment is made.'

JUDGMENT

Lewis JA (Theron, Pillay and Mbha JJA and Mathopo AJA concurring)

[1] This appeal concerns the question whether foster child grants made to the foster parent of children whose mother was killed by the driver of a motor car, and for which the Road Accident Fund (RAF), the appellant, admitted liability, are deductible from damages awarded for loss of support to the children. The Western Cape High Court (Henney J) held that the fact of the foster child grants was 'res inter alios acta' and that the dependent children were entitled to the full amount of the damages suffered as loss of support of their mother. The quantum of the award to be paid was agreed by the curator ad litem for the children, Mr Wayne Coughlan, and the RAF. The amount already paid by the State as foster child grants was also agreed. (It exceeded the amount agreed to be payable as damages.) The appeal lies with the high court's leave.

[2] The question was put to the high court by way of a stated case, and the only evidence led was that of the foster mother, who is the biological grandmother of the

children, all of whom have now reached the age of majority. The facts are not contested and are, in summary, these. The children's father died in August 2000. In June 2002, their mother, the deceased, was killed on the road when, as a pedestrian, she was knocked over by a driver whom the RAF admitted was 100 per cent to blame for the collision such that it was liable for damages suffered by the children for loss of support.

[3] Prior to her death, the mother had placed the children in the care of her parents: for a brief time she was imprisoned and the children lived with their grandparents in that time. Even on her release they remained with the grandparents as their mother was unable to look after them. But when she did find work, as a builder, she assisted her parents financially so that they in turn could support their grandchildren.

[4] After the death of her daughter the grandmother applied to the Children's Court to be appointed as a foster parent to her grandchildren and was so appointed in August 2002 in terms of the Child Care Act 74 of 1983. As a result she was entitled to receive foster child grants in terms of the Social Assistance Act 59 of 1992, replaced by the Social Assistance Act 13 of 2004.

[5] In the stated case put to the high court the RAF and the curator agreed that the quantum of damages to which the children were collectively entitled for loss of the support of their mother was some R112 942. The amount that the grandmother had been paid as foster child grants at the time of the action was R146 790. The RAF contended that the children were not entitled to compensation for loss of support as the foster child grants had been paid as a result of the death of their mother and that they had therefore already been compensated for loss of support. But for the collision and her ensuing death, for which the RAF admitted liability for damages, the grandmother would not have received grants for the children. It argued that payments of foster child grants and of damages for loss of support amounted to double compensation for the death of the mother.

[6] The curator contended, on the other hand, that the payments of the grants were acts of gratuity by the State: they were paid to people who elected to become foster parents, and were not compensation for losses sustained by accident victims. The source of the grants, the National Treasury, was not the same as the source of

damages for loss of support, the RAF, although admittedly that too is funded by the State.

[7] The question put to the high court for decision was: 'Whether or not the foster child grants . . . fall to be deducted from the amount agreed to in respect of the loss of support . . .'. As I have said, Henney J held that the amount should not be deducted, the payments being res inter alios acta.

[8] On appeal, the RAF argued that the high court had incorrectly relied on *Makhuvela v Road Accident Fund*[1] in which Malan J had found that foster child grants, made under the Social Assistance Act of 2004, were paid not to the children of the deceased who was killed in a collision, but to the foster parents, and were not deductible from the damages awarded by a court for loss of support. The RAF placed reliance instead on a judgment of this court: *The Road Accident Fund v N F Timis.*[2] That case was concerned with social assistance grants, and in finding that these should be deducted from the damages awarded for loss of support, this court distinguished *Makhuvela* on the basis that the nature of the grants might be different and that the court did not have to determine whether *Makhuvela* was correctly decided.

[9] In order to determine whether the grants made by the State should be deducted from the award of damages for loss of support it is necessary first to see whether there is any real distinction between the social assistance grants made in *Timis* and the foster child grants made in this case and in *Makhuvela*. I shall then turn to the general principles relating to the deduction of amounts paid to dependants by reason of the death of a breadwinner from awards made for loss of support against the RAF or its predecessor funds.

[10] The Social Assistance Act 13 of 2004, which came into operation on 1 April 2006, seeks to give effect to the Constitution's injunction that everyone has the right to have access to social security, 'including, if they are unable to support themselves and their dependants, appropriate social assistance'.[3] The grants made in *Timis*

[1] *Makhuvela v Road Accident Fund* 2010 (1) SA 29 (GSJ).
[2] *The Road Accident Fund v N F Timis* [2010] ZASCA 30.
[3] See the preamble to the Act.

were made in terms of s 6. This court held[4] that the purpose of such grants is to supplement the income of indigent families – those who do not have the means to support themselves and to provide for a child. An applicant 'primary care giver' qualifies for a grant if he or she has no income or the income is below a particular threshold.[5]

[11] In *Timis* the mother of two children applied for a child support grant under the former Social Assistance Act (59 of 1992) after the death of their father, the sole breadwinner in the family, in a motor collision. She subsequently instituted action against the RAF for damages for loss of support. The RAF conceded liability on the merits but argued that the grants already paid – some R14 690 – should be deducted from the award of damages. The trial court had held that the grants had not been received as a consequence of the father's death, and the grant should not be deducted. But this court held on appeal that the grants had been made as a direct consequence of the death of the father, the only income earner in the family, and were directly linked to his death.

[12] This court upheld the RAF's appeal against the decision, finding that the amount of the grants should be deducted from the damages award. Mhlanthla JA said:[6]

'[T]he State assumed responsibility for the support of the children as a result of the breadwinner's death. The moneys paid out in terms of the Road Accident Fund Act and the Social Assistance Act are funded by the public through two State organs. Not to deduct the child grant would amount to double recovery by the respondent [the mother] at the expense of the taxpayer and this is incapable of justification. In my view it was not the intention of the Legislature to compensate the dependants twice.'

[13] It is trite that dependants are not permitted to get double compensation. The principle was put thus in *Zysset & others v Santam Ltd*:[7] (I quote extensively from the judgment of Scott J because he dealt not only with the principles but also summarized usefully the various authorities on the subject).

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[4] Paragraph 6 in *Timis*.
[5] Section 6.
[6] Paragraph13.
[7] *Zysset & others v Santam Ltd* 1996 (1) SA 273 (C) at 278A-279C.

‘The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. See *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B. Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. *Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action.* [My emphasis.]

Notwithstanding the aforegoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are *(a)* benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and *(b)* moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff. Nor, it would seem, are these the only benefits which are to be treated as *res inter alios acta*. In *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) it was held, for example, that a military pension which was in the nature of a *solatium* for the plaintiff's non-patrimonial loss was not to be deducted. Nonetheless, as pointed out by Lord Bridge in *Hodgson v Trapp and Another* [1988] 3 All ER 870 (HL) at 874*a*, the benefits which have to be left out of account, “though not always precisely defined and delineated”, are exceptions to the fundamental rule and “are only to be admitted on grounds which clearly justify their treatment as such”.

In practice, a plaintiff who seeks to have a benefit which he has received from a third party left out of account attempts to categorise the benefit as falling within the ambit of, or as being analogous to, one or other of the two classic exceptions referred to above. The present case was no exception. In the *Dippenaar* case *supra* the approach was slightly different. In that case certain pension benefits which were payable in terms of the plaintiff's contract of employment were held to be deductible. The reason, in short, was that when a plaintiff seeks

to establish his loss of earning capacity on the basis of a contract of employment, regard must be had to the contract as a whole and any benefits flowing from the contract, such as pension benefits, cannot simply be ignored. In the present case, counsel on both sides sought to analyse the benefits received by the plaintiffs and to compare them with the benefits received in the *Dippenaar* case. Counsel on the one side emphasized the differences, while counsel on the other emphasized the similarities.

It is doubtful whether the distinction between a benefit which is deductible and one which is not can be justified on the basis of a single jurisprudential principle. [My emphasis.] In the past the distinction has been determined by adopting essentially a casuistic approach and it is this that has resulted in a number of apparently conflicting decisions. Professor Boberg in his *Law of Delict* vol 1 at 479 explains the difficulty thus:

'(W)here the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.'

But, whatever the true rationale may be, if indeed there is one, it would seem clear that the inquiry must inevitably involve to some extent, at least, considerations of public policy, reasonableness and justice . . . . This in turn must necessarily involve, I think, a weighing up of mainly two conflicting considerations in the light of what is considered to be fair and just in all the circumstances of the case. The one is that a plaintiff should not receive double compensation. The other is that the wrongdoer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party.'

[14] This court followed the principles set out in *Zysset* in *Timis*, quoting much of the passage above. So did the high court in *Makhuvela.* Yet different results were reached. *Makhuvela* was distinguished by the court in *Timis* on the basis that a foster child grant 'has its own dimensions'.[8] It left open the question whether *Makhuvela* was correctly decided.

[15] In this appeal, the RAF argued that the court in *Makhuvela* had erred. There Malan J placed great emphasis on the rights of children to protection and support, and the pivotal role that the Constitution plays in the protection of children's rights. That case was also concerned with the deductibility of a foster child grant from an award of damages for loss of support arising from the negligent killing of a father by a driver. Malan J said:[9]

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[8] Paragraph 12.
[9] Paragraph 5.

'The purpose of the Act [the Social Assistance Act of 2004] is . . . not only to secure the support of foster children and other groups of people, but also to ensure equality and the realization of the rights of the child under the Constitution.'

He distinguished such a grant from the kinds of benefits or payments that have been deducted from awards for loss of support (like those set out in the passage from *Zysset*) on the basis that foster child grants are made not to the dependant who has lost support but to the foster parent. 'It is given to the foster parent to enable him or her to comply with his or her obligations to the child'. The learned judge did point out, however, that there were several safeguards put in place by legislation to ensure that a foster child grant is used for the benefit of the child and is payable only for so long as the foster child is cared for by the foster parent.[10]

[16] The RAF contended that the distinction between social assistance grants, as awarded to the mother of the children whose father had been killed, and foster child grants as awarded to the foster parent of the children in this case, is a false one. In both cases the grants are made to enable the support of a child. They are granted to parents or caregivers of children in need of care. Section 8 of the Social Assistance Act (2004) states that a 'foster parent is . . . eligible for a foster child grant for as long as that child needs such care'. Such grants must thus be used for the benefit of the foster child. Moreover, in terms of the Children's Care Act 74 of 1983, a foster parent has a duty to maintain a child placed in his or her care (s 41(1) and (2)).

[17] Thus, argued the RAF, the foster parent does not have unfettered powers to use the foster child grant: it must be used for the benefit and maintenance of the child. And although the foster child does not have a claim to the grant himself or herself, if the foster parent abuses the grant the Social Services has a discretion, in terms of s 19 of the Social Assistance Act, to substitute another foster parent.

[18] In my view, there is no difference in substance between child support grants and foster child grants. Counsel for the curator accepted that there was no difference in principle between the two types of grant, but argued that in this case, the children had been in the care of their grandparents before their mother died. Although she had made some contribution to the children's support, the grandparents may have needed additional funds for their support before she died. That may well have been

[10] Paragraphs 6 and 7 of *Makhuvela*.

so. But no evidence was led in this regard, and the fact is that the grandmother applied to be appointed as a foster parent, and for foster child grants, only after the death of her daughter. I therefore accept the argument of the RAF that, but for the death of the mother in a collision for which the RAF accepted liability, the foster parent would not have claimed foster child grants.

[19] The curator also argued that the circumstances underlying the need for foster child grants in this matter arose not because of the death of the children's mother, but because the family was indigent. The foster parent could not support the children. The purpose of grants made under the Social Assistance Act is to provide a basic need for people who are impoverished. But as I have said, there was no evidence to support the proposition that the foster parent would have applied for grants had the mother of the children not died. On the contrary, the evidence showed that the mother had contributed to the financial support of her children before she was killed.

[20] The RAF raised one further argument as to why double compensation should not be given to the children. The funding of the RAF and that given under the Social Assistance Act has the same source: the National Treasury. That is correct but in my view it makes no difference. In other cases, double compensation has been precluded where the sources of the compensation are different. In *Lambrakis v Santam Ltd*[11] this court held that where the deceased's estate devolved on the children deprived of support by the death of their father in a road accident, and the estate maintained them, no action for loss of support lay against the insurer of the negligent driver. No financial loss had in fact been suffered by the dependants and their action against the insurer had to fail. The court said in that case that the dependants should not profit from the wrongdoing of the defendant, relying on *Indrani & another v African Guarantee & Indemnity Co Ltd*,[12] and on a series of articles written by Professor P Q R Boberg.[13] Boberg's work had shown that our courts have worked on a casuistic basis in determining whether other sources of support should be deducted from an award of damages for loss of support, applying

[11] *Lambrakis v Santam Ltd* 2002 (3) SA 710 (SCA).
[12] *Indrani & another v African Guarantee & Indemnity Co Ltd* 1968 (4) SA 606 (D) at 607F-H.
[13] (1964) 81 *SALJ* 198.

a principle of losses and gains, without any clear jurisprudential principle – a view endorsed by Scott J in *Zysset* in the passage quoted above.

[21] In my view the high court erred in finding that the children were entitled to damages for loss of support from the RAF. The foster child grants served the very purpose which an award of damages would do: providing the children with the financial support lost as a result of the death of their mother. That means that the court in *Makhuvela* also erred, the necessary implication of the decision in *Timis* by which we are bound.

[22] It is important to stress that this finding does not mean that there is any general principle precluding an award of damages for loss of support where dependants have had the benefit of social support grants. In this situation, as in most, the facts should determine whether there has been an actual financial loss caused by the death of a deceased. Where there is evidence that social assistance grants are warranted, and that double compensation will not ensue, an award of damages may well be appropriate. As was said in *Zysset*, the enquiry must involve considerations of public policy, reasonableness and justice. A court faced with the enquiry must take into account two conflicting policy considerations: that a dependant should not receive double compensation, on the one hand, and that a wrongdoer should not be relieved of liability because of fortuitous benefits received by the dependant.[14]

[23] It should be noted, for the sake of completeness, that certain benefits received by a dependant are not deductible from an award of damages by virtue of the provisions of the Assessment of Damages Act 9 of 1969: these include insurance moneys, pensions or benefits (all as defined in that Act) paid as a result of a person's death. Social assistance grants do not fall within the exceptions.

[24] In this matter the grants made to the foster parent exceeded the amounts that the children would have been entitled to had their foster parent not received the grants. The question put to the high court in the stated case should have been answered on the basis that the dependants were not entitled to both the benefit of the foster child grants and to damages for loss of support. Both parties agreed that

[14] *Zysset* at 278H-J.

they should bear their own costs on appeal. Equally, no costs should be ordered against the curator in the high court.

[25] Accordingly the appeal is upheld and the order of the high court is set aside and replaced with:

‘The foster child grants are to be taken into account in assessing the damages to be awarded for loss of support, and, since these exceed the amount agreed to be payable as damages by the defendant, no order as to payment is made.’

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C H Lewis

Judge of Appeal

APPEARANCES

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