IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE
EASTERN CIRCUIT LOCAL DIVISION AT GEORGE)

CASE NO.:1934/2005
REPORTABLE

In the matter between:

CORDELIA NTOMBIZABUNTO FOSI
PLAINTIFF

And

ROAD ACCIDENT FUND **1ST**
DEFENDANT

KHOLISWA FOSI N.O. **2ND**
DEFENDANT

JUDGMENT DELIVERED ON 21 FEBRUARY 2007

DLODLO, J

INTRODUCTION

1) The Plaintiff, an unemployed female person born on 13 September 1949 and who presently resides at 52 Mandela Street, Hillview, Plettenberg Bay, sues in this action in her personal capacity as mother and natural guardian of her late son Phumezo Sonnyboy Fosi ("the deceased"). The First Defendant is the Road Accident Fund, an entity established in terms of Section 2(1) of the Road Accident Fund Act 56 of 1996 ("the Act") upon which the rights and obligations of the Multilateral Motor Vehicle Accident's fund, established by Act 93 of 1989 as amended, have devolved. The First Defendant's principal place of business is at 7th Floor, 1 Thibault Square,

Long Street, Cape Town. The Second Defendant is an adult female person cited in these proceedings in her *nomino officio* capacity as the executrix of the deceased's estate duly appointed as such in terms of Regulation 4(1) of the Regulations for Administration and Distribution of Estates of Deceased Blacks published under Government Notice No. R200 of 1987; the Second Defendant is merely cited as an interested party.

2) The cause of action emanates from a motor vehicle accident at or near Hoekwinkel Road, Wilderness, involving the insured vehicle bearing registration letters and numbers CAW24152 which at that time was driven by one Salmon Gerber and a motor cycle with registration letters and numbers CA37795 ridden by the deceased. It is averred in the summons that during his lifetime the deceased was unmarried and was under a legal duty to support and maintain the Plaintiff who was indigent and had no other means of support and maintenance, and that the deceased did in fact so support and maintain the Plaintiff.

3) The action is resisted by the First Defendant on a rather narrow aspect. I say so because the First Defendant in the Rule 37 meeting conceded that the collision was caused by some negligence on the part of the insured driver, thereby rendering it unnecessary for the Plaintiff to prove this aspect. What has been placed in dispute is whether or not the Plaintiff can be said to have been indigent such that the deceased had a duty in law to support and maintain her. Whether the deceased was under a duty to maintain his mother at the time of his death is critical to the Plaintiff's case, because if such duty cannot be established, it cannot be imputed to the First Defendant. Indeed a child's duty to support his or her parents is recognised in our law.

Numerous authorities supporting this principle are summarised and discussed in ***Oosthuizen v Stanley*** 1938 AD 322. According to these authorities, a child's duty to support a parent arises if both parents are indigent and are unable to support themselves and if the child is able to provide support. See at 327-8 ***Oosthuizen v Stanley*** (*supra*). To succeed the Plaintiff had to prove that each of these requirements was satisfied.

THE EVIDENCE

4) The Plaintiff, the mother of four (4) children, was born in a rural area of the Eastern Cape, called Edutshwa on 13 September 1949. She grew up and attended school up to standard five (5) at her place of birth. The only language she can understand and speak is Xhosa. She got married by way of customary marriage to one Johnson Fosi. The names of the children born out of their marriage are hereunder given in the order of their birth, namely: Phumezo; Xoliswa ; Monwabisi and Lungiswa.
During the period 1998/1999 the Plaintiff and her family lived in Edutshwa. Already at that stage her husband was no longer employed but he received a pension amounting to between approximately five hundred and twenty rands (R520-00) and five hundred and forty rands (R540). According to the evidence Johnson Fosi was already an alcoholic at that stage and would use all his pension money on alcohol.

5) During the same period mentioned above, the Plaintiff worked at Thembaza earning thrity rands (R30-00) per forth night. She would spend ten rands (R10-00) on bus fare and would effectively be left with twenty rands (R20-00) on which amount she and her family had to live. Asked if there were no better paying jobs at the time, she responded that she was

disadvantaged by her inability to speak and understand English and Afrikaans and she therefore could not secure alternative and better paying employment. She then lived in a mud-house together with the family. This was a traditional house without basic necessities like running water, toilet and electricity. The water had to be fetched from the local river. They used firewood for making fire outside where cooking had to be done. The Plaintiff was struggling in maintaining the household whilst Johnson used his pension money at shebeens on alcohol for himself. In order to survive the Plaintiff would time and again go to her parental home in order to be helped with food for the family.

6) At times her brother would render assistance. The local church used to give her some hand-outs. She used this food to feed not only herself and the children, but also Johnson. Asked why Johnson, she added she was married to this man and in keeping with her tradition, it remained a duty on the shoulder of a mother to ensure that there was food in the house. The Plaintiff had no control over Johnson's pension money at all. She had consistently spoken to Johnson who never mended his ways. Even clothing for the Plaintiff and the children would be donations of old clothing from the church. Before the deceased started to work life was totally unmanageable for the Plaintiff as the church and her relatives who helped with basic necessities like food, could not do it all the time.

7) However, in November 1998, when the Plaintiff's son, Phumezo, the deceased, was employed, the Plaintiff's life totally changed for the better. The deceased was then employed by the Department of Forestry on a reasonably good salary. This is

evident from the fact that every month he would send to his mother the sum of one thousand rands (R1000-00), an amount remarkably substantial regard being had to what the Plaintiff used to earn as income. According to evidence the deceased sent this money to the Plaintiff every month via the post office without fail. This was the position until an interruption was caused by the deceased' sudden demise in a motor vehicle accident. When the Plaintiff was asked why did the deceased send her money, she responded by telling the Court that the deceased had to send money because he knew "where he was coming from and who had given birth to him". The money the deceased sent to the Plaintiff was spent by the Plaintiff on general maintenance for herself and the younger children she still had to care for. The deceased was a non-smoker and non-drinker, he enjoyed good health. There were no plans known to the Plaintiff that the deceased intended to marry, nor was the Plaintiff as a mother aware of any girlfriend to the deceased.

8) When her deceased son died in a motor vehicle accident, the Plaintiff and her family were still living at Edutshwa, Kingwilliams Town. However, upon the death of her son, the pressure on the Plaintiff became so unbearable that she moved to Plettenberg Bay looking for some opportunity of employment. This she did as she could no longer get one thousand rands (R1000-00) which the deceased made available to her for support. Her position reverted to what it used to be before her son (deceased) started working. The family split-up in the sense that as she moved to Plettenberg Bay, she took along her youngest daughters Lungiswa and Xoliswa, whilst her other son, Monwabisi, remained at Edutshwa with his father, Johnson. The latter subsequently died. At Plettenberg Bay the Plaintiff was

unsuccessful in obtaining any jobs. Apart from being old (according to what would be said by employers) she still had the same language problem. She could not speak or understand Afrikaans, a language commonly spoken at Plettenberg Bay.

9) She eventually got a job that allowed her to earn thirty rands (R30-00) per day. However, twenty rands (R20-00) would be deducted for transport. This saw her earn at least four hundred and eighty rands (R480-00) per forth night. She subsequently lost this job and she now does washing for a school teacher who pays her forty rands (R40-00) per day. She only performs this job four (4) times in a month. Xoliswa now works and does support her mother, the Plaintiff, at the rate of six hundred rands (R600-00) per month. In conclusion the Plaintiff (if she gets money)buys maize meal and they cook and eat porridge as it is. She painstakingly explained to the Court how at times they would go to bed without food because there was no food; they would merely drink water and go to bed. The Plaintiff applied for a grant from the Government but it was turned down. From the death of the deceased to date, the Plaintiff received no money from the employers, except for two hundred and fifty rands (R250-00) from the Provident Fund.

INDIGENCY/DESTITUTION

(10)I fully agree with Mr. Frost that the Plaintiff was a good and credible witness. The Court was impressed with her testimony, her simplicity and sincerity. Reliance can indeed be placed on what she told the Court. Mr. Niekerk did not express a contrary view in this regard. I accept her evidence. I must, however, consider whether this evidence does succeed on a balance of probabilities to establish that the Plaintiff in the instant matter is

indigent and whether at the time of the deceased' demise, the latter was under a duty to support her.

(11) The test was set out in ***Smith v Mutual & Federal Insurance Co. Ltd*** 1998 (4) SA 626(C) at 632 D-E as follows:

> "***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 the basic necessities of life."***

The test set out *supra* is, in my view, more onerous and difficult to prove compared to the pronouncements made by our Courts in earlier decisions. I have in mind for an example, the observation by Bekker J in ***Wigham v British Traders Insurance Co Ltd*** 1963(3) SA 151 (W) at 153, namely:

> ***"The authorities furthermore make it clear that in order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received a contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed… The aim and object is to place the dependants in as good a position as regards maintenance as they would have been if the deceased had not been killed, to which end***

material losses as well as benefits and other prospects must be considered."

(12) The two cases referred to *supra*, that is ***Smith's*** case and ***Wigham's*** case, both dealt with claims against insurers by parents for damages arising from loss of maintenance from deceased children. It is of note that one of the authorities referred to in ***Wigham*** case *supra*, namely ***Oosthuizen v Stanley*** 1938 AD, is judgment by Tindall JA who wrote as follows at 327-8:

"***There is no doubt on the authorities which are quoted in Waterson v Mayberry, 1934 T.P.D. 210, that the plaintiff had to prove not only that either Stephanus or Elsie contributed to his support but that there was a legal duty to contribute because his circumstances were such that he needed the contribution. The liability of children to support their parents, if these are indigent (inopes), is beyond question; See Voet, 25.3.8; Van Leeuwen, Censura Forensis, 1.10.4. the fact that a child is a minor does not absolve him from his duty, if he is able to provide or contribute to the required support; See In re Knoop, 10 SC 198. Support (alimenta) includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness; See Voet 25.3.4; Van Leeuwen, Censura Forensis, 1.10.5; Brunnemann, in A Codicern 5.25. Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent's income***

is a question of fact depending on the circumstances of each case. I find, in an old Scottish case quoted by Fraser, Parent and Child, 3rd ed. P.137, and in Green's Encyclopaedia of Scots Law, vol.1 p.300, that a widow having an annual income of £60 was held to be not entitled to claim additional aliment from a son who had an income of £1 500 a year. No doubt the higher value of money 80 years ago was an important factor in the failure of the parent's claim in that case. However, though each case must depend on its own peculiar circumstances, that decision supports the view, I think, that the parent must show that, considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities."

(13) I am aware that several claims by parents that their children were under a legal duty to maintain them have failed essentially because the parents did not succeed to prove that they were indigent. Cases such as ***Petersen v South British Insurance Co. Ltd*** 1967(2) SA 236 (C) and ***Anthony & Another v Cape Town City Council*** 1967(4) SA 445 (A) are examples of cases where such claims did not succeed. I hold the view though, that these cases did not establish an absolute line between indigent and "mere" poverty when one has to make a determination of the duty of the children to support and maintain a parent. Such cases must necessarily be read in the light of their own facts. Simplistically put, the deciding principle seems to be whether

the parent can prove that he or she was dependent on the child's contribution for the necessities of life. Indeed what constitutes necessities of life will in turn depend on the individual parent's station in life. I fully agree with the observations made by Schreiner AJ (as he then was) in an unreported Free State Judgment, ***Burger v Die Padongelukkefonds***, Case number 2223/1999 where the Judge observed as follows:

> "…***..Die vraag of 'n ouer in sodanige staat van nooddruftigheid (indigency, destitution) is dat die ouer geregtig is op onderhoud van die kind is, 'n feitlike vraag, afhangend van die omstandighede van elke saak, maar die ouer moet aantoon dat, …"considering station in life, he or she is in want of what should be regarded as coming under the head of necessities"."***
>
> Rabie JA in ***Van Vuuren v Sam*** 1972(2) SA 633 (AD) at 642F correctly spelt out what may be regarded as constituting necessities of life when he stated:
>
> > "…***Dit is natuurlik waar, …dat noodsaaklike behoeftes en behoeftigheid relatiewe begrippe is, maar daar dien terselfdertyd op gelet word dat die verlenging van hulp beperk is tot wat as die mens se basiese behoeftes beskou kan word, nl. voedsel, klere, onderdak en geneesmiddels en versorging in tyd van siekte (Voet 25.3.4; Oosthuizen v Stanley, supra)."***

(14) From the evidence in the instant matter it is clear that the income the Plaintiff regularly received from her deceased son enabled her to put bread on the table, buy some clothing for

herself and her younger children etc. Mr. Niekerk did his best in cross-examining the Plaintiff but her evidence remained intact. In fact each question put to her in cross-examination elicited a further exposition of her unfortunate life without the support the deceased gave her. The undisputed evidence in this matter satisfies me that the Plaintiff's son indeed owed her a duty of support at the time he died. Although she also had some hand-outs from the church and some sympathetic persons in her maiden home, the deceased' contributions were clearly so required that she could not do without same. This contribution by the deceased was used (as evidence indicates) to assist the Plaintiff to acquire the bare minimal of the basic necessities of life. The Defendant has not suggested that these contributions made by deceased to his mother's modest income of R30-00 a week, were merely gratuities which enabled the mother and those nearer and dependant on her, to indulge in luxurious lifestyle which they would not have been able to afford but for the contributions. Mr. Johnson Fosi was like a dead man. He was never there for his family. Like many alcoholics, he turned his back on those things that were his responsibility. Mr. Niekerk questioned the Plaintiff why she did not proceed against Johnson in the maintenance Court. Her answer was that in keeping with tradition, she could not do so. Even if she lodged the complaint, this alcoholic would not comply with the Court order. The result would be that he could end up in prison. No money would become available to the Plaintiff anyway.

(15) The evidence in this matter further satisfied me that the Plaintiff's own income referred to *supra* was totally insufficient and inadequate not only to sustain her but also to give her the modest additional succour she needed to preserve her human

dignity. There were no resources to replace the contribution the Plaintiff was deprived of when the deceased untimely died. I say so being mindful that there is only now another child who recently has been employed and who does at times give the plaintiff some money. However, the liability of other siblings is not relevant to a claim against one of them. See: ***Khan & Another v Padayachee*** 1971(3) SA 877(W). Even if the Plaintiff now gets some income from her younger daughter, that alone would not be fatal to the Plaintiff's case.

AFRICAN LAW PERSPECTIVE

(16) There is yet another consideration. Indigenous African Customary Law has occupied an unfortunate position in the legal history of our Country. The fact is that it was hardly recognised by the law makers and was accordingly scarcely applied in the South African Courts. It enjoyed the status of being known that it existed and its continued existence was merely tolerated as a necessary evil. African law obligates a child who is financial able to do so to provide maintenance to his/her needy parents. When an African (black) provides support and education to his/her son/daughter, he/she is not only under a duty to do so on the strength of South African legal system, but custom also obliges such a parent. In fact, in African tradition to bring up a child is to make for oneself an investment in that when the child becomes a grown-up and is able to participate in the labour market, that child will never simply forget about where he came from. That child without being told to do so, will make a determination (taking into account the amount he/she earns, her travelling to and from work, food to sustain himself and personal clothing etc) of how much he must send home to the parents on a monthly basis. This duty is

inborn and the African child does not have to be told by anybody to honour that obligation. In fact, that is the trend in almost all black families in rural areas including the so-called urban black communities. In each family there would invariably be one or two sons or daughters who is/are employed. Those children in employment provide their individual parental home with the hope in life in that they monthly and without fail send money to their parents so that basic necessities of life are afforded by the latter. It is for this reason that the Plaintiff was puzzled on being asked in cross-examination, why did the deceased send her money. Her answer was rather telling, “because the deceased knew where he was coming from”. The duty of a child to support a needy and deserving parent is well-known in indigenous/customary law. It is observed by such children. There is always an expectation on the part of a parent that his child will honour this duty.

(17) In African law it is most certainly an actionable wrong on the part of the child who is financially able, not to provide support to his needy and deserving parents. Quite apart from it being an actionable wrong, failure to maintain one’s parents by a child who is financially able to do so, is, in black traditional law contrary to the public policy (*contra bonos mores*). The parent can successfully civilly proceed against such a child in traditional courts. It is also a morally reprehensible act to fail to maintain one’s own parents who are in need of such maintenance. If the parents were to decide not to lodge a complaint before the tribal Court, but opt somehow to alert members of the immediate family about this predicament, such a child would be ostracised and be looked down upon as a person who has no ubuntu. The latter scenario is rather rare

because as stated above every African child is born with this duty consciousness never to forget his/her roots. It is unacceptable to African traditional law that the death of a child who is employed and who is conscious of his duty to support and sustain his parent, should not entitle the parent who has lost such support as a result of the untimely death of such a child consequent upon any wrongful act on the part of anybody including an accident caused by a negligently driven motor vehicle (as in the instant matter).

(18) It will be noted that I have used both descriptive words, namely indigenous and customary law *supra*. I personally prefer to call this legal system African law. I have said *supra* that African customary law was "recognised" and merely tolerated in the past. To be precise, this was nothing but partial recognition because in many instances Presiding Officers were allowed a choice as to which legal system they should use in a matter which was the subject of dispute between black people. The colonial masters also partially recognised customary law and it was applied in matters selectively. This is evident from the following dictum in the then Privy Council decision of ***Oke Lauripekun Laoye v Amao Ojetunde*** 1944 AC 170:

> ***"The policy of the British Government in this and other respects is to use for purposes of the administration of the country, the native laws and customs in so far as they have not been varied or suspended by Statutes or Ordinances. The Courts which have been established by the British Government have the duty of enforcing these native laws and customs so far as they are not barbarous, as part of the law of the land."***

We know that prior to 1988 the position regarding the recognition and application of customary law was also rather limited in that there was a provision made in the Black Administration Act 38 of 1927 for the limited recognition of customary law by a Court structure especially established for dealing with disputes between blacks. These were called Commissioners' Courts (See: cf ***Olivier Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes*** 610-651); ***Bekker Seymour's Customary Law in South Africa*** 4-68; ***Bennett Customary Law*** 63-136) which were presided over by mainly white males not necessarily legally qualified but often those who had some history of having some form of formal understanding of the customs and practices of black people. They were also not obliged to apply customary law in the resolution of disputes, but they had an option. It is apposite that I quote the relevant section of the Black Administration Act in this regard to illustrate that there was never a compulsion to apply customary law.

(19) Section 11 of the Black Administration Act provided as follows:

> "***11(1) Notwithstanding the provisions of any other law it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far as it shall have been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the***

custom of lobola or bogadi or other similar custom is repugnant to such principles.

(2) In any suit or proceedings between Blacks who do not belong to the same tribe; the Court shall not, in the absence of any agreement between them with regard to the particular system of Black law to be applied in such suit or proceedings, apply any system of black law other than that which is in operation at the place where the defendant or respondent resides or carried on business or is employed, or if two or more different systems are in operation at that place, not being within a tribal area, the Court shall not apply any such system unless it is the law of the tribe (if any), to which the defendant or respondent belongs."

(20) Schreiner JA (as he then was) dealing with section 11 of the Black Administration Act 38 of 1927 in **Ex Parte Minister of Native Affairs: In Re *Yako v Beyi*** 1948 (1) AD 388 at 396-397 made the following observation:

"**No doubt when colonisation takes place among a people having their own customary law, and when the law of the colonists becomes the law of the land, difficult questions of policy are likely to arise as to the proper extent of recognition and use, at any particular period, of the customary law of the native inhabitants; and presumably South Africa has not been exceptional in this respect. Faced by**

such difficulties, Parliament, in enacting sec. 11(1) appears to have used a device which may have been expected to permit of some elasticity and provide scope for development, so as to achieve the primary desideratum of an equitable decision between the parties without laying down any hard and fast rule as to the system of law to be used to attain that end. ….. On the contrary, the indications are rather that common law was intended to be applied unless the native Commissioner in his discretion saw fit in a proper case to apply native law…..Framed as it is, it appears to me that the sub-section assumes that the native commissioner should in general apply common law and on that assumption empowers him in a proper case to apply native law."

Schreiner JA (as he then was) was of the view that it would be wrong to apply section 11(1) without regard to the circumstances of particular cases. In his view, it would not be a proper exercise of the discretion given by that sub-section for a native commissioner to hold that all cases of seduction should be dealt with as if the parties were living under primitive tribal conditions.

(21) The recommendations of the Hoexter Commission, thankfully, led to the abolition of the Commissioners' Courts throughout the Country. All matters of South African litigants then fell to be litigated before the Magistrate's Court. One would have thought that the abolition of the Commissioners' court must necessarily result to full recognition and application of customary law in this Country. That was not to be. Strangely section 11 of the black

Administration Act which obviously must be taken to have died with the abolition of the relevant Courts it empowered, was resuscitated in that it was replaced by section 54A(1) of the Magistrate's Courts Act 32 of 1944. Section 54A(1) of the Magistrate's Courts Act contained virtually the same provision which constituted the content of the then defunct section 11 of the Black Administration Act. Again no full recognition and application of customary law came to the fore.

(22) The coming to the statute book of the law of Evidence Amendment Act 45 of 1988 was indeed welcomed in black communities because it brought hope that may be eventually their system of law was to be fully recognised and applied. In terms of section 2 of the Law of Evidence Amendment Act, section 54A of the Magistrate's Courts Act was repealed. Section 1(1) of the Law of Evidence Amendment Act, in essence, is identical to section 11(1) of the Black Administration Act (referred to s*upra*) with the significant extension that all South African courts are since 1988 empowered to apply customary law (and foreign law) irrespective of whether one or both parties were blacks. But the essential ingredients of the old section 11 of the Black Administration Act persisted even in this section 1 of the Law of Evidence Amendment Act.

(23) Those are that Courts were merely empowered to take judicial notice of the law of a foreign state and of African law in so far as such law can be ascertained readily and with sufficient certainty, provided that such law may not be opposed to the principles of public policy or natural justice etc. Taking judicial notice of customary law is not "recognition" and it hardly empowered the Courts to fully recognise and apply such

customary law. Presiding Officers (Magistrates essentially) were not really obliged to take judicial notice of customary law in cases where it is an indicated systems of law. They were armed with a discretion in this regard. I fully associate myself with observations I have come across in **Joubert- LAWSA** first Reissue Vol 32 at page 17, namely:

> "…***Because of, amongst other things, the lack of expertise and the reluctance to require a compulsory university course in customary law as a prerequisite for the appointment of magistrates or to provide for compulsory in-service training for practising magistrates, …insufficient application of customary law by magistrates will continue. The same applies to the High Courts."***

So much for the unfortunate history. We now live in a constitutional democracy. Customary law should not only be tolerated (as was the position in the past) but it must be recognised, applied and married to the existing Roman-Dutch legal system currently in place in this Country.

(24) It took the promulgation of an interim constitution (Act 200 of 1993) that customary law became a matter of constitutional importance in the legal history of this Country. It was at this stage that it became apparent that customary law was now being treated as a foundation of the South African legal system virtually on the same terms as Roman-Dutch law. The position presently is that section 211(3) of the Constitution of the Republic of South Africa 108 of 1996 determines that all Courts in South Africa must apply customary law where appropriate, subject the constitution and legislation that deal in particular with customary law. The Constitution is the supreme law in this

Country. Finally, full recognition has been given to customary law. The Courts are obligated to apply it in disputes where applicable. Full recognition and the obligatory application of customary law in instances where it is indeed applicable, comes with an added obligation to the administrators of justice (Magistrates and Judges) to actively engage in the development of customary law. I am thus constitutionally enjoined to develop customary law and bring it to the same level reached by common law. The Plaintiff in this matter is an African (Black) person. The deceased was a Black person. I fail to see why must I not apply customary law that governed them.

(25) I have shown above that customarily the child who is financially able to do so, is under an obligation to maintain his needy parent. There is no reason, in my view, why consideration should not be given to this portion of customary law in the determination of liability of the Road Accident Fund towards a parent who has lost a child in a motor vehicle accident caused by the negligent driving thereof. I hold therefore that even on this consideration, the Road Accident fund cannot escape liability towards the plaintiff in this matter.

(26) Grogan AJ in an unreported judgment, (***David Clannon Jacobs v Road Accident Fund***) handed down in the South Eastern Cape Local Division) surprisingly came very nearer to what is very similar to the exposition I have given above when he made the following observation:

> ***"It would in my view be invidious were this Court to rule that the deceased had no duty to support his father when he had voluntarily assumed that obligation. In my view, this undertaking gave the***

plaintiff a reasonable expectation that his maintenance contributions would continue. A duty of support between family members is one of those areas in which the law gives expression to the moral views of society. In the present case, the plaintiff did not have to enforce his right to maintenance from the deceased. The deceased voluntarily assumed that obligation. In my view, this is sufficient in itself to warrant a finding that the plaintiff had acquired a right to maintenance from his son, which was enforceable against the insured and, by law, against the defendant."

COSTS

(27) The costs shall follow the result as per the general rule governing the question of costs.

ORDER

(28) I make the following finding:

(a) That the First Defendant is liable to compensate the Plaintiff the amount of the damages the Plaintiff is able to prove.

(b) The First Defendant shall pay the Plaintiff's costs of this action.

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DLODLO, J