

**Republic of South Africa**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 977/08

In the matter between:

WAYNE COUGHLAN N.O.

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

**JUDGMENT DELIVERED ON 6 JUNE 2013**

**HENNEY. J**

**Introduction**

[1] On 16 June 2002 N[...] M[...] B[...] ("the deceased") was involved in a fatal collision on the R300 near Delft in this province. She was hit by a motor vehicle bearing registration number C[...] ("the insured vehicle").

The deceased left behind 3 minor children, J[...] Williams born on [...] 1988, A[...] B[...] born on [...] 1992 and E[...] J[...] B[...] born on [...] 1995 ("the minors"). J[...] and A[...] are no longer minors. The children's biological father passed away before that in 2001.

[2] Subsequent to the collision and on 13 August 2002, the Children's Court for the Magisterial District of Mitchell's Plain and pursuant to the provisions of Section 13(3) and 15(1) of Act 74 of 1983, ordered that the minor children be placed in the foster care of the grandparents Mr and Mrs D[...] L[...]. As a result of this, the

foster, child grants received as of the date of the hearing of this matter for the children amounted to R146 790,00.

[3] It is further common cause that the Defendant has conceded liability to compensate the Plaintiff in his representative capacity for 100% of proven damages suffered as a result of the death of the deceased.

[4] The Defendant contends that as per the Children's Court enquiry, that the collision was the *sine quo non* for the foster parent applying for the grant.

The Plaintiff contends that child foster grants are paid to people who elect to become foster parents and such payments are to be considered as *res inter alios acta* and therefore non-deductible.

#### The Facts

[5] During the hearing of this matter, the Plaintiff called the grandmother/foster parent of the minor children. According to Mrs D[...] L[...] the children came to stay with her on different dates, while their mother was still alive. E[...] came to stay with her on 19 September 2001, A[...] on 11 January 2002 and J[...] on 14 January 2002. This was during a period whilst the deceased was still alive, but was imprisoned. The deceased was unemployed for a while but later found employment again. At that stage the deceased was staying with her.

[6] In March 2002 the deceased went to stay in her own place and A[...] went to stay with the two other children remained in her care. The deceased made a small contribution towards the children when she was alive. She did not have any difficulty in supporting the children, but this money was not enough.

[7] After she died she lost this means of support and applied for the foster grant. She receives an amount of R770,00 per month for each of the children as foster grant. She uses the grant to buy food for these children. The foster grant is much more than the contribution the mother made on a monthly basis.

#### [8] Issue for Consideration

Whether the foster grant payment received should be deducted from the amount agreed on for loss of support or whether such payments are to be considered *res inter alios acta* and therefore non-deductible.

#### [9] Plaintiff's Argument

The Plaintiff contends that child foster grants are paid to people who elect to become foster parents and that such payment is to be considered as *res inter alios acta*. The patrimonial damages suffered by a Plaintiff are the difference between the patrimony before and after the commentaries of a delict.

[10] The Plaintiff argues that there is an exception to the general rule, that in order to determine a Plaintiff's patrimony after the commission of a delict, that advantageous consequence resulting therefrom should be taken into account. When faced with such a situation a Court will have to determine which benefits are deductible and which are considered *res inter alios acta* or collateral benefits.

[11] The Plaintiff argues with reference to *Zysset & Others v Santam Limited 1996 (1) SA 273 C at 278 B-D, and 278 H - 279 C* that such an enquiry must at least involve considerations of public policy, reasonableness and justice, which according to this dictum in turn must necessarily involve, a weighing up of two conflicting considerations.

The one is that the Plaintiff should not receive double compensation. The other is that the wrong-doer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party.

[12] The Plaintiff contends that the foster parent grant is a grant payable to the foster parent to enable him to comply with his obligations to the child. The child has no claim to the grant. The grant therefore is *res inter alios acta* and not deductible from the damages claimed, in this regard the Plaintiff relied on the dictum of *Malan J in Makhuvela v Road Accident Fund 2010 (1) SA 29 (GSJ) page 34 at paragraph [8]*.

[13] The Defendant's Argument

The Defendant relied on the dictum of the *Road Accident Fund v N F Timis (29/09) [2010] ZA SCA 30 (26 March 2010)*, where it was held that in the case of a child care grant it is deductible from the damages to be awarded in respect of children. The Court held that when a child support grant is payable in terms of Section 6 of Social Assistance Act 13 of 2004 at... paragraph [6]:

*"... Each case in which the deduction of a benefit is in issue must, of course, be considered on its own facts and having regard to the applicable statutes. It is necessary to have regard to the person or objects of the Act. The purpose of the grant is to supplement the income of indigent families. The grants are meant for those who have insufficient means to support themselves and to provide for the child who does not have maintenance."*

[14] Mr Salie on behalf of the Defendant argued that a foster care grant should only be awarded to a child in need of care and that such grant must be for the benefit of the foster child and not the foster parent. Such grants in terms of Section 4 of Act 13 of 2004, the Social Assistance Act are paid out by the Treasury after having been approved by the Minister of Finance. Child care grants and the grant payable to foster parents for the benefit of a foster child emanates from the Treasury. Mr Salie contends that similarly, the Road Accident Fund compensates victims from funds allocated by the Treasury.

[15] Mr Salie further argued that the Court in the *Timis (Supra)* agreed with the conclusion of *Indrani and Another African Guarantee and Indemnity Company Ltd 1968 (4) SA 606D*, in which case the mother brought an action for loss of support suffered by her and her minor children as a result-" of the death of her husband from injuries sustained in a motor vehicle collision. After the death of her husband, she received certain allowances in respect of maintenance for her children from the State. It was held in that case that the contributions by the State prior to the award of the damages by the Court were deductible because it was benefits received by the children by reason of the death of their father, in the *Timis* case, the learned Judge also referred with approval to the judgment of *Santam Versekeringsmaatskappy v Byleveldt 1973 (2) SA 146 A at 173 -174*.

[16] Mr Salie further pointed out that *Mhlantla JA* in the *Timis* judgment said at paragraph [13] that:

*"In this matter the State assumed the responsibility for the support of the children as a result of the breadwinner's death. The monies 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 at the expense of the tax payer and this incapable of justification. In my view, it was not the intention of, the legislature to compensate the dependents twice."*

[17] It was further argued that the children in this matter were placed in foster care by virtue of a Court Order granted on 13 August 2002 and the subsequent receipt of the foster grant is directly awarded to the motor vehicle collision in which their father died. Mr Salie urged this Court not to follow the dictum of *Malan J* in *Makhuvela v Road Accident Fund (supra)* and held the respectful view that it was wrongly decided. This he says was because of two reasons, firstly, where it was held that the foster care grant was given to the foster parent and not to the child itself in order to comply with his/her obligations and that the parent has no discretion to spend the grant in "part" only on the foster child.

This according to Counsel is not correct because a foster parent does not have unfettered powers to utilize a child foster grant in any manner other than for the benefit of the child.



[18] Secondly, he argued that even though the foster child never has or will have a claim to the foster grant per sé, it shall at all times be the property of the Department of Social Services discretion pursuant to Section 19<sup>1</sup> to substitute any beneficiary in the event of an abuse of the grant by the said beneficiary.

Mr Salie therefore submitted, not to deduct the foster grant, would amount to double compensation and it would be detrimental to the tax payer.

[19] He further argued that in terms of ss 1 (1) and (2) of the Assessment of Damages Act 9 of 1969 where it is stated that:

*"(1) When in any action the cause of which arose after the commencement of this Act, damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.*

*(2) For the purpose of ss (1)~*

*'benefit' means any payment by a friendly society or trade union for the relief or maintenance of a member's dependence;*

*'insurance money' includes the refund of premiums and any payment of interest of such premiums;*

*'pension' includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or lump sum by a pension or provident fund or by an employer in the respect of a person's employment."*

A foster care grant is not a benefit as defined in this provision. It is neither payable by a friendly society nor by a trade union, but through State funding and therefore falls to be deducted.

## [20] **Analysis**

It is common cause that a claim for compensation for loss of support paid out by the Road Accident Fund and all payments made in terms of the Social Assistance Act are funded by the public through two State organs.

[21] In the case of monies paid out in terms of the Road Accident Fund, a claim for loss of support of minor children will always be as a result of the breadwinner's death as a result of a motor collision. In *Makhuvela v Road Accident Fund (Supra)* at page 30 paragraph [5] *Malan J* held:

*"[5] The Social Assistance Act 13 of 2004 provides for the rendering of social assistance to persons*

*and seeks to give effect to the constitutional right of access to social security by providing for 'effective, transparent, accountable and coherent government in respect of social security' The purpose of the Act is, among others, to provide for the administration of social assistance and the payment of social grants. The preamble states that it is enacted, since the Constitution provides 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, and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'.*

*The purpose of the Act is thus not only to secure the support of foster children and other groups of people, but also to ensure equality and the realisation of the rights of the child under the Constitution. ”*

[22] I am further in respectful agreement with *Malan J* where the learned Judge holds the view that the foster grant is given to the foster parent and not to the child itself and that it is given to the foster parent to enable him/her to comply with his/her obligations to the child. I agree with his interpretation of the Act that the point of departure in the Act is the “family which is assumed to shoulder the primary responsibility for the care of the children”,

[23] I further respectfully agree with the teamed Judge’s finding that a foster grant may obviously be used to support the child, but its primary purpose is the realisation of the child through the intervention of the foster parent. No such grant may be paid without the child having a foster parent.

[24] Support for this contention is also to be found in the Regulations published in GN 31356 dated 22 August 2008<sup>2</sup> under Regulation 28(3). The portion thereof which is relevant to this case is that:

*'a foster child grant lapses, on the last day in which the foster child dies, and may also lapse on the last day of the month in which the last living foster parent dies. ’ (own emphasis)*

[25] Regulation 28(2) which deals with the child support grant with which the Court in the *Timis* judgment dealt with states that *a 'child support grant lapses on the last day of the month in which the child in respect of whom the child support grant is paid, dies or when the child who receives the grant attains the age of 15 years with effect from 1 January 2009 or such child is no longer in the custody of the primary care-giver'*

[26] Clearly in terms of Regulation 28(3)(b), no foster care grant may be paid out after the last living foster parent dies. No such payment can therefore be made to the foster child, unless he or she is placed in the care of other foster parents after a Children’s Court enquiry is once again held in terms of the Child Care Act.

[27] In such a case if a child is not again immediately placed in the care of a foster parent and only after a proper Children's Court enquiry in terms of Section 14(4) of the Child Care Act that must determine whether such a child is a child in need of care such a child will have no means of support, without formally being placed in the care of a foster parent, it therefore does not automatically follow that a child who has lost his or her parents and cannot be supported will receive assistance from the State.

[28] In this particular matter, according to the evidence the children were in need of care before the death of the deceased. According to the evidence of their grandmother, Mrs D[...] L [...], a pensioner, aged 74, the children's father passed away before their mother. The mother worked as a construction site worker and earned R80.00 per day. The youngest son E[...] went to stay with her and her husband, also a pensioner on 19 September 2001 when the deceased was sent to prison. Thereafter the two other children also went to stay with her. After the mother's release from prison, two of the children continued staying with Mrs D[...] L [...] and one of them again went to stay with the mother. The other two remained in the care of Mrs D[...] L [...] and her husband until their mother passed away. Thereafter all three children had to stay with her. While the mother was employed, she supported the children while they were staying with Mrs D[...] L [...], but this was not enough to sustain the children's needs.

[29] According to her, after the death of her daughter, she applied for the foster grant. The foster grant according to her is not really enough to care for the children. On the evidence presented it seems that there was sufficient grounds for the children, to be placed in the foster care of Mr and Mrs D[...] L [...] even before the death of her daughter and that they were in need of care.

[30] The death of their mother only formalised their placement as foster children under the care of their grandmother and grandfather. This foster care grant as pointed out by *Malan J*, in the present case was given to the grand parents as foster parents after the death of the deceased, to enable them to comply with their obligations towards the children. They had these obligations prior to the death of the deceased.

[31] It helped them to shoulder the primary responsibility as family for the care of the grandchildren.

The death of the children's mother did not cause the grand parents to take care of the children, but the need for the children to be cared for, even before the mother's death. The later formalization and appointment of them as foster parents and the subsequent grant was to assist them to enable them to comply with the obligations they already had prior to the death of their daughter to care for the children.

[32] Unlike in the case of a child support grant a foster care grant has its own dimensions as pointed out by *Mhlantla JA* in the *Timis* judgment and the two types of grants as pointed out earlier cannot be compared with each other. For the reasons cited above, and in the particular circumstances and facts of this case I



conclude that the child foster grant is indeed a *res inter alios acta*,

[33] Order It is ordered;

1. That the child foster grants are *res inter alios acta*.
2. That the Defendant is ordered to pay the proven damages to the Plaintiff.
3. The Defendant to pay the costs of this application.

HENNEY, J

Judge of the High Court

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1    "19. (1) Whom the Agency has reasonable grounds to suspect that a beneficiary, parent, procurator, or a primary care giver is abusing the social grant, the Agency may appoint a person to investigate such suspected abuse.  
If such person finds on objective grounds that such abuse has taken place, the Agency must appoint a person to receive the social grant on behalf of the beneficiary antj to use it for the benefit of that beneficiary subject to any prescribed conditions. F3

*The Agency may-*

*(a) suspend payment of a child support grant, foster child grant ora care dependency grant to a parent, primary care giver, foster parent or procurator, where the pamnt, primary care giver, foster parent or procuratar-(i) is convicted of abuse or neglect of the child in respect of whom he orshe receives a grant"*

- 2 Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance.