REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: 2022/21891

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

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P.H. MALUNGANA **17 October 2023**

In the matter between:

ZWANE SINETHEMBA obo MINORS Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

MALUNGANA AJ

[1] The plaintiff, a 35-year-old nurse, instituted a dependent's claim against the defendant on behalf of her two minor children arising out of the motor vehicle collision which occurred on 17 June 2020. It is common cause that after receipt of the plaintiff' summons did not enter appearance to defend. As a result, the plaintiff has brought this matter before me by way of an application for default judgment.

[2] In the particulars of claim the plaintiff averred that she is the biological mother of two minor children, aged between 6 and 10 years. On 31 May 2021, and at about 00:10, their biological father, Thulasizwe Praisegod Dlamini ("the deceased"), sustained fatal injuries when the vehicle he was driving collided with another vehicle which was travelling in the opposite direction.

[3] The plaintiff contends further that the aforesaid collision was caused by the sole negligence of the driver of a Nissan Bakkie, Mr B Zwane, whom I shall for the sake of convenience, refer to as "the insured driver."

[4] Although the defendant did not lead any oral evidence, it was legally represented during the proceedings by Mr Jaquelinah Mhlanga from the State Attorney's office, while the plaintiff was represented by Advocate Lerato Mashilo.

[5] This being a dependent's claim, the plaintiff need only prove a proverbial 1% negligence on the part of the insured driver. In *McIntosh v Premier, Kwazulu-Natal and another* [reported at [2008] JOL 21806 (SCA) -ED] Scott JA remarked as follows:

> "As is apparent from the much quoted *dictum* of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the *deligens paterfamilias* take reasonable to guard against such occurrence and did the defendant fail to take these steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as …perform some or the other act positive act, and if so whether the failure on the part of the defendant to do so amounted to a breach of that duty."

Scott JA further proceeded to state that:

> "The crucial question, therefore, is the responsibility or otherwise of the respondent's conduct. This is the second leg of the negligence inquiry. General speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involve a value judgment which is to be made by balancing various competing considerations, including such factors as the degree or extent of the risk created by the actor's conduct, the gravity of possible consequences and the burden of eliminating the risk of harm. See *Cape Metropolitan Council V Graham* 2001 (1) SA 1197 (SCA) para 7."

[6] It follows from the aforegoing principle that the plaintiff must place evidence before the court demonstrating that the insured driver failed in one or the other way to take reasonable steps to avoid the collision and that such failure was the proximate or contributory to the collision.

[7] The plaintiff led the evidence of Bhekiziza Magubane. At about 12h00 (midnight) he was being conveyed as a passenger at the back of an Opel Corsa bakkie driven by the deceased along the road between Inyathi and Dundee. Visibility was dark and

the road consists of single lane on each side which is divided by white broken lines. Whilst so being conveyed he observed that there was a vehicle flashing its bright lights travelling in the opposite direction. Suddenly the vehicle and collided with the one in which he was being conveyed. He further testified that the collision ensued when the deceased's vision was blurred by the bright head lights coming from the insured driver's vehicle. He lost consciousness and only regained it at the hospital. When asked about the statement he made to the police, he testified that the statement was pre-prepared by the police officer who came to his work place and told him to append his signature. He also testified about his lack of formal qualification. He said attended school only up to grade 11.

[8] During cross examination he could not confirm whether the deceased was under the influence of alcohol because he was not with him during the day. He however, testified that he himself had consumed alcohol on the day of the accident. He also testified that the road on which they were travelling did not have street lights, but could see the insured vehicle travelling in the opposite direction because it was flashing its lights. The head lights were too bright to be ignored. He described the accident as head on collision.

[9] Counsel for the plaintiff submitted that the insured driver was the cause of the accident because he drove the vehicle with bright lights thereby blurring the vision of the deceased. Counsel for the defendant on the other hand submitted that the plaintiff's witness was unreliable as he was intoxicated during the collision. He also argued that the witness sought to distance himself from his written statement made to the police which contradicts his evidence. The deceased equally had a duty to avoid the collision.

[10] It was Mr. Magubane's evidence that he was sitting at the back, but could clearly see the lights of the oncoming vehicle which had its bright lights on. It was also his evidence that the insured vehicle (the police vehicle) was also flashing its head lights as it approached the deceased vehicle from the opposite direction. According to him this was the probable cause of the collision in question. He conceded that he signed the statement which was prepared for him by the police, but denies that the version contained therein is the correct account of how the collision occurred.

[11] As pointed out above, the defendant did not lead any oral evidence to contradict his account of the accident. The defendant's failure to lead evidence does not necessarily mean that the plaintiff's evidence must be accepted as correct. The Court will be remiss of its duty if it fails to determine whether the evidence lead is credible and reliable. I have assessed the evidence placed before me. I accept on the inferential basis that the deceased could have been blinded by the lights of the insured vehicle. As a matter of law, there is a duty on every motorist to keep a proper lookout, and to take steps to avoid the accident from happening. The fact that the insured driver was flashing his head lights suggests that he could see the vehicle

driven by the deceased encroaching upon his lane, and could have taken reasonable steps to avoid the collision. I find that the witness testified truthfully and honestly. He did not exaggerate his evidence. On the objective facts the plaintiff had established on the balance of probabilities that the insured driver had failed to avoid the collision when by the exercise of due and reasonable care he could and should have done so.

[12] Turning now to the quantum. Certain things are common cause, or not in dispute. Two minor children, namely Siyethemba (born on 12 September 2013) and Amkelokuhle (born on 15 August 2017) were born out of the love affair between the plaintiff and the deceased. In paragraph 11 to 13 of the particulars of claim, the plaintiff contended as follows:

> "11. The deceased prior to his death had a legal duty to maintain and maintained the minor children.
>
> 12. During the deceased's lifetime, the deceased was gainfully employed as a Belt Crew. At Balindi Mining (Pty) Ltd and had an obligation to contribute towards the maintenance and support of the minor children, which duty and obligation existed after his death.
>
> 13. Further, as a result of the death of the deceased, the minor children have now been deprived of the contribution towards their maintenance and support and have as a result thereof, suffered damages as follows: …"

[13] In support of the dependants' claim, the plaintiff urged me to consider the following documentary information: (i) A copy of his payslip from Balindi Mining (Pty) Ltd; (ii) the actuarial report by Robert Amos Oketch; (iii) The Actuarial confirmatory affidavit of the content of the report (iv) Copies of the birth certificates in respect of the minor children supported by paternity affidavits obtained from the relevant witnesses.

[14] According to the salary advance[1] the deceased earned a gross amount of R 9 202.00 and was also entitled to other benefits such as housing allowance, medical aid as well as overtime bonus.

[15] In *Paixao and another v Road Accident Fund* [2012] 4 All SA 262 (SCA) Cachalia JA said at para [12] as follows:

> "A claim for maintenance and loss of support suffered as a result of a breadwinner's death is recognised at common law as a "dependents action." The object of the remedy is to place the dependants of the deceased in the

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same position, as regards maintenance, as they would have been had the deceased not been killed. The remedy has been described as "anomalous, peculiar and *sui generis"* because the dependent derives her right not through the deceased or his estate but because she had suffered loss by the death of the deceased for which the defendant is liable. However, only a dependant to whom the deceased, whilst alive owed a legally enforceable duty to maintain and support may sue in such action."

[16] On the facts placed before me, I am satisfied that the deceased owed the minor children a legally enforceable duty to maintain and support them. What remains is the amount of money that the plaintiff is entitled to based on the evidence proven by the plaintiff. According to the actuarial report filed in support of the application for default judgement the minor children's loss of earnings were calculated based on two scenarios, the first one is based on the assumption that the minor children would be depended on the deceased until the age of 18 years, and the second one is based on the age of 21 years. In both instances the actuary applied general contingencies of 5% for past loss and 15% for future loss of support. In respect of the loss of support based on 18 years dependency, the actuarial calculations yielded the following results:

SCENARIO 1

	SIYETHEMBA	**AMKELOKUHLE**	**TOTAL**
Past Loss	37 717	37 717	75 434
Contingencies	(1886)	(1886)	3 772
Nett Past Loss	35 831	35 831	71 662
Future Loss	451 369	651 282	1 102 651
Contingencies	(67 705)	(97 692)	(165 397)
Net Future Loss	383 664	553 590	937 254
Total Loss	414 495	589 421	1 008 916

[17] In respect of scenario 2 based on the age of 21 years dependency, the actuarial calculations produced the following results:

SCENARIO 2

	SIYETHEMBA	**AMKELOKUHLE**	**TOTAL**
Past Loss	37 717	37 717	75 434
Contingencies	(1886)	(1886)	3 772
Net Past Loss	35 831	35 831	71 662
Future Loss	555 496	747 903	1 313 399
Contingencies	(84 824)	(112 185)	(197 009)
Net Future Loss	480 672	635 718	1 116 390

Total Loss	516 503	671 549	1 188 052

[18] The deceased would have turned 33 years of age on 25th November 2023, but for the accident. The actuarial calculations take into account the rate of inflation, tax deduction, assumptions as to the mortality and plaintiff's working life. The salary inflationary increases have been assumed until normal retirement age of 65 on 30 November 2055. I take into account that the deceased was still a young man. There is no evidence that he was a sickly person. I am of the view that he would have been able to support the minor children beyond the age of 18 years, and see them through college or university life. I have no reason to reject the plaintiff' submission that favours the actuarial calculations based on scenario 2 above. Due to this finding the Court will therefore assess the plaintiff's past and future loss in the amount of R1 188 052.00.

[19] In the result judgment is granted in the plaintiff's favour as follows:

1. Payment of the sum of R1 188 052.00 within 180 days from date of this order;

2. Interest on the above amount of R 1 188 052.00 at the rate of 8.55 calculated 14 days from date of judgment to date of final payment;

3. Defendant shall pay plaintiff's taxed or agreed party and party costs which costs shall include costs of expert witness and employment of counsel.

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P.H. MALUNGANA
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	25 May 2023
Judgment:	17 October 2023

Appearances:

For Plaintiff:	L Mashilane
Instructed by:	Khumalo T. Attorneys
For Defendant:	J Mhlanga
Instructed by:	Office of the State Attorney