THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 882/2016

In the matter between

ROAD ACCIDENT FUND **APPELLANT**

and

REBECCA MOHOHLO **RESPONDENT**

Neutral citation: *Road Accident Fund v Mohohlo* (882/16) [2017] ZASCA 155 (24 November 2017)

Coram: Leach JA, Meyer, Mokgohloa, Makgoka and Rogers AJJA

Heard: 13 November 2017

Delivered: 24 November 2017

Summary: Delict – dependant's action – claim by deceased's aunt – de facto adoption – deceased owed her duty of support – claimant sufficiently indigent to enforce duty.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Rogers AJA (Leach JA, Meyer, Mokgohloa and Makgoka AJJA concurring):

[1] The question in this appeal is whether the respondent, who was the plaintiff in the court a quo, is entitled to claim damages for loss of support arising from the death of her nephew, Otshepeng Letshufi, who died on 27 October 2011 as a result of injuries sustained in a motor collision on 2 July 2011. The appellant, the defendant in the court a quo (RAF), conceded the issue of negligence but disputed the respondent's right to damages. For convenience I refer to the respondent as the plaintiff.

[2] The parties asked the court a quo to determine whether Otsepeng owed the plaintiff a legal duty of support and whether she had the degree of indigence entitling her to enforce the duty. The quantification of her claim, if these questions were answered in her favour, stood over for later determination. Unfortunately, and despite repeated admonishments from this court, the matter proceeded without a formal separation order, without a clear identification of the issues and without proper consideration as to whether separation was convenient.[1] The result was that the court a quo, which found for the plaintiff, made an order that the RAF was 'liable to compensate the plaintiff… (for) the amount of damages the plaintiff is able to prove'. This was not in terms a determination of the issues which the parties apparently wanted the judge to decide.

[1] See eg *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4; 2004 (4) SA 481 (SCA) para 3; *Absa Bank Ltd v Bernert* [2010] ZASCA 36; 2011 (3) SA 74 (SCA) para 21.

[3] It is doubtful whether a separation of issues was convenient. The quantification would not have required extensive evidence. More importantly, there is a connection between indigence and quantification, since the quantum of support, if any, to which the plaintiff is entitled would be the amount required to eliminate the indigence.

[4] However, it would not be fair to the plaintiff if we were to refuse to determine the appeal at this stage. We thus proceed on the basis that the court a quo's decision should be understood as a determination that Otsepeng owed the plaintiff a legal duty of support and that she was sufficiently indigent to enforce the duty. Since quantification has been deferred for later decision, even a slight deficit in her resources would suffice to sustain the court a quo's decision.

[5] It is not the plaintiff's case that Otsepeng owed her a duty of support merely by virtue of their blood relationship. According to our common law, blood relationship per se only gives rise to a duty of support to the second degree of consanguinity so that, while there is a duty of support between grandchild and grandparent, and between siblings inter se, there is no duty of support between uncle/aunt on the one hand and nephew/niece on the other. See Voet *Commentary on the Pandects* 25.3.10 (Gane's translation); Van Leeuwen *Roman-Dutch Law* 1.13.7 (Kotze's translation, 2 ed); Van Leeuwen *Censura Forensis* 1.10.4 (WP Schreiner's translation); Sande *Frisian Decisions* 2.8; Huber *Jurisprudence of My Time* 1.23.30 (Gane's translation); *Ford v Allen & others* 1925 TPD 5, which contains a full discussion of the old authorities; *United Building Society v Matiwane* 1933 EDL 280 at 284; *Vaughan NO v SA National Trust and Assurance Co Ltd* 1954 (3) SA 667 (C) at 670D-671B. See also Van Heerden et al *Boberg's Law of Persons and the Family* 2 ed at 253.

[6] In *Vaughan NO* Herbstein J, with whom Van Wyk AJ concurred, referred to Grotius 3.33.2 where the writer speaks of 'the widow and children and any others, if such there be, who were maintained by the dead man's labour', observing that insofar as Grotius related the duty of support to the factual provision of support by the deceased at the time of his death, the writer did not appear to state our law (at 671A). He also pointed out that, in the light of Voet's unequivocal statement at

25.3.10, the same writer's reference at 9.2.11 to a duty of support owed to the wife and children and 'other near relations' could not be a reference to the relationship between an uncle/aunt and nephew/niece.

[7] In the present case, the plaintiff relies on circumstances additional to the blood relationship. She was the only person to testify (which she did through an interpreter) and her evidence must be accepted unless it was plainly unsatisfactory, which I do not think it was. Her evidence disclosed the following. She is the oldest of her siblings, of whom only two sisters survive. She was 64 when she testified in August 2015. Otsepeng is the child of one of her surviving sisters, Lenah. The latter was an unmarried woman of 19 when she gave birth to Otsepeng in March 1983. She was still at school. Otsepeng's alleged father is deceased and disputed paternity while he was alive. Lenah subsequently married another man with whom she has four children and a grandchild.

[8] The plaintiff testified that in her culture, when a woman who has a child marries another man, the man's family will not accept the child as their own. In such circumstances there is family consultation to decide who will take care of the child. In the present case the plaintiff, who had no children of her own, agreed to take Otsepeng into her home. He was about three months old. She treated him as her son and he viewed her as his mother. Lenah and her husband never provided financial support for him. She was asked why she did not formally adopt Otsepeng. Her answer was that 'in our culture we do not have these things of adopting'.

[9] The plaintiff was a domestic worker until 2004 when she was forced by ill-health to give up permanent employment. She testified that she suffers from diabetes, high blood pressure, heart troubles and arthritis. She has subsequently done occasional jobs as a babysitter and selling vegetables and vetkoek. She evidently cared well for Otsepeng because he was able to enter the formal job market in 2007 at the age of about 24. At the time of the collision he was earning R6 690 per month as a financial consultant with Old Mutual. He continued to live with her. She testified that he supported her by giving her cash and buying her groceries and clothes.

[10] This court has on several occasions in recent years considered the extension of claims for loss of support to persons who do not fall within categories recognised by the common law, in particular partners who are not married according to civil law. Most recently, in *Paixão & another v Road Accident Fund* 2012 (6) SA 377 (SCA), which dealt with a claim for loss of support by an unmarried life partner and her daughter, Cachalia JA said the following (para 13, citation of authority omitted):

'The existence of a dependant's right to claim support which is worthy of the law's protection, and the breadwinner's correlative duty of support, is determined by the boni mores criterion or, as Rumpff CJ in another context put it in *Minister van Polisie v Ewels*, the legal convictions of the community. This is essentially a judicial determination that a court must make after considering the interplay of several factors: "the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas of where the loss should fall". In this regard considerations of "equity and decency" have always been important. Underpinning all of this are constitutional norms and values. So the court is required to make a policy decision based on the recognition that social changes must be accompanied by legal norms to encourage social responsibility. By making the boni mores the decisive factor in this determination, the dependants' action has had the flexibility to adapt to social changes and to modern conditions.'

[11] Cachalia JA went on to refer to a passage from Mahomed CJ's judgment in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) para 7 where the Chief Justice said that the precise scope of the dependant's action was unclear from the writings of the Roman-Dutch jurists and that there were passages in Grotius and Voet perhaps suggesting that the action might be extended to any dependant within the deceased's 'broad family whom he in fact supported whether he was obliged to do so or not' or to any dependant enjoying a 'de facto close familial relationship with the breadwinner'. As I have said, Voet and others were quite clear that there was no legal duty of support beyond the second degree of consanguinity.

[12] However, the legal convictions of the community are not static. It may well be that a legal duty of support which depends on nothing more than the happenstance of a blood relationship should be kept within the limits indicated in our old authorities. Our ideas of morals and justice may not, in general, insist on support between more distant relatives. It by no means follows that the same approach

should be followed where the blood relationship has been fortified by additional circumstances. And in answering the latter question, one must have regard to the values underlying our Constitution. One of these is ubuntu:

'The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'

See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37; see also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) para 38.

[13] Another relevant consideration is that in terms of s 211(3) of the Constitution the court must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. In *United Building Society v Matiwane*, cited earlier, the plaintiff, who claimed inter alia on behalf of the daughters of the deceased's sister, alleged that the deceased had been duty bound to support his nieces 'by native law and custom' and that the plaintiff was entitled to bring the claim on their behalf as the head of the kraal according to such law and custom. The court held that customary law could not govern the defendant's liability and that our common law did not recognise a duty of support owed by an uncle to his nieces. By virtue of s 211(3) of the Constitution, the answer would be different now. What needs to be ascertained is whether in law the one family member owed the other a duty of support. If that duty existed by virtue of a customary law applicable to the family, the duty should be recognised, even though – in a dependant's claim – the defendant is not itself a party bound by customary law.

[14] In the present case there was no expert evidence as to customary law. However, the plaintiff testified as to what was required by her culture and her evidence was not put in issue. It may well be that, once she agreed to care for Otsepeng following family consultation, she had by customary law a legal duty to support him but it is unnecessary to go so far. On her evidence, she at least felt under a duty to do so. She started caring for him when he was still an infant and

continued to maintain him until he became self-supporting. Her behaviour, and the way Otsepeng reciprocated when he became an adult, gave expression to ubuntu. For all practical purposes the plaintiff adopted him, even though according to her there was no formal process of adoption in her culture. The de facto relationship between them was that of mother and child. This de facto relationship was every bit as real as the de facto life partnerships which our courts have accepted as giving rise to reciprocal duties of support.

[15] In *Fosi v Road Accident Fund & another* 2008 (3) SA 560 (C) Dlodlo J provided an African law perspective of the duty of support. Although in that case the deceased was the biological child of the mother, the following passage almost certainly would have been recognised by the plaintiff and Otsepeng as applicable to their de facto relationship of mother and child (para 16):

'When an African (black) provides support and education to his/hers son/daughter, he/she is not only under a duty to do so on the strength of the 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. . . It is for this reason that the plaintiff was puzzled on being asked in cross-examination why the deceased sent 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.'

[16] In *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) the court recognised a duty of support where an uncle had accepted custody of two minor children upon the death of their father, his brother, even though the process of adoption was not complete according to tribal rules because of the absence of consultation with the mother's family. With reference to this and other cases, Sutherland J in *JT v Road Accident Fund* 2015 (1) SA 609 (GJ) said the following (para 26):

'It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally embedded notion of "family", constituted as being a network of relationships of reciprocal nurture and support, informs the common-law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in relationships akin to that of family. This norm is not parochial but rather is likely to be universal, it certainly is consonant both with norms derived from the Roman-Dutch tradition . . . and, no less, from norms derived from African tradition, not least of al as exemplified by the spirit of Ubuntu, as mentioned by Dlodlo J in *Fosi v RAF* supra.'

[17] In my view it would be consistent with the legal convictions of the community to recognise a reciprocal duty of support between the plaintiff and Otsepeng. Indeed, to deny it would revolt one's ideas of 'morals and justice' and considerations of 'equity and decency' (see *Paixão* supra).

[18] The defendant's counsel submitted that such a finding would open the floodgates to similar claims and that the RAF would be at an evidential disadvantage in determining whether the de facto relationship existed. I do not think the recognition of the duty of support can depend on the particular position of the RAF. The question is whether, as between the de facto mother and child, a duty of support exists. The fact that the breadwinner may die in a motor accident as a result of another driver's negligence, leading to potential liability on the part of the RAF, cannot affect the answer to the question. If, for example, Otsepeng had fallen out with his de facto mother and stopped supporting her, her right to claim support from him could obviously not have been affected by the notional possibility that he might at some stage die in a motor accident because of another driver's negligence.

[19] Furthermore, there is nothing before us to show that claims of the present kind would be very numerous. We will not be deciding that there is, without more, a duty of support between an aunt and her nephew; or that such exists once it could be shown that the nephew has assisted his aunt financially. We are only deciding that a duty of support exists where, in accordance with the family's cultural practices, an aunt has de facto adopted an infant and brought him up as her own

child. I doubt whether such cases are likely to be more common than the life partnerships which have already been recognised by the courts as giving rise to a duty of support.

[20] In any event, the 'evidential disadvantage' should not be overstated. There are many aspects of claims against the RAF which depend on information of which the RAF in the nature of things can have no knowledge. Where loss of support is claimed, para 18 of the prescribed RAF 1 form requires all necessary particulars to be furnished, including the reason for dependence. Where the duty of support rests on a de facto relationship rather than a blood or marital relationship recognised by law, the proper answering of this component of the form would require adequate particularity to be given. The RAF could ask the claimant to provide corroborating information under oath, with the warning that if the claimant fails to do so but eventually succeeds at trial, the RAF will ask for an adverse costs order. By signing the prescribed form, the claimant expressly gives the RAF consent to obtain information and documents from any persons who are able to provide it. After the institution of proceedings the RAF could file a request for further particulars for purposes of trial. It could consult with other family members.

[21] The other question we must decide is whether the plaintiff's financial circumstances are such that she is entitled to enforce the duty of support. In *Oosthuizen v Stanley* 1938 AD 322 it was said that a child has a duty to support his parents if they are 'indigent'. Tindall JA referred to support in the form of food, clothing, lodging and medical care 'in accordance with the quality and condition of the persons to be supported'. Whether a parent is in such a state of 'comparative indigency or destitution' was said to be a question of fact depending on the circumstances of each case (p 328). The word 'comparative' was presumably used by the learned judge to emphasise that the exercise should be undertaken with reference to the 'quality and condition of the persons to be supported' so that what might constitute indigence with reference to one person would not necessarily constitute indigence with reference to a more humble person (see *Van Vuuren v Sam* 1972 (2) SA 633 (A) at 642E-F and 643E-F). Even so, support is limited to the dependant's basic needs – food, clothes, board and medical care (at 642F).

[22] Just as the existence of a duty of support is affected by considerations of public policy, so in my view is the content of the duty. With the advent of democracy and abolition of apartheid, people disadvantaged under the previous regime have the opportunity of improving their economic lot. One of the ways of doing so is by providing children with opportunities denied to their parents. I do not think it would be consistent with our constitutional values to hold that an indigent woman, who has been able to raise and educate a child despite her straitened circumstances, can expect no more support from the child than is necessary to keep her in the same deprived circumstances as she was forced to endure for most of her life.

[23] The plaintiff testified that while Otsepeng was alive they lived in Hillbrow where her accommodation cost R1 000 per month. Since Otsepeng's death she has had to move back to her rural roots (she called it her homeland) where she now pays R600 for accommodation. She estimated her monthly grocery and transport expenses at R1 000 and R350 respectively. She also pays (or used to pay) a monthly amount to a burial society. In cross-examination she was asked to confirm that these were her expenses. She replied:

'I have highlighted those things before court although they themselves are accommodated to the grant that I receive and again what will it help me if I highlight to this court much more things, there is quite a lot of things to life. There is quite a lot of things to spend in the life of today that are in need to a person to survive.'

[24] The grant mentioned in this passage is an old age pension which she has been receiving since she turned 60 (which would have been in 2011). This amounted to R1 350 as at August 2015. She testified that while Otsepeng was alive he would pay her between R1 200 and R1 300 per month in cash, which she spent on rent, medication and her burial society contributions. In addition he would buy groceries. From time to time he would also buy her clothes. She was asked about her lifestyle before his death. She replied:

'I was leading a very nice lifestyle your ladyship even in clothing. [Otsepeng] sometimes said to me Mama let's go out, let me go and buy you something that will make you look nice.

And now ma'am what is your lifestyle now like? --- Even now in clothing your ladyship it is a disaster with me. I do not have nice clothes any more. I do not live a lifestyle which I used to live.'

[25] The defendant's counsel submitted that this demonstrated that the plaintiff was wanting support for luxuries. I disagree. Otsepeng's income was not large. He no doubt wanted the plaintiff to be able to dress in a way which lent her dignity and gave her a certain basic pleasure. I do not think that that goes beyond her basic needs.

[26] In regard to her selling of vetkoek, the plaintiff said that the income was sporadic. She required assistance to sell as she could not stand for a long time. When she ran out of money she looked to other relatives for help. As noted, she has moved back to the countryside to reduce the cost of her accommodation. Her household consists of herself and an unemployed daughter of her deceased brother, for whom it seems she is caring on much the same basis as she took Otsepeng into her home. The daughter has a child whom the plaintiff described as her grandchild.

[27] It is clear, in my view, that R1 350 per month, plus modest sporadic income from selling vetkoek, is not enough to cover the plaintiff's basic necessaries of life, such as are reasonably appropriate to her station in life following Otsepeng's successful entry into the job market in 2007. At that time she was living in Hillbrow and she should not be denied the opportunity of returning there, particularly since she is likely to have increasing need of medical care as she ages. Even if one confines her accommodation expenditure to the current amount of R600, that leaves only R750 for groceries, clothing, transport, burial society contributions and other incidental expenses. That is not enough to save her from indigence, even if it be assumed that all medical expenses are provided free of charge by State facilities.

[28] In the circumstances, it is unnecessary to decide whether the plaintiff's ability to obtain free medical services from the State should be taken into account when it comes to quantifying her claim for loss of support. When that question comes to be answered, the parties will need to have regard to the recent judgment of the Constitutional Court in *Member of the Executive Council for Health and Social*

Development, Gauteng v DZ obo WZ [2017] ZACC 37 (31 October 2017). In para 23 of the majority judgment, Froneman J said the following with reference to this court's decision in *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (A):

'*Ngubane* is authority for allowing a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care, will be available to a plaintiff in future. If that evidence is of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses. This approach is in accordance with general principles in relation to the proving of damages.'

Froneman J disapproved the contrary conclusion in the more recent decision of this court in *The Premier, Western Cape N.O. v Kiewitz* [2017] ZASCA 41; 2017 (4) SA 202 (SCA). If this approach were extended to claims for loss of support incorporating future medical treatment, the passage I have quoted suggests that the evidential burden would rest on the RAF to show that the plaintiff does not reasonably require private medical treatment as part of her support.

[29] I thus make the following order:

The appeal is dismissed with costs.

O L Rogers
Acting Judge of Appeal

APPEARANCES

For Appellant	R Strydom (with him CPJ Strydom) Instructed by FourieFismer, Pretoria c/o Maduba Attorneys, Bloemfontein
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