THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 29/09

In the matter between:

THE ROAD ACCIDENT FUND **Appellant**

and

NTOMBIZANELE FLORENCE TIMIS **Respondent**

Neutral citation: *The Road Accident Fund v N F Timis* (29/09) [2010] ZASCA 30 (26 March 2010)

Coram: Navsa, Heher, Mhlantla JJA, Hurt et Saldulker AJJA
Heard: 1 March 2010
Delivered: 26 March 2010

Summary: Motor vehicle accident ─ death of breadwinner ─ claim against RAF ─ deductibility of child care grants from the damages awarded. Held ─ child support grants are directly linked to the death of the deceased and deductible from final award.

ORDER

On appeal from: The Eastern Cape High Court, Port Elizabeth (Liebenberg J sitting as court of first instance).

The following order is made:

1. The appeal is upheld.
2. The order made by the court below is set aside and replaced with an order in the following terms:

'There shall be judgment for the plaintiff as follows:

(a) In her capacity as mother and natural guardian of Siphokazi, payment of the amount of R136 594.40.

(b) In her capacity as mother and natural guardian of Zandile, payment of the amount of R166 386.05.

(c) In her personal capacity, payment of the amount of R324 586.60.'

JUDGMENT

MHLANTLA JA (NAVSA, HEHER JJA, HURT and SALDULKER AJJA concurring):

[1**]** Mr Alfred Vuyisile Makeleni (the deceased) died from injuries sustained after being struck by a motor vehicle on 28 July 2001. He was married to Ms Ntombizanele Timis, the respondent in this matter, in terms of customary law. They had two minor children, namely Siphokazi born on 24 June 1996 and Zandile born on 25 May 1999. The deceased was the sole breadwinner. Shortly after his death, the respondent, who

was unemployed, applied for the benefit of her children for a child support grant in terms of the Social Assistance Act 59 of 1992, which has since been repealed by the Social Assistance Act 13 of 2004 (the Act). The application was approved during November 2001.

[2] The respondent instituted action in the High Court, Port Elizabeth against the Road Accident Fund, a statutory insurer and the appellant in this matter, for damages arising from the death of her husband. The matter came before Liebenberg J. The merits already having been conceded, the learned judge was only required to determine quantum. One of the issues that had to be decided was whether the amount of the children's grant received by the respondent after the death of her husband should be deducted from the damages to be awarded in respect of the children. At the time of the trial, the total amount of the grants received by the respondent on behalf of the children was R14 690.

[3] At the end of the trial, the learned judge, after discussing *Indrani & another v African Guarantee and Indemnity Co Ltd*,[1] disagreed with that court's conclusion to the effect that the contributions by the State prior to the award of damages were deductible because they were received by the children by reason of the death of their father.

[4] Liebenberg J held that the child support grants could not be said to have been received in consequence of the deceased's death and that the amount of R14 690 could therefore not be deducted from the final award made to the children for loss of support by the deceased. The court, after

[1] 1968 (4) SA 606 (D).

taking into account the question of contingencies, awarded damages in respect of the children[2] as follows:

In respect of Siphokazi - R143 939.40

In respect of Zandile - R173 731.05

The appellant now appeals against this finding with the leave of the court below.

[5] The issue on appeal is whether or not the child support grants should have been deducted by the trial court from the damages awarded to the respondent in her representative capacity for loss of support.

[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 purpose and 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 a child who does not have maintenance. A child support grant is made in terms of section 6 of the Act.[3] Certain requirements have to be complied with before a person qualifies for the grant.[4] An applicant, inter alia, qualifies for the grant, if

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[2]The damages awarded to the respondent in her personal capacity was in an amount of R324 586.60.

[3] Section 6 reads:

'**Child support grant**

A person is, subject to section 5, eligible for a child support grant if he or she is the primary care giver of that child.'

[4] Section 5 reads:

'**Eligibility for social assistance**:

(1) A person is entitled to the appropriate social assistance if he or she ─

(a) is eligible in terms of section 6, 7, 8, 9, 10, 11, 12 or 13;

(b) . . . ;

(c) . . . ;

(d) complies with any additional requirements or conditions prescribed in terms of subsection (2); and

(e) applies for social assistance in accordance with section 14(1).

(2) The Minister may prescribe additional requirements or conditions in respect of ─

(a) income thresholds;

(b) means testing;

(c) . . . .'

he or she has no source of income or if the income is below the threshold level.

[7] In *Indrani*, a 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 the husband, she received certain allowances in respect of maintenance for the children from the State in terms of section 89(1) of the now repealed Children's Act 33 of 1960. Fannin J stated that a dependant entitled to damages for loss of support should be awarded damages only for the material loss caused by the breadwinner's death.[5] The judge held that the contributions by the State prior to the award of the damages by the court were deductible because they were benefits received by the children by reason of the death of their father. A similar approach is to be found in the judgment of Trollip JA in *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) at 173 to 174. It is that fundamental principle, subject to the considerations set out in the next paragraph, that has to be applied in this case.

[8] In *Zysset & others v Santam Ltd*[6] the following was stated:

'[I]t 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

[5] At 607F-G.
[6] 1996 (1) SA 273 (C) at 278B-D; and 278H-279C. See also Lawsa Vol 8(1) 2ed para 156 and *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A) at 42B.

assistance of the plaintiff . . . . Nonetheless, as pointed out by Lord Bridge in *Hodgson v Trapp & 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 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 . . . .

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. 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.'

[9] A plaintiff should not be precluded from obtaining a full measure of damages. He or she should however not receive double compensation. In *Hodgson v Trapp & another*,[7] the plaintiff claimed damages for personal injuries sustained and loss and expenses incurred as a result of a motor vehicle accident. The trial judge awarded damages. The defendants

[7] [1988] 3 All ER 870 (HL).

appealed to the House of Lords to determine whether or not the attendance and mobility allowances payable to the plaintiff pursuant to sections 35 and 37 of the Social Security Act should be deducted from the award made. Lord Bridge stated the following:[8]

'In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as the "benevolent donor", intends to benefit "the wrongdoer", as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to me entirely artificial. There could hardly be a clearer case than that of the attendance allowance payable under s 35 of the 1975 Act where the statutory benefit and the special damages claimed for cost of care are designed to meet the identical expenses. To allow double recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground.'

[10] Counsel for the respondent submitted that the child support grants were not causally linked to the death of the deceased as the receipt of such grants was not a benefit arising from his death and accordingly that these grants were *res inter alios acta*.

[11] This submission has no merit. It is not in dispute that the deceased was responsible for the support of his family during his lifetime. The position, however, changed upon his death as his family became indigent. The respondent had to apply for the child care grant as the parent who had provided maintenance had died. The children received a benefit of a social grant because they had lost their father, a breadwinner, in

[8] At 876F.

circumstances set out in para [1] above. The child support grants are therefore directly linked to the death of the deceased.

[12] Counsel for the respondent relied further on *Makhuvela v Road Accident Fund*.[9] In that case, the parents of a minor child had died, whereafter the grandparents were appointed as foster parents. The grandmother received a foster care grant. The court had to decide whether the payment of such a grant was *res inter alios acta* and not deductible from the final award of damages. Malan J held that the primary purpose of the foster care grant was the realisation of the constitutional rights of the child through the intervention of the foster parent. The grant was paid to the foster parent and not the child to enable the parents to comply with their constitutional and other obligations to the child. In *Makhuvela*, the court was dealing with a foster care grant which has its own dimensions. In the present case, we are concerned with the material loss suffered by reason of the deceased's death and the impact of a social assistance grant for the benefit of a child. For this reason, it is not necessary to explore the correctness or otherwise of the judgment in *Makhuvela*.

[13] In this matter, the 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 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.

[9] [2009] ZAGPJHC 18; 2010 (1) SA 29 (GSJ).

[14] Although the amount in dispute in the present case may appear to be small and insignificant, one has to consider the fact that there may be a multitude of similar claims and with resultant ramifications for the National Treasury. It seems to me that the principles of fairness, equity and reasonableness dictate that the grants received should be deducted from the awards made by the court a quo. As far as equity is concerned, there is a public interest in the support of indigent children. The deduction of the grants will not leave the children destitute as their interests have been met by the final award of the sums of R136 594.40 and R166 386.05 respectively, which represents the true measure of the damages sustained.

[15] The court a quo accordingly erred in finding that the child support grants should not be deducted. Its order in that regard must be set aside.

[16] That brings me to the question of costs. The appellant does not seek a costs order against the respondent. We were, however, provided with three volumes of unnecessary material, when the parties could have agreed that the matter be decided in the form of a stated case. It has become an undesirable and not infrequent practice that parties do not give due consideration to the rules relating to the composition of records on appeal. We record, once again our disapproval of this practice.

[17] In the result the following order is made:

1. The appeal is upheld.
2. The order made by the court below is set aside and replaced with an order in the following terms:

'There shall be judgment for the plaintiff as follows:

(a) In her capacity as mother and natural guardian of Siphokazi, payment of the amount of R136 594.40.

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(c) In her personal capacity, payment of the amount of R324 586.60.'

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JUDGE OF APPEAL

APPEARANCES:

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