THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 058/2017

In the matter between:

CHINAZ SEPTOO obo J M SEPTOO

& M SEPTOO **APPELLANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *C Septoo obo J M Septoo & another v The Road Accident Fund* (058/2017) [2017] ZASCA 164 (29 November 2017)

Coram: Tshiqi, Majiedt and Mocumie JJA, Mbatha and Rogers AJJA

Heard: 09 November 2017

Delivered: 29 November 2017

Summary: Delict – action for damages – loss of support – dependant's action – breadwinner died as a result of own negligence – single vehicle accident – wrongfulness not established against the Road Accident Fund – appeal dismissed.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Schoeman J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Mbatha AJA (Tshiqi, Majiedt and Mocumie JJA and Rogers AJA concurring)

[1] The appeal before us is with the leave of the high court, Eastern Cape Local Division, Port Elizabeth. The issues on appeal are; first, whether dependants, in the position of the appellant Ms Chinaz Septoo, and her minor children, are entitled to claim compensation for loss of support from the respondent, the Road Accident Fund (the Fund) in terms of the Road Accident Fund Act 56 of 1996 (the Act) in circumstances where the deceased breadwinner was the sole cause of the collision; second, whether the common law should be developed to include such claims.

[2] The deceased, who was the driver of the motor vehicle at the time of the collision, was married to the appellant and was the father to both her minor child and unborn child. The appellant and her minor child were both passengers in the said motor vehicle. The deceased negligence was the sole cause of the collision. In a separate action the Road Accident Fund (the Fund) was declared liable for the appellant and her minor child's general damages and future medical expenses. In

another action giving rise to the present appeal, she claimed damages for loss of support.

[3] Section 3 of the Act stipulates that:

'The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.'

The underlying basis for the Act is the common law principles of the law of delict. A claimant must therefore prove all the elements of a delict before it can succeed with its claim in terms of the Act.

[4] In *Legal Insurance Company Ltd v Botes*[1] this Court described the nature of the dependants' claim for loss of support in the following manner:

'At the outset it is necessary to deal with the nature and scope of the action, according to existing South African Law, by dependants against a person who has unlawfully killed the bread-winner who was legally liable to support them. The remedy was unknown to Roman Law, in which no action arose out of the death of a freeman, and consequently the Aquilian action was not available. It had its origin in Germanic custom, in which the reparation of "maaggeld" was regarded as a conciliation to obviate revenge by the kinsmen of the deceased, and it was divided among the latter's children or parents or other blood relatives. The Roman-Dutch Law modified the custom by regarding the payment as compensation to the dependants for loss of maintenance. The Roman-Dutch jurists felt that this could be accommodated within the extended framework of the Roman Aquilian action by means of a *utilis actio.* The remedy has continued its evolution in South Africa - particularly during the course of this century - through judicial pronouncements, including judgments of this Court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss "caused to the dependants of the deceased man by his death". It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed.

[1] *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608; [1963] 1 All SA 593 (A).

To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and *sui generis* - but it is effective.'[2]

[5] In *Evins v Shield Insurance Co Ltd*[3] this Court illustrated the distinction between a dependant's claim, and a damages action for bodily injuries as follows: 'In the case of an Aquilian action for damages for bodily injury . . . the basic ingredients of the plaintiff's cause of action are *(a)* a wrongful act by the defendant causing bodily injury, *(b)* accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and (c) *damnum*, ie loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of an action arises. In the usual case of bodily injury arising from a motor accident this concurrence would take place at the time of the accident.' On the other hand, in the case of action for damages for loss of support, the basic ingredients of the plaintiff's cause of action would be (*a*) a wrongful act by the defendant causing the death of the deceased, (*b*) concomitant *culpa* (or *dolus*) on the part of the defendant, (*c*) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (*d*) *damnum*, in the sense of a real deprivation of anticipated support. The *facta probanda* would relate to these matters and no cause of action would arise until they had all occurred.'[4]

[6] In *Aetna Insurance Co v Minister of Justice*[5] this Court said that the purpose of motor vehicle insurance legislation was to remedy the evil 'that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been

[2] Ibid at 614B-E.
[3] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); [1980] 2 ALL SA 40 (A).
[4] Ibid at 838H-839C.
[5] *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A).

killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance.'[6]

[7] The provisions of the Act that are relevant to the present enquiry are ss 17, 19 and 21. Section 17 confers on a third party a right to claim against the Fund for any loss or damage suffered by him or her as a result of personal injury to himself or herself, or death of or any personal injury to any other person, if the injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle.

[8] Section 19*(a)* of the Act excludes liability for the Fund in certain cases. It provides that:

'The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage –

(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21; or

(b) . . .'

[9] Section 21(1) provides that:

'(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie–

(a) against the owner or driver of a motor vehicle; or

(b) against the employer of the driver.

(2) Subsection (1) does not apply –

(a) if the Fund or an agent is unable to pay any compensation; or

(b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was

[6] Ibid at 285A-B.

informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle.'

[10] In *Mlisane v South African Eagle Insurance Co Ltd*[7] the facts and the legal question raised were similar to the ones raised in this case. The court in that matter held that:

'the defendant incurs liability because he has acted wrongfully and negligently (or with *dolus*) towards the deceased and thereby caused the death of the deceased.'[8]

It held further that the right of action was against a third party who unlawfully caused the death of a breadwinner and not against the estate of a breadwinner who caused his own death.[9]

[11] In *Amod v Multilateral Motor Vehicle Accidents Fund*[10] this Court set out the requirements for the action for dependants, being that:

'*(a)* The claimant for loss of support resulting from the unlawful killing of the deceased must establish that the deceased had a duty to support the dependant;

(b) It had to be a legally enforceable duty;

(c) The right of the dependant to such support had to be worthy of protection by the law;

(d) The preceding element had to be determined by the criterion of *boni mores*.'

[12] In *Amod* the requirement of the unlawful killing of the deceased was reaffirmed as an essential requirement. This Court in *Du Plessis v Road Accident Fund*[11] stated as follows:

'In terms of s 17 of the Act the defendant or an agent is, subject to the provisions of the Act, obliged to compensate any person for any loss or damage which that person has suffered as a

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[7] *Mlisane v South African Eagle Insurance Co Ltd* 1996 (3) SA 36 (C).
[8] Ibid at 41G.
[9] Ibid at 41E-F.
[10] *Amod v Multilateral Motor Vehicle Accidents Fund* (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA); 1999 4 All SA 421 (A) para 12.
[11] *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

result of the death of any other person caused by or arising from the driving of a motor vehicle if the death is due to the negligence of the driver or owner of the vehicle. Section 19*(a)* of the Act exempts the defendant from liability for loss or damage for which neither the driver nor the owner of the motor vehicle which caused the deceased's death, would have been liable at common law.'[12]

[13] In *Brooks v Minister of Safety and Security*[13], where this Court had to deal with whether a claim for maintenance against the Minister of Safety and Security by the dependant of a convicted criminal was competent or not, the following was said:

'It is true that in matters of human behaviour we are often told not to judge by results, but in law, when considering whether a contention is well-founded, the absurdity of the results to which it will give rise is not an immaterial consideration. That a person in the position of Brooks could by his own intentional wrongful act create in favour of his dependants a cause of action that would not otherwise exist is nothing short of preposterous; indeed in my view that would be a dangerous proposition. After all it is a trite principle of our law, that a person should not be allowed to benefit from his/her own wrongful act.'[14]

[14] The reasoning adopted by this Court as illustrated above is consistent with the common law position. In my view the Act codifies the common law position, which recognises that compensation for loss of support can only arise from the unlawful killing of the breadwinner by a another person. Section 19(a) expressly states that liability is excluded in certain cases. Therefore the dependants in the case of the deceased, who died as a result of his own negligence, do not have a cause of action for damages for loss of support.

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[12] Ibid para 6
[13] *Brooks v Minister of Safety and Security* [2008] ZASCA 141; 2009 (2) SA 94 (SCA); [2009] 2 All SA 17 (SCA).
[14] Ibid para 16.[14] See also *Mnguni v Road Accident Fund* (1090/2014) [2015] ZAGPPHC 1074 (26 November 2015).

[15] In order to bolster its contention that the dependants should be eligible to claim even if the breadwinner was the sole cause of the accident, the appellants contended that the common law should be developed. In *Carmichele v Minister of Safety and Security*,[15] the Constitutional Court warned judges to be mindful that the major engine for law reform should be the Legislature and not the Judiciary. It stated that 'the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society'.[16]

[16] In *Cape Town City v South African National Roads Authority & others*[17] this Court said:

' . . . if the common law is to be developed, it must occur not only in a way that meets the s39(2) objectives, but also in a way most appropriate for the development of the common law within its paradigm. Faced with such a task, a court is obliged to undertake a two-stage enquiry: It should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond the existing precedent – if the answer to that question is a negative one that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise.'[18]

[17] In this matter the appellant has failed to lay the basis for the proposed development. The effect of such a development would amount to jettisoning an essential element of the law of delict, ie wrongfulness. In any event *Du Plessis* and *Brooks*, to the extent relevant to the issues in this matter, affirmed the common law position in the existing current constitutional dispensation. The decision in *Mlisane*

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[15] *Carmichele v Minister of Safety and Security* & another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).
[16] Ibid para 36.
[17] *Cape Town City v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 ALL SA 517 (SCA).
[18] Ibid para 29.

was cited with approval in *Amod.*[19] This is the correct approach that is still applicable to cases of this nature and there is no uncertainty to the law.

[18] For its contention that the common law should be developed, the appellant also seeks to place reliance on the Apportionment of Damages Act 34 of 1956. According to the appellant the Apportionment of Damages Act 34 of 1956 discriminates against dependants' claims for loss of support where only a single vehicle is involved in an accident as opposed to where there are joint wrongdoers. This argument is based on s 2(1B) which provides as follows:

'Subject to the provisions of the second proviso to subsection (6)(a), if it is alleged that the plaintiff has suffered damage as a result of any injury to all the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for the purposes of this section be regarded as joint wrongdoers.'

[19] The discrimination argument is misconceived. The purpose of s 2(1B) is not to grant a remedy to the dependant against the deceased breadwinner. Its purpose is to ensure that the other negligent party can reduce his own liability by bringing into account the negligence of the deceased breadwinner. Boberg says this of the amendment in terms of The Apportionment of Damages Amendment Act:[20]

'It appears, then, that the effect of this amendment on its literal wording is not merely to grant a third party a right of contribution against a guilty spouse, but to abolish the common-law prohibition of actions in delict between spouses married in community for the purposes of s 2 of the Act, ie *if the defendant spouse was a joint wrongdoer*. But what if he was the *sole*

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[19] *Amod* fn 10 para 6.
'It constitutes the juristic basis for any claim which the appellant might have against Biyela and therefore against the respondent which is only obliged to compensate the dependants of a deceased for losses suffered by them in consequence of a motor accident caused by the negligent or other unlawful conduct of the driver of the relevant motor vehicle, if such a driver would have been liable for such losses at common law.'

[20] The Apportionment of Damages Amendment Act 58 of 1971.See Boberg 1971 SALJ 452.

wrongdoer? The Act does not deal with that situation: the common-law prohibition therefore remains.'[21]

[20] The appellant argued that the deletion of s 19*(b)* of the Act in 2008 showed that the liability which the appellant asserts in the present case was no longer excluded. Section 19*(b)* previously excluded the Fund's liability for loss or damage suffered as a result of bodily injury to or the death of any passenger who was a member of the household of the negligent driver of the vehicle. The simple answer is that on the previous restrictions applied to claims arising from the injury or loss caused to the claimant directly or from the death of a breadwinner who was also a passenger in the vehicle. The exclusion was not directed at the type of liability asserted by the appellant in the present case – no such liability ever existed.

[21] In circumstances such as the present, the appellant and the minor children have a right to claim for loss of support against the estate of the deceased. This is a liability which exists regardless of the manner in which the deceased died. There is thus no conceivable basis to extend the common law to create another action on their behalf. That is not the role of the courts. It is thus not necessary to develop the common law in this regard.

[22] The only question that remains for consideration is that of costs. The respondent as the successful party in this litigation is entitled to costs as a general rule. Though the general rule is that costs should follow the result, the issue of costs is an exercise of a judicial discretion. In the case where a party has been successful, there must be exceptional circumstances, to deprive the successful

[21] P Q R Boberg, 'The Apportionment of Damages Amendment Act 58 of 1971: Reform of the law regarding delictual actions between spouses married in community and the dependants' action' (1971) 423 SALJ at 433.

party of its costs. A court 'should take into consideration the circumstances of each case, . . . the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties.'[22]

[23] I have considered whether it will be in the interests of justice to make an order of costs against the appellant and it is my view that exceptional circumstances exist that should persuade this Court not to mulct the appellant with costs. Though the litigation was not undertaken to assert a constitutional right, the issue raised by the appellant was of broad public concern and in the public interest. We were told that there are a number of such claims in the pipeline and that the present matter is in the nature of a test case. Private litigants should not be discouraged to approach the courts on issues that affect the general public, for fear of being mulcted with costs.

[24] In *Hotz & others v University of Cape Town*[23] the Constitutional Court held that the starting point when determining an award for costs is to have regard to the 'nature of the issues' between the parties. In considering whether the appellant should be held liable for the costs of the appeal, I have taken into consideration the nature of the claim. This claim was not a frivolous exercise. It addressed concerns which had been brought through the various divisions of the high court. This matter will hopefully clear the uncertainty brought about the Fund due to the fact

[22] *Fripp v Gibbon & Co* 1913 AD 354 at 363.
[23] *Hotz & others v University of Cape Town* [2017] ZACC 10' 2017 (7) BCLR 815 (CC) para 29.

that the Fund had settled similar claims in the past and rejected others.[24] (See also *Ferreira v Levin NO & others*; *Vryenhoek & others v Powell NO & others*).[25]

[25] In the light of the aforementioned I make an order that each party should pay its own costs in the appeal. Accordingly the appeal fails.

[26] The following order is made:
The appeal is dismissed.

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Y T Mbatha
Acting Judge of Appeal

[24] *Khonziwe Ntombizanele Mbambani v Road Accident Fund* Case no 340/2015 Eastern Cape Local Division, Port Elizabeth, 02 March 2016.
[25] *Ferreira v Levin NO & others*; *Vryenhoek & others v Powell NO & others* 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) para 3.

Appearances

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