THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 241/2008

THE ROAD ACCIDENT FUND **Appellant**

and

THEMBEKA MONANI **First Respondent**

THEMBEKA MONANI N O **Second Respondent**

Neutral citation: *Road Accident Fund v Monani* (241/2008) [2009] ZASCA 18 (20 March 2009)

Coram: Lewis, Maya JJA and Hurt AJA

Heard: 19 February 2009
Delivered: 20 March 2009

Summary: **Dependants' claim for loss of support – court's wide, equitable discretion to arrive at a fair award – One dependant dying contemporaneously with breadwinner – Such dependant's hypothetical share of maintenance to be distributed amongst surviving dependants.**

ORDER

On appeal from: Cape Provincial Division (Erasmus J sitting as court of first instance).

1 The appeal is dismissed with costs.

JUDGMENT

HURT AJA (LEWIS and MAYA JJA concurring):

[1] This is an appeal by the Road Accident Fund against an award of damages in a dependants' claim. It will be convenient to refer to the parties by their respective designations in the trial court, viz to the appellant as 'the defendant' and to the respondents as 'the plaintiffs'. The issue is a very narrow one and was defined in a stated case in terms of rule 33(4). The stated case reads as follows:

'1. Xolani Andrew Molani ("the Deceased") died in a road accident on 7th December, 2001 ("the accident").

2. At the time that he died he had a duty to support and supported:-

2.1 First Plaintiff;

2.2 Second Plaintiff, Xolasisipho Monani ("Xolasisipho");

2.3 Anela Aubrey Kwezi ("Anela");

2.4 Thando Monani ("Thando").

3. Thando died in the accident and as a result thereof.

4. The claim of Anela has not been prosecuted in these proceedings,[1] but the fact that Anela has a claim against the estate of the Deceased for loss of support has been taken into account in reducing the sum of damages due to the Plaintiffs as contemplated below.

5. The parties have agreed on the amount of the Deceased's past and future earnings, contingencies to be applied to the Plaintiffs' claims and the

[1] Anela was a child of the deceased by a relationship previous to that with the first plaintiff, the mother of Xolasisipho and Thando. It had been agreed by the parties that Anela would be paid one of two possible fixed amounts, pursuant to the ruling in this case.

ratio in which the amount of money available to the Deceased's dependants should be distributed between such dependants.

6. The question for adjudication by this Honourable Court is whether the death of Thando in the accident constitutes a collateral benefit resulting from the accident, for which the Plaintiffs should not be compensated.

7. The parties are agreed that should this Honourable Court find that the death of Thando is not a collateral benefit resulting from the accident, Plaintiffs will be entitled to receive damages in a further sum of R163 428,00, the parties being in agreement, at present, that the Plaintiffs are entitled to payment of the sum of R1 389 531,00.'

[2] The dependant's claim for loss of support was introduced into our jurisprudence during the Roman-Dutch era. Cases such as *Jameson's Minors v CSAR*[2] and *Hulley v Cox*[3] trace its reception into and development in our common law. In *Hulley*, Innes CJ referred to the different approaches adopted by the early writers to the method of computation of the quantum of such claims. Of these, he expressed a preference for the equitable approach recommended by Voet,[4] summarizing that writer's views in the following terms:[5]:

'Voet on the other hand favours a more general estimate.[6] Such damages, he thinks, should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his wife and children. That would seem to be the preferable view.'

The further development of this approach is concisely summarized by Holmes JA in *Legal Insurance Co Ltd v Botes*.[7] The principles involved are well-known and need not be restated here.

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[2] 1908 TS 575.
[3] 1923 AD 234.
[4] *Ad Pandectas* 9.2.11.
[5] At 243- 244.
[6] *Sc* Preferable to the 'annuity approach' opted for by a number of other writers.
[7] 1963 (1) SA 608 (A) at 614C-F.

[3] The computation of the award in a claim by dependants is, in a sense, dichotomous. The first part of the exercise is to assess what the breadwinner would probably have earned had he not died when he did. The gross amount is appropriately adjusted and discounted to arrive at a 'present-day value'. In those cases where it is assumed that the whole of the breadwinner's income would have been devoted to the upkeep of his family (and this is one of them), the second exercise is to distribute the equivalent of the lost income between the beneficiaries. In this instance it is agreed that the income would have been allocated in the proportions of two parts to each adult and one to each child. The amount thus distributed must, according to the parties' agreement,[8] take account of the assumption that each child would become self-supporting at the age of 18. It is apparent from the actuarial calculations that the share previously attributable to an 18-year-old child would become available for distribution amongst the mother and the other dependants not yet self-supporting.

[4] As is apparent from the stated case both computation exercises have been performed, to the mutual satisfaction of the parties, on two separate bases. The first assumes that Thando's share would not fall for distribution amongst the surviving members of her family and the second, that it would. The matter was thus argued before Erasmus J in the Cape High Court. He held that the additional amount of R163 428 was payable and gave judgment for the total amount of R1 552 959. He refused leave to appeal but leave was subsequently granted by this court .

[5] Erasmus J approached the matter on the basis that what was available for distribution to the dependants was the 'present-day value' of the amount which the deceased would have contributed to the upkeep of his family members (with the customary allowances for contingencies, discounting to current value etc). Referring to this metaphorically as a 'cake' or 'pot', he said:
'But the fact that the late Thando was there at the time, and may have been alive even at a later stage, would not have diminished the total amount. In

[8] And as is explicitly stated in the actuary's explanation of his method of assessment, attached to the stated case.

engaging counsel I referred to the total cake or the pot. And the fact is that that amount is agreed *(sic)* would have been there for distribution as a manner of support for the family.

. . .

In my view, I do not even have to look at the legal argument presented here, because it's a matter of logic. It's a matter of, on these particular facts one cannot diminish the total pot or cake, as I referred to it, simply because Thando is late.'

[6] Before us, Mr Bridgman, for the appellant, based his contentions on the fundamental principle that an award in this type of claim is aimed at putting the claimants, as nearly as is possible, into the position they would have occupied if the delict had not caused the deceased to die when he did. If the accident had not occurred, he submitted, the deceased's dependants would have included Thando. Thus the support which each minor dependant would have received but for the accident would have amounted to one seventh of the deceased's income and the first plaintiff's share would have been two sevenths. And this amount, so the argument ran, is what should be awarded to achieve the object of what I have referred to as 'the fundamental principle'. But, if the one seventh share for Thando is awarded proportionally to her mother and the surviving siblings, they would receive one third and one sixth each, respectively, and thus receive more than they could have expected had the deceased not died. Counsel was at first inclined to contend (as was indeed the contention in the stated case) that to award Thando's share to her mother and siblings in this manner would constitute a 'collateral benefit,'[9] but he wisely forsook this basis in argument before us. Instead he pinned his colours to the mast of the 'fundamental principle' and contended that the award to the surviving dependants should be restricted to what they would have received had Thando not died.

[7] Mr Bridgman readily conceded that if, hypothetically, Thando had died at any time before the deceased, then her 'share' of the family maintenance

[9] As dealt with in *Lambrakis v Santam Ltd* 2002 (3) SA 710 (SCA) particularly paras 19 and 20 and the authorities there cited.

would have fallen away and become available for distribution among her mother and siblings. He was by no means ready to concede, however, that if Thando had died after the deceased, the same situation would have applied, save for such maintenance as would have been appropriated for her between the date of the deceased's death and the date on which she died. Mr Bridgman's reluctance to make such a concession was undoubtedly attributable to a fear that, if he made it, his carefully crafted contentions would founder on the rocks of logic. He submitted that, quite apart from what might be the position if Thando died *after* the deceased, there appeared to be no decided case in our law which dealt with the computation of compensation in a dependant's claim where one or more of the dependants died simultaneously with the breadwinner. He therefore asked that the matter be considered as *res nova*.

[8] The absence of reported authority for a particular proposition relating to the computation of damages in delict can, in this day and age, invariably be attributed to only one of two circumstances. The first is that it indeed is *res nova* and has thus never been considered by a court before. The second is that its answer is so obvious that no court has seen fit to classify it as reportable. I rather think that the proposition here put forward by the defendant falls into the latter category.

[9] It is, after all, perfectly clear that the court takes into account events which occur after the death of the breadwinner in assessing the award to each dependant. The simple occurrence of one of the dependants becoming self-supporting is one such event. It has the effect of making available to the others the share which was previously allocated to the now self-supporting sibling. This is one of the very precepts by which the actuary in this case was called upon, by agreement between the parties, to make his assessments. Bekker J dealt with the question as a matter of general principle in the case of *Wigham v British Traders Insurance Co Ltd*[10] In that case the plaintiff's husband had died in a motor vehicle collision in January, 1960. At that time

[10] 1963 (3) 151 (W).

the plaintiff was 81 years old, and her expectation of life was fixed at six years. The matter came to trial in 1963, when the plaintiff was 84. Her life expectancy at the date of trial was assessed at five years. The argument for the insurer was that her award should nevertheless be computed on the basis that she would live to the age of 87 (the assessment at the date of the breadwinner's death) and not to the age of 89 (the assessment at the date of trial). Bekker J rejected this contention, saying:[11]

'It is of course quite true that the general principle requires the amount of damages to be assessed at the date of the wrong but the court is entitled in the case of prospective damages to inform itself of subsequent facts which are known at the date of the trial and which if taken into account would enable the court to determine with a greater degree of certainty or accuracy the total loss of a plaintiff. By so doing the amount of speculation involved in such an assessment is reduced.'[12]

Wigham plainly disposes of any logical ground for Mr Bridgman's reluctance to concede that if Thando had died between the date of the deceased's death and the date of trial, the support which would otherwise have been allocated to her would have gone to the surviving dependants.

[10] The defendant has thus correctly conceded that if Thando had died before the date of the delict, the plaintiffs would have been entitled to the extra amount of R163 428. And that would also be the position if she had died at any time after the date of the delict (save, of course, for any amount of maintenance that would have accrued to her between that date and the date of her death). Can there then be any basis, in logic or otherwise, for a contention that since her death occurred simultaneously or contemporaneously with that of the deceased, the amount of R163 428 falls to be excised from the award? I think the question only has to be stated to be

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[11] at 156B-D.

[12] *Wigham* has not been expressly approved by this Court, but in *General Accident Insurance Co SA Ltd v Summers* 1987 (3) SA 577, Rabie ACJ dealt exhaustively with the question of whether there was a fixed rule as to the date at which a plaintiff's loss of support should be assessed, and came to the conclusion (at 610J) that there was no authority to the effect that the loss of income (or, in dependants' claims, the loss of support) had to be assessed as at the date of delict. In that case, the judge in the court a quo had expressly based his computation on the quoted dictum by Bekker J, and Rabie ACJ did not question the correctness of this approach. *Wigham* has been referred to and applied in a number of subsequent decisions and should now be taken as a correct statement of the law, subject always to the consideration that the trial judge has a wide discretion in these matters.

answered in the negative. It seems to me that the defendant's contention stems from confusion between the exercise of determining the total loss (the 'pot' or 'cake' in the graphic language of the learned judge a quo) and that of distributing that amount amongst the dependants. The view of the court a quo that Thando's death could not have the effect of reducing the total loss cannot be faulted.

[11] The appeal is dismissed with costs.

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NV HURT
ACTING JUDGE OF APPEAL

Appearances:

For Appellant: M J M Bridgman

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