IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: A181/2019

In the matter between:

R MN.O.
(Appointed as curator ad litem on behalf of the
minor child Z M) 1st Appellant

D CN.O.
(On behalf of her minor child F M) 2nd Appellant

T D N.O.
(On behalf of her minor child S M) 3rd Appellant

and

THE ROAD ACCIDENT FUND Respondent

CORAM: VANZYL, *Jet* REINDERS, *Jet* MAJOSI, AJ

JUDGMENT BY: REINDERS, J

HEARD ON: 4 MAY 2020

DELIVERED ON: 11 JUNE 2020

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[1] This is an appeal against the judgment and order by a single judge of this Division ("the trial court") handed down on 22 March 2019. Leave to appeal was refused by the trial court on 21 June 2019 and on 4 September 2019 the Supreme Court of Appeal granted leave· to the Full B,ench of this Division. The appellants were the plaintiffs in the trial court and the respondent was the defendant.

[2] The three appellants are the duly appointed curator ad !item and respective mothers on behalf of three minor children. I will henceforth make alternate references to the appellants and the minor children. It was common cause that the deceased succumbed to his injuries sustained in a motor vehicle collision which occurred on 9 April 2011 and that such collision was as a result of the sole negligence of the insured driver. On 6 March 2018 an order was issued declaring the defendant liable towards the minor children for 100% of their proven or agreed damages. The matter therefore served before the trial court in respect of the quantum of the minor children's damages in the form of lost past and future support.

[3] The summons avers that prior to the deceased's death he was in law legally obliged to maintain and support the minor children and in fact did maintain and support them. It is further averred that the minor children would have been totally dependent on the deceased for support and maintenance until the age of 21 years. The summons claimed in respect of all three minor children a total past loss of support in the amount of R 118 000-00 and future loss of support in the amount of R 250 000-00. In addition the minor children claimed funeral expenses in the amount of R 50 000-00. The defendant in its plea denied all the allegations in respect of damages. Although the record of the Rule 37 pre-trial minutes reveals no further admissions, the only pertinent issues during the trial were the deceased's income (if any), whether he did in fact support the minor children financially and the quantum of the minor children's damages (if any).

[4] The minor children (the plaintiffs) called two witnesses, the first of whom was

an actuary, Mr Wim Loots, who made calculations of the alleged loss of support suffered by the minor children and handed in the report. In cross-examination the witness confirmed that the calculations were made on information provided to him and stated that the earnings of the deceased as supplied to him, formed the basis thereof.

[5] The second witness, Mr Dindala Mthembu, testified that he and the deceased were partners in an informal business. In his evidence he estimated the deceased's income to have been approximately R 3 500-00 monthly. In response to questions by the court he conceded that expenses still had to be deducted and he later estimated deceased's income to have been R 1 100-00 per month. However, he was uncertain whether fuel costs still had to be deducted therefrom.

[6] Respondent adduced no evidence. The trial court confronted with the said evidence found that the evidence of the actuary on its own consisted of no more than inadmissible hearsay evidence which did not call for a response by the defendant (in the application for leave to appeal the same judge stated that he expressed himself incorrectly, and clarified that the evidence of the actuary was based on assumptions and nothing more). The trial court relying on **Santam Insurance Company Limited v Fourie** 1997 (1) SA 611 (SCA) found that appellants must establish the minor children's actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner. The trial court concluded that sadly for the minor children, the appellants failed to prove same.

[7] The appeal was not opposed. The appellants submitted comprehensive heads of arguments in terms of the Practice Directives of this Division, questioning the trial court's judgment in several respects. As a result of regulations regarding the Covid-19 pandemic, the appeal was decided on the said heads of argument (supplemented as requested) only without hearing any oral submissions. In the heads the evidence of the actuary was summarised, as the appellants submitted that the trial court's judgment did not refer thereto. It was submitted by the appellants that the said evidence is crucial as it involved the quantification of the deceased's income and the loss of support suffered by the minor children. Amongst others it was stressed that the actuary did his calculations based on the information extracted from

two affidavits which were ostensibly supplied to him by the appellants' attorneys. It was pointed out that the actuary assumed that the total earnings (in an amount of R 3 500-00 monthly) would be apportioned, two parts to the deceased and one part to each dependent minor child. We were urged to find that the trial court misdirected itself and erred in not taking into account the evidence of the actuary in as far as it was never controverted by the respondent, and not having regard to the unchallenged evidence of Mr Mthembu. The appellants submitted that it was entitled to judgment in their favour and that the appeal should be upheld on that basis.

[8] In my view the trial court did not err in disallowing the minor children's claims. On the contrary, the appellants failed to adduce sufficient evidence to make out a prima facie case. From the totality of the record, it is evident that it became common cause that deceased as biological father of the minor children was legally obliged to maintain and support them. However, it had to be proved, as was alleged in the particulars of claim, that prior to deceased's death he in fact maintained and supported the minor children. No such evidence was tendered. The trial court in this regard correctly relied on **Fourie** *supra* at 615 F-G thereof:

> "The basic fallacy in the plaintiff's approach, it seems to me, is the following. It assumes that, because the wife is in principle under a duty to support her husband and children, every contribution which she makes to the common pool must be taken to be "in part" a payment pursuant to that duty. This does not follow. **The question whether she paid for the maintenance of the children is, as stated above, one of fact."** (own emphasis)

[9] In **Evins v Shield Insurance Ltd** 1980 (2) SA 814 (A) at 838A (cited with approval in **Fourie** *supra)* the following principle relating to a claim for damages by a dependant was described:

> "...(T)he dependant **must establish actual patrimonial loss,** accrued and prospective, as a consequence of the death of the breadwinner." (own emphasis)

The principle that compensation by the Road Accident Fund is aimed at placing a child in the position which she/he would have been if her/his parent had not died, was confirmed in **Coughlan N.O. v Road Accident Fund** 2015 (4) SA 1 (CC) at para [41].

[10] The evidence tendered by the actuary could and did not cure the shortcoming that the appellants failed to prove that deceased in fact maintained and supported the minor children. Since there was no evidence in this regard, the minor children's claims could not succeed and the actuary's evidence became irrelevant. But even if the trial court's finding was wrong in this regard (and I do not think that it was), the evidence tendered of the deceased's income was insufficient. Not only was there no proper evidence to serve as basis for his calculations, he also conceded that he could not quantify the deceased's net income. Had I been the trial judge, I would have found it difficult to assess and or quantify on his evidence what the deceased's income was. But even if one could have come to an estimated quantified amount of the deceased's income, there was still no evidence satisfying the requirements in the **Fourie** case, in particular to at least prima facie show that any part of such income was in fact used to support the minor children. Second and third appellants are represented by their mothers in terms of the particulars of claim. Certainly if the deceased did in fact support the minor children, the said mothers could have testified and supplied all the information in this regard. Likewise, the curator ad litem for the first minor child could have and should have enlightened court as to the deceased's financial contributions, but no such evidence was adduced.

[11] The funeral costs (if any) were on no different footing. No evidence was tendered to the effect that the minor children paid for the said costs and consequently suffered damages in this regard. The trial court therefore refused the claim in this respect.

[12] I am convinced that the trial court correctly dismissed the minor children's claims and align myself with the view expressed by the trial court that this result is sad, and in my view regrettable. Unfortunately court cases are to be determined on the basis of the law.

[13] I therefore see no reason to interfere with the orders made by the trial court. There was no appearance for defendant and in the event of the dismissal of the appeal, there is no reason to make any order as to costs.

[14] The following orders are therefore issued:

14.1 The appeal is dismissed

14.2 No order as to costs.

C REINDERS, J

I agree.

C VAN ZYL, J

I agree.

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O MAJOSI, AJ

On behalf of appellants: Heads of Arguments prepared by:
Adv M G Mashaba
Adv M N Leballo
Instructed by:
SMO Seobe Attorneys Inc
BLOEMFONTEIN

On behalf of Defendant : No appearance