

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/MSU/617/2008

In the matter between

MALIAKAE MOHOLISA

PLAINTIFF

AND

DISTRICT MEDICAL OFFICER

1ST DEFENDANT

MOTEBANG HOSPITAL

2ND DEFENDANT

MINISTRY OF HEALTH

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

Neutral Citation: Maliakae Moholisa v District Medical Officer & 3 Others
(CIV/T/617/2008) [2021] 50

JUDGEMENT

CORAM: BANYANE J

HEARD: 18/08/2020, 29/10/2020, 11/11/2020

DELIVERED: 04/06/2021

Summary

Action for loss of support - child to be maintained retarded - dependency of the minor child to extend to his lifetime - factors to be taken into account

Annotations

Cases

1. Kalisthehe Lambrakis v Santam Limited 2000 (3) SA 1098 (SCA)
2. Makakole v LNIG CIV/T/444/2006
3. Ntoli v Ntoli and Others C of A (CIV) No.45 of 2018
4. Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A)
5. Santam Bpk v Henery 1999 (3) SA 421 (SCA)
6. Evins v Sheld Insurance Co Ltd 1980 (2) SA 814 (AD)
7. Hulley v Cox 1923 AD 234
8. Groeneval v Snyders 1966 (3) SA 237 (A)

Books

1. PJ Visser & Potgieter: The Law of Damages (1993) Juta & co
2. PJ Visser & Potgieter: The Law of Damages through cases (3rd ed) Juta & co

BANYANE J

Introduction

- [1]** This is a claim for loss of support occasioned by the death of a deceased breadwinner. The plaintiff is the deceased's mother and the claim is brought on behalf of the deceased's minor child, K. This claim was instituted by the plaintiff pursuant to her appointment as a *curator ad litem* for the minor child. She claims compensation in the sum of M 400. 000.00.
- [2]** In her declaration, the plaintiff avers that on Friday, the 13th February 2009, her daughter Sophia was urgently referred to Motebang Hospital by Sofia Health Care Centre after complaining of pain and swelling on the left calf and high temperature. At Motebang, she was examined by Dr. S.I Mpariwa who suspected that she had a stroke. He recommended certain medication which could not however be disbursed due to absence of supply at the time. She was told to come back on the following Monday if the pain persisted. Her condition worsened because the swelling increased and at this time the left thigh also started swelling. She was sweating, had an increased heart rate and difficulty in breathing. The doctor advised her to seek urgent medical attention at the nearest facility. She immediately proceeded to Dr Jessi's Polyclinic and regrettably lost her life thereat on the same day due to deep vein thrombosis (DVT) on the left leg.
- [3]** The plaintiff avers that her daughter's death was caused by the negligence of Dr. S.I Mpariwa who, according to her, failed to take appropriate remedial action when he was consulted about Sophia's condition. She therefore holds the defendants liable for her daughter's death.

[4] The action was initially opposed by the defendants who, during the course of trial admitted liability, thus leaving the issue of quantum as the sole issue for determination.

The trial

[5] The plaintiff testified that the deceased left behind a child, K, born on the 22nd July 2005. She told the court that the child was asphyxiated during his birth as a result of which he suffers a serious degree of retardation and requires special attention and care.

[6] She described the child's development as slow. She told the court that at the time of deceased's demise, the child was aged 4 but he was still unable to walk due to the condition. He is now 15 but his speech so poor and retarded and similar to that of a toddler. She says she often struggles to hear what he is saying because he cannot clearly express himself. She says the child plays with kids aged 3.

[7] She testified further that due to his profound intellectual disability, resulting in reduced learning capacity, the child cannot be enrolled in normal schools of kids his age but is "stuck", in pre-school. He is slow and his brain does not seem to be functioning properly so much that he cannot even write his name at this age.

[8] She told the Court further that the child is not self-supportive and is completely dependent on her for activities of daily functioning. He cannot bath himself, he is unable to independently care for himself and put on warm clothes during cold weather unless same are selected and given to him to wear.

- [9]** She told the Court that the abnormality is so extreme that he often becomes emotional and cry for no apparent reason. He is a child that needs one to keep a close eye on because he often wanders away from home, at times, following total strangers. She says this conduct renders the child vulnerable to kidnapping.
- [10]** She told the court that the covid-19 pandemic exacerbates the vulnerability, because his condition constricts him from knowing and understanding the safety precautions necessitated by the urge to curb the spread of the virus. As a result, he often pays no attention to whether or not he is wearing his mask at all times, gets in contact with various people and even spontaneously touches them.
- [11]** As regards the needs of the child, she told the Court that she singly provides the child with basic needs and scarcely gets financial assistance from her other children. She says she does not know the father of the child nor his whereabouts because he disappeared on Sophie during her pregnancy. She says she has been struggling to make ends meet and had to sell vegetables at small scale to get a meagre income in order to take care of their daily needs. She now lives on pension which she only recently started receiving (sometime this year).
- [12]** In relation to the deceased's income and support of the child during her lifetime, she testified that the deceased worked as a senior sales Clerk at some business, then situated at Maseru West; that she earned a gross salary of M 2 000 plus commission on the sales of phones sold by her. This amount she earned until her death. She told the Court that the deceased used to support her family; the child and herself.

[13] Her evidence was not challenged through cross-examination.

[14] The child was examined by a Clinical Psychologist John Makoala at Motebang Mental Observation and Treatment Unit. His findings are that the child has moderate mental disability / retardation which is characterised by;

- a) a deficit in an adaptive functioning that results in failure to meet developmental and socio-cultural standard for personal independence and social responsibility,
- b) deficits in general mental abilities such as reasoning, problem solving, planning, abstract thinking, judgement and academic learning.

14.1 He confirms that the child struggles with activities of daily living such as dressing, feeding and attention to hygiene and cannot read and write.

14.2 His assessment shows that the child generally needs support for activities of daily living.

Plaintiff's Submissions

[15] The defendant's counsel file any written submissions. Mr Molapo for the plaintiff referred the court to a number of decisions enunciating applicable legal principles when considering a claim for loss of support. These are; **Kalithene Lambrakis v Santam Ltd 2000 (3) SA 1098 (SCA), Makakole v LNIG CIV/T/444/2006, Ntoli v Ntoli and Others C of A CIV No 45 of 2018 and Others.**

Principles governing award of damages in loss of support claims

[16] The remedy of loss of support relates to material loss caused to the dependants of the deceased by his/her death. It aims at placing them as far as maintenance is concerned, in the position they would have

had if the breadwinner had not died. **Legal Insurance Company Ltd v Botes 1963(1) SA at 616 E at 614 E-F.**

[17] In a claim of this nature, the plaintiff must establish that the deceased had a legal duty to support the dependants and that the dependants have a right of support against the deceased. **Santam Bpk v Henery 1999(3) SA p421(SCA) para 425-H to 426A.** The dependant must also establish the actual patrimonial loss, accrued or prospective, as a consequence of the death of the breadwinner. **Evins v Shield Insurance Co Ltd 1980(2) SA at 838.**

[18] It is important to also note that the object of awarding damages to the dependants of a deceased is to compensate them for material or financial loss. The dependants should not profit from the wrongdoing. **Legal Insurance Company Ltd v Botes (supra), Groeneval v Snyders 1966(3) SA 237(A).**

Issue

[19] Since liability is not denied, the court is required to only resolve the question whether the child is entitled to judgement in the sum of M400 000 as claimed.

Analysis

[20] It is indisputable that the deceased owed a legal duty to support the minor child in question. This child was a dependant of the deceased and is therefore entitled to compensation for the loss of maintenance or right to support consequent upon the death of his mother. I proceed now to the calculation of damages.

[21] In computing compensation, the judge has a wide discretion to award what he considers right under the circumstances of each case. **Legal Insurance Company Ltd v Botes** (*supra*). Factors relevant in the computation of damages include the following;

- i. The period during which the dependant has been deprived of support (which depends upon the joint expectation of life of the plaintiff and his breadwinner, the period within this joint expectation of life during which the breadwinner would have continued to earn an income, and during which the deceased breadwinner, but for his death would have devoted a portion of his/her income to the plaintiff)
- ii the net annual income of the breadwinner over this period
- iii. The amount of maintenance devoted by the deceased to support his or dependants. See **Visser & Potgieter: The Law of Damages P 376-377**, see also **Kalithene, Lambrakis** (*supra*).

[22] Due allowance should also be made in the assessment, for contingencies and factors inclusive of the fact that children may be self-supportive, the existence of insurance policies on the life of the deceased and the fact that the earning capacity of the deceased might be diminished with advancing years. **Visser & Potgieter: The Law of Damages through cases, p460-461**. See also **Hulley v Cox 1923 AD 234**.

The period of loss

[23] In the instant case, there is no evidence on how the deceased's swelling on the calf, had it been immediately attended to and treated would impact on her life expectancy. There is therefore no evidence

that she did not enjoy a normal expectation of life. I would therefore estimate that she would have lived until 60.

23.1 Coming now to the period within which she would have earned income (i.e quantification of future earnings), the nature of her employment, the state of her health and her expected retirement age are relevant.

23.2 There is no evidence of the prospects of the business(for which she worked) to grow or fall. How thriving the business was at the time and the likelihood of its existence in the next 20 years (counted from 2009). There is also an element of uncertainty as to whether she would continue to work for this business or be in continuous employment.

[24] The deceased worked as a clerk. She had acquired no special qualification or skill nor was a suggestion made that she intended to do so. The continuity of employment was therefore not guaranteed and a risk of unemployment existed. She would therefore probably not have worked for 10 percent of the time.

[25] Without evidence, it is also hard to assume that the swelling that initially landed her in hospital would not negatively affect her legs and movement, and ultimately lead to an early retirement. The value of the support must therefore be calculated on the assumption that she would have continued to work until the age of 55.

Income of the deceased

[26] In calculating the income of the deceased, the actual earnings at the time of death must be ascertained, the nature of the work, the deceased's capabilities and prospects, benefits in addition to the deceased salary and general contingencies that would reduce the

salary must be taken into account in establishing the income of the deceased. **Visser & Potgieter P 378**

[27] The deceased's income at the time of her death was M2 000. There is uncertainty on the commission earned or an estimation earned annually. As stated above, the deceased worked as a clerk. She had acquired no special qualification or skill nor was a suggestion made that she intended to do so. It will therefore be assumed that her income would have continued at that rate until she attended 55 years.

Monthly maintenance devoted to the minor child

[28] Relevant considerations here include the actual amount of maintenance provided by the deceased before her death, the requirements of the deceased and the dependant, the fact that the child may grow older and be self-supportive and the ill-health of the dependant.

[29] In the instant matter, the amount assigned by the deceased to the support the child has not been stated. We are told how much was spend or given to plaintiff to cover household bills, the value of foodstuffs per month, clothes for the child and herself if she paid rent and transport expenses to and from work e.t.c

[30] What is clear from the evidence however is that the child's disability renders him perpetually in need of financial care. He is a special child with special needs, and it seems almost impossible that his condition will improve. He would for this reason be dependent on the deceased for the rest of his life.

30.1 He is therefore entitled to be put in the position in which he would have been if the deceased had lived out her expected age. If she had lived, she would have provided him with food, clothing and other necessities, such as enrolling him special schools.

The Calculation

[31] Regard being had to the deceased's salary; on average she would have devoted half of it to the support of the child. This means an allowance for food and groceries is estimated at M 1000 per month, totalling M 12 000 per annum.

31.1 Having considered all circumstances, discussed under paragraphs 22-30 above, the amount M 2 000.00 is calculated from the time of the deceased's death in 2009 to 2020 when the trial commenced. This is 11 years. M12 000.00 multiplied by 11 amounts to M132 000.00. The deceased was 29 years at the time of her death. If she worked until 55, she could have earned income for the next 26 years. M12 000.00 multiplied by 26 years amounts to M312 000.00. These (M132 000.00 and M312 000.00) added together amounts to M 444 000.00. A deduction of 10 percent for the risk of unemployment is M44 400.00. This deducted from M444 000.00 leaves M399.600.00.

Conclusion

[32] Taking into account all the circumstances and having considered the authorities and principles which regulate the grant of compensation in loss of support claims, I am of the view that compensation in the sum of M 400.000.00 appears to be an adequate award.

Order

[33] In the result, the plaintiff's claim succeeds, and the following order is made;

The defendants are ordered to pay the plaintiff;

a) loss of support in the amount of M400 000.00

b) Interest at the applicable bank rates to be calculated annually
from the date of judgement.

c) Costs of suit.

**P. BANYANE
JUDGE**