L.L. TSHIQI

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MOLEFE DLEPU INC
attorneys & conveyancers

70 Northumberland Street,
South Kensington, Johannesburg
Tel. (011) 616-0005
Fax. (011) 616-0210
DOCEX no. 673 JHB
Lodgement number – Johannesburg: 19
Lodgement number – Pretoria: 1144

P.O. Box 7398 Johannesburg 2000
Email: molefe@dlepu.co.za
Website www.molefedlepu.co.za
VAT no. 4070163060
Reg. No. 95/06409/21

Your Ref: Our Ref: Mrs Dlepu/bk/NominationJudgeTshiqi Date: 13 April 2015

THE SECRETARY
JUDICIAL SERVICE COMMISSION
CONSTITUTIONAL COURT
PRIVATE BAG X1
CONSTITUTIONAL HILL
BRAANFONTEIN
JOHANNESBURG

RE: NOMINATION TO FILL VACANCY AS JUDGE IN CONSTITUTIONAL COURT: ZUKISA LAURAH LUMKA TSHIQI

1. In response to the Judicial Services Commissioner's Call for Nominations to fill a vacancy as a Judge in the Constitutional Court, I hereby nominate Judge Z.L. L. Tshiqi

2. Prior to her appointment to the bench, Judge Z.L.L. Tshiqi was a senior and experienced attorney. Judge Tshiqi was a founder member of a female owned attorneys firm, Matolo Dlepu Tshiqi Attorneys in 1994; together we started the firm with the main objective of giving female candidate attorneys who were struggling to be placed in articles of clerkship an opportunity to mentor and give them hope of becoming attorneys.

3. We started our practice with a personal loan of R20 000.00 struggling to make ends meet. Our determination to succeed resulted in us establishing a branch office in Kempton Park with Judge Tshiqi as an Attorney in charge. Our determination resulted in us attracting clients; amongst others; Transnet, Eskom and Road Accident Fund and Labour Unions.

4. We were determined to succeed against all odds . The location of the practice in such milieu, gained her vast experience in the development of Constitutional,commercial and Fair Labour practice jurisprudence. She established herself and through self-determination she gained invaluable knowledge and appreciation of the independence of the judiciary. She was also trained as both Mediator and Arbitrator through the Independent Mediation Services of South Africa and Commission for Conciliation, Mediation and Arbitration.

5. Through sheer courage and hard work, we managed to sustain the practice and when she left for the bench in 2005, she left a viable and one of the successful women owned attorney's firm.

6. Judge Tshiqi has a good understanding of our Constitutional and democratic systems. In the period since her appointment as a Judge, she has written several judgments on several arrears of the law.

7. Taking into consideration, her background personality and experience in addition, she is one of the most senior black female members of the Judiciary.

I believe that she has the requisite skill and experience to ably serve the Country by appointment to the Constitutional Court.

Yours faithfully

MRS H.K. DLEPU
DIRECTOR

ACCEPTANCE OF NOMINATION

I, **ZUKISA LAURA LUMKA TSHIQI**, do hereby accept the nomination

ZUKISA LAURAH LUMKA TSHIQI

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

Supreme Court of Appeal – Judges' Chambers • PO Box 258, Bloemfontein, 9300 • C/O Elizabeth and President Brand Streets, Bloemfontein • Tel (051) 412 7400
Fax (051) 412 7449 • www.supremecourtofappeal.gov.za.

April 2015

The Secretary
Judicial Service Commission
c/o Constitutional Court
Private Bag X1
BRAAMFONTEIN
2017

Messrs

LETTER OF SUPPORT: MADAM JUSTICE ZLL TSHIQI

1. I have become aware that Judge Zukisa L L Tshiqi has been nominated for a position at the Constitutional Court (CC). I support her nomination and wish to submit the following commendation for her ultimate appointment to the position.

2. I have known Judge Tshiqi since the early 1990's whilst we were both members of the Black Lawyers Association (BLA) .She was employed by BLA as a Litigation Officer. She worked tirelessly and selflessly in fighting against the injustices meted out to Africans by the odious apartheid regime of the time. Her dedication and commitment to her work was informed by her unflinching hatred for any form of injustice. In the process she developed an admirable sense and culture of activism. She later practiced as an attorney for her own account.

3. During 2005, she was appointed a permanent judge at the South Gauteng High Court. As a colleague at the North Gauteng High Court, I had an opportunity to work much closer with her. She understood and embraced her oath of office to deliver justice to all without fear, favor or prejudice. I experienced her as a Judge imbued with an acute sense of fairness and justice. She manifested a keen understanding of the sufferings and deprivation suffered by the historically disadvantaged people of this country.

4. I had yet another opportunity to interact and work even closer with her when joined me in 2009 at the Supreme Court of Appeal (SCA). During her tenure at the SCA she has

proved herself to be a worthy member of that court. She is well liked and respected by all her colleagues. She possesses a sharp intellect, admirable work ethic, good interpersonal skills and a sunny personality. Her diligence, dedication and commitment to her work is second to none. Furthermore, she has a strong character, moral fortitude to stand up to her principles and conscience and an independent mind although open to persuasion.

5. To her credit she has penned a number of important judgements which show her clear understanding of the new vision of a society based on the achievement of equality, human dignity and the advancement of human rights and freedoms for all as encapsulated in our transformative Constitution. Her strongest attributes are scholarship, collegiality and her ability to work as a member of a team.

6. Based on the above, I have no doubt that she will add value to the Constitutional Court and assist in its momentous task of interpreting the Constitution and the law in line with our constitutional vision of a free, non-sexist, non-racist, equal and egalitarian society.

In the circumstances, I recommend her for appointment to the Constitutional Court.

Kind Regards

Judge LO Bosielo
Supreme Court of Appeal
Bloemfontein

JUDICIAL SERVICE COMMISSION

Private Bag X 1
Constitution Hill
mail:chiloane@concourt.org.za/dube@concourt.org.za
Braamfontein
Johannesburg
2017

Tel: (011) 359 7537/7570
E-

Fax2Email: 086 649 0944

QUESTIONNAIRE FOR JUDGES

SECTION 1: PERSONAL

1. **What are your full names and surname**

   1.1 Surname : Tshiqi

   1.2 Full names : Zukisa Laura Lumka

   1.3 Maiden name : Qingana

2. **What is your address?**

   2.1. Residential : 12 Banchory Street, Blue Valley Golf Estate, Kosmosdal, 0096

   2.2 Postal : P.O Box 177, Blue Valley Golf Estate, Kosmosdal, 0096

   2.3 Telephone Number : (011) 512 0271
   Mobile 083 654 4383
   E-mail : Ztshiqi@yahoo.com

3. **What is your date and place of birth?**

   3.1. Date of birth : 1961/01/11

   3.2 Place of birth ; Ngcobo, Eastern Cape

   3.3 Citizenship : South African

   3.4 Identity Number 6101110605086

4. **What is your marital status?**

   4.1 (Indicate with an "X")

		Divorced X		

4.2 **Particulars of children**

Number and ages of children

Bongiwe 29 years

Mandisa 25 years

Makhi 20 years

5. **Please furnish particulars of your tertiary education.**

5.1 Qualifications :

B Proc

Name of institution(s) : Wits University

Date acquired: 1989

5.2 Post Graduate Diploma in Labour Law

Name of Institution University of Johannesburg

Date acquired 2001

6. **Please furnish chronological particulars of employment since leaving school or university**

Name of employer	***Position held***	***Period***
South African Council of Churches	Legal Co-ordinator	1986 - 1989
Neluheni Attorneys	Articles of Clerkship	1989 - 1991
Matlala Attorneys	Professional Assistant	1991 - 1992
Black Lawyers Association	Litigation Officer	1992 - 1994
Tshiqi Attorneys	Managing Partner	1994 - 2005
PART TIME		
IMMSA	Mediator, Facilitator, Arbitrator, Trainer	1994 - 2005
CCMA	Mediator, Arbitrator	1997 - 2005
Bargaining Councils	Mediator, Arbitrator	1997 - 2005
Land Claims Commission	Mediator, Facilitator, Trainer	1997 – 2005
Medunsa	Long Distance Trainer Labour Law	Around 2003

Several Companies	Conducting Disciplinary Hearings	1994 - 2005
Black Lawyers Association Legal Education Centre	Trial Advocacy Trainer.	1992 to present.
Law Society of S.A	Council Member	Until 2005.
Small Claims Court Kempton Park	Commissioner	2002 - 2005.
SAJEI	Trainer, Judicial Education	2013 – to present
Demarcation Board	Panel Member – For Appointment of Board Members	2013 – to present

7. **Please furnish chronological particulars of your membership of legal organizations – Past and Present.**

Name of organisation	***Position held***	***Period***
N/A		

8. **Please furnish particulars of community and other organizations of which you are or have been a member in the past ten years.**

Name of organisation	***Position held***	***Period***

Anglican Church	Women's Fellowship	Around 2004 until around 2006
Anglican Church	Mother's Union	Around 2006 to present
Johannesburg Welfare Society	Member and presently a patron and inactive as a result of the distance between Bloemfontein and Johannesburg	Around 2007/08 to present

9. **Are you now or have you ever been a member of a secret organization?**
(Indicate with an "X")

	NO
	X

If so, please identify the organization and the dates of membership.

N/A

10. **Is there anything about the state of your health which should be disclosed to the Commission?** (Indicate with an "X")

YES	NO
	X

If so, please state:

N/A

SECTION 2: JUDICIAL AND LEGAL BACKGROUND

11 Please furnish particulars of your appointment.

11.1 To which court were you appointed?

Acting Appointments:

South Gauteng High Court (2003 – 2004).

Labour Court (2003 – 2004).

Competition Appeal Court (2007 – 2009).

Constitutional Court (November 2014 – May 2015).

Permanent Appointments:

South Gauteng High Court (2005 – 2009)

Supreme Court of Appeal (2009 – to present).

12. **If you have any publications in the field of law please list them and identify those which you regard as most significant and state shortly why you regard them as significant.**

NONE

13. **In regard to major publications indicate by whom they have been reviewed.**

N/A

14. **If any of your writings have been cited in judicial decisions please identify those decisions and indicate whether the citing was with approval.**

N/A

15. **If you have any publications outside the field of law please list them.**

N/A

16. **Cases**

16.1 **List the cases where you have written the judgment (not more than ten) which you regard as being the most significant and why**

a) City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Other 2015 [ZACC] 9

Apart from the fact that this is my first judgment as an acting judge at the Constitutional Court, this judgment addresses a concern raised by the Labour Appeal Court on whether municipal entities are subject to the Labour Relations Act 1995. The Constitutional Court unanimously held in the affirmative.

b) Coughlan N.O. v Road Accident Fund 2015 [ZACC] 10

The Court held that foster child grants and child support grants are not deductible from compensation for loss of support. That finding is in favour of children, specifically the vulnerable who are beneficiaries of those grants.

c) Macleod v Babalwa Kweyiya 2013 (6) SA 1 (SCA)

An issue of prescription was raised. The outcome was able, within the confines of the law of prescription to assist a paraplegic whose attorney had negligently under settled her claim from the Road Accident Fund.

(d) Mashilo and Another v Prinsloo 2013 (2) SACR 648 (SCA).

The judgment clarifies the provisions of section 50 (1) and (6) of the Criminal Procedure Act 1977. The 48 hour outer limit during which an arrested person may be detained does not, without more, entitle a policeman to detain someone for that entire period, if it can be done earlier. The police are obliged to bring an arrested person before court as soon as reasonably possible. This is so, whether or not the 48 hours expires before or during the weekend. Expedition relative to circumstances is what is dictated.

(e) NDPP v Naidoo 2011 (1) SACR 336 (SCA)

This case emphasized the dangers inherent in giving orders and promising to give reasons later. There may be intervening factors that delay the furnishing of reasons and that, in turn, would frustrate the ability of litigants to lodge an appeal timeously.

(f) Lekota and Another v Tsedu and 2 Others [Cannot locate it online]

The outcome hopefully emphasized the need for the media to be careful and accurate on the choice of words used in their publications, specifically in sensitive matters that may potentially harm the reputation of people.

(g) Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webtrade Inv No 45 2006 (5) SA 327 (W)

The outcome clarified the objectives of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (PIE Act). It stated that the purpose of the PIE Act was not to protect the affluent.

16.2 **Which of these cases has been reported?**

a) Macleod v Babalwa Kweyiya 2013 (6) SA 1 (SCA)

(b) Mashilo and Another v Prinsloo 2013(2)SACR 648(SCA)

(c)NDPP v Naidoo 2011 (1) SACR 336 (SCA)

(d)Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webtrade Inv No 45 2006 (5) SA 327 (W)

Please note: A comprehensive schedule of my judgments I could source online is attached and marked "D" for ease of reference.

16.3 **Please list cases in which you gave judgment that were unsuccessfully appealed against (not more than ten).**

Tsedu and Others v Lekota and Another [2009] ZASCA 11; 2009 (4) SA 372 (SCA)

Please note I could not source a list of all the judgments online. I will continue to to so and update this portion if necessary.

16.4 **Please list cases in which you gave judgment that were successfully appealed against (not more than ten).**

Please note I could not source a list of the judgments online. I will continue to to so and update this portion if necessary.

16.5 **Please list any reserved judgments still outstanding and the date(s) on which judgment was reserved.**

NONE

17 **What would you regard as your most significant contribution to the law and the pursuit of justice in South Africa?**

- Trainer - Trial Advocacy Skills
- Trainer – SAJEI
- Take a Girl Child to work project conducted whilst in South Gauteng High Court. This project exposed young women in grades 11 to 12 from the Watville township, Benoni, to the justice system and also served as a form of career guidance. The young women would be allocated to judges willing to participate in the programme with a view to afford them exposure to the various facets of the judicial functions.
- Job Shadowing whilst at the South Gauteng High Court – one of the young women is serving articles presently. I would work with young women individually in my chamber and invite them to court to observe the proceedings.
- Educating the community by giving talks in my church and in women's conferences on legal issues: drafting of wills, property rights, matrimonial arrangements.
- Targeting and training black candidate attorneys, some of them are holding the following positions:
  - A partner in a law firm,
  - Employed at Legal-wise
  - Employed as a legal advisor in government.
  - A magistrate in Tembisa.
  - A claim's handler at the Road Accident Fund.
  - The managing partner at Tshiqi Zebediela Attorneys.

SECTION 3: GENERAL

18. **Are there any circumstances known to you which may cause you embarrassment in seeking the appointment for which you have been nominated?**

	NO X

If so, please furnish particulars.

N/A

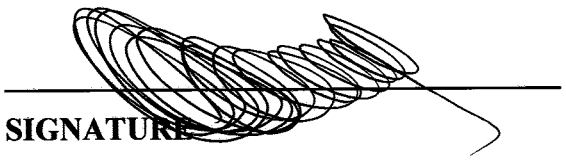
19. **Is there any other relevant matter which you should bring to the attention of the Commission?**

	NO **X**

N/A

Do you hold or have you ever held any other office of profit? If your answer is yes have you divested yourself of those assets? Kindly furnish details if applicable.

I have not held any other office of profit after my appointment as a judge. The only benefit I enjoy at the moment is my cellphone contract and number still registered and paid for by my previous firm, Tshiqi-Zebediela Attorneys.



SIGNATURE

22 April 2015

DATE

Judge of the Supreme Court of Appeal

TSHIQI, ZUKISA LAURAH LUMKA.

Personal:
Born Qingana
11 January 1961, Eastern Cape
Three children

Education:
B Proc (Wits University)
Advanced Diploma in Labour Law (University of Johannesburg)

Judicial positions:
Acting Judge – Constitutional Court (November 2014 – May 2015)
Judge – Supreme Court of Appeal (November 2009)
Acting Judge – Supreme Court of Appeal (April 2009 – November 2009)
Acting Judge – Competition Appeal Court (2007 – 2009)
Judge of the High Court (South Gauteng High Court) (2005 – 2009)
Acting Judge of the High Court and the Labour Appeal Court (2003 – 2004)

Career history:
Tshiqi-Zebediela Inc- Managing Partner (1994 – 2005)
Black Lawyers Association - Litigation Officer (1992 – 1994)
Matlala Attorneys – Professional Assistant (1991 – 1992)
Neluheni Attorneys – Articles of Clerkship (1989 – 1991)
South African Council of Churches – Legal Co-ordinator (1986 – 1989)

Other positions:
(1994 – 2005) Senior Commissioner - CCMA and Bargaining Councils;
Medunsa – Long Distance Part-Time Lecturer in Labour Law ;
IMSSA and Tokiso – Mediator, Arbitrator, Trainer and facilitator and Chairing Disciplinary Hearings;
Council Member; Law Society of South Africa
(2013 to present) Panel Member for appointment of Demarcation Board members;
Trainer, continuing judicial education and for SAJEI

Interests
Reading, walking, golf, swimming

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List of cases

NB: JDR refers to the Juta Daily Reports

NAME OF MATTER	REPORTED	NOT REPORTED	UNCERTAIN
Porritt v National Director of Public Prosecutions 2014 JDR 2209 (SCA)		✓	
Minister of Safety and Security v Janse Van Der Walt 2014 JDR 2454 (SCA)		✓	
Maclead v Babalwa Kweyiya 2013 (6) SA 1 (SCA)	✓		
Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd 2013 JDR 0697 (SCA) **(With Nugent JA)**		✓	
Peter Taylor & Associates v Bell Estates (Pty) Ltd 2014(2) SA 312 (SCA)	✓		
Mashilo and another v Prinsloo 2013 (2) SACR 648 (SCA)	✓		
S v Musiker 2013 (1) SACR 517 (SCA)	✓		
NDPP v Naidoo 2010 JDR 1424 (SCA) **(With Mpati P)**		✓	
S v Raghubar 2013(1) SACR 398 (SCA)	✓		
S v PB 2010 JDR 1468 (SCA)		✓	
Chretien v Bell 2011 (1) SA 54 (SCA)	✓		
S v BM 2013 JDR 2670 (SCA)		✓	
The Commissioner for the South African Revenue Service v Moresport (Pty) Ltd 2009 JDR 0510 (SCA)		✓	
Mutual & Federal Insurance Company Ltd v SMD Telecommunications CC 2010 JDR 1168 (SCA)		✓	
The Chief Executive Officer of the South African Social Security Agency v Cash Paymaster	✓		

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List of cases

NB: JDR refers to the Juta Daily Reports

Services (Pty) Limited [2011] 3 ALLSA 233 SCA; 2012(1) SA 216 (SCA)			
Maake v DPP 2011(1) SACR 263 SCA; [2011] 1 ALLSA 460 (SCA)	✓		
S v Managa 2013 JDR 2156 (SCA)		✓	
S v Khorombi 2013 JDR 2710 (SCA)		✓	
S v Mahlase 2013 JDR 2714 (SCA)		✓	
S v Herman 2013 JDR 2726 (SCA)		✓	
Botha v Iveco South Africa (Pty) Ltd 2012 JDR 0863 (SCA)		✓	
Florence v Government of RSA 2013 JDR 2085 (SCA)		✓	
S v AR 2013 JDR 2186 (SCA)		✓	
S v Seyisi 2012 JDR 1775 (SCA)		✓	
S v Zondo 2012 JDR 0492 (SCA)		✓	
S v SM 2012 JDR 0541 (SCA)			✓
Aberdeen International Incorporated v Simmer and Jack Mines Ltd 2010 JDR 0303 (SCA)			✓
Grove v Road Accident Fund 2011 JDR 0298 (SCA)			✓
Botha v Coetzee 2010 JDR 0608 (SCA)			✓
The Commissioner for the South African Revenue Services v Saira Essa Productions CC 2010 JDR 1450 (SCA)			✓
S v Biyela 2011 JDR 0278 (SCA)			✓
Randfontein Municipality v Grobler 2009 JDR 0990 (SCA)			✓

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List of cases

NB: JDR refers to the Juta Daily Reports

Maluleke v The Minister of Home Affairs 2008 JDR 0426 (W)			✓
S v Fletcher 2009 JDR 1306 (SCA)			✓
Eveready (Pty) Ltd Limited v Commissioner, South African Revenue Service 2012 JDR 0500 (SCA) **(With Nugent JA)**			✓
S v Grigor 2012 JDR 0912 (SCA)			✓
S v Manzini 2007 JDR 0293 (W)			✓
Lekota and another v Tsedu and 2 others			✓
Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webtrade Inv No 45 2006(5) SA 327 (W)	✓		
Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd 2010 (2) SA 400 (SCA)	✓		
Norfan (Pty) Ltd v City of Johannesburg 2007 JDR 0180 (W)			✓
Galdstone v Liberty Group Ltd and others 2005			✓
City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd 2015 [ZACC] 9			✓
Wayne Coughlan N.O. v Road Accident Fund 2015 [ZACC] 10			✓

secured, there is a further insuperable hurdle to establishing the causal connection between the negligent conduct and the loss, which is that the venture was, in any event, doomed from the start, although the Duvenhages did not know it at the time. Clearly, it was not possible to acquire the farm and complete planting by the end of February 1997, which was when that planting season ended, even if the bank had immediately advanced a loan. And on a proper construction of the permits—the undisputed evidence of an official of the Department of Water Affairs and Forestry was to the same effect—it would have been illegal to plant once the permits expired on 15 May 1997 and 28 August 1997, respectively, which was before the next planting season commenced. The project was thus always bound to fail.

[21] The true cause of the expenditure of the money, and the loss of the opportunity to recover it and to profit, was that the Duvenhages embarked upon the venture when, unbeknown to them, because they misunderstood the terms of the permits, it was not capable of being completed before the permits expired. Even the contractual claim was bound to fail for want of a causal connection between the breach and the loss. And, if the contractual claim was bound to fail, the claim in delict was bound to follow.

[22] At times it is worth giving thought to causation at the outset, as suggested by Knobel, even if not on doctrinal grounds, because in practice claims often fail for want of a causal connection between the unlawful conduct and the loss.

[23] The appeal is upheld with costs. The order of the Court below is set aside and substituted with an order dismissing the appeal with costs.

Harms JA, Cameron JA, Navsa JA and Brand JA concurred.

Appellant's Attorneys: *John Koch & Co*, Durban; *Israel Sackstein Matsepe Inc*, Bloemfontein. Respondent's Attorneys: *Bale Buchanan*, Pietermaritzburg; *Claude Reid Inc*, Bloemfontein.

ANDRIES VAN DER SCHYFF EN SEUNS (PTY) LTD t/a COMPLETE CONSTRUCTION v WEBSTRADE INV NO 45 (PTY) LTD AND OTHERS

WITWATERSRAND LOCAL DIVISION

TSHIQI J

2006 February 1 Case No 1277/2006

Land—Unlawful occupation—Eviction from—Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998—Applicability of—Affluent property owners unlawfully taking occupation of own property not entitled to protection of PIE—Construction company (applicant) having been in possession of property by virtue of contract with owners in terms of which it was to construct house on property—Owners taking occupation before applicant having completed construction and handed over property—Dispute existing as to quality of applicant's workmanship and outstanding money due to applicant—Applicant seeking to be restored to possession by way of mandament van spolie—Owners seeking to rely on provisions of PIE to protect them from eviction—Protection under PIE clearly not intended to be available to affluent property owners who deliberately take unlawful occupation of own property—Respondents not in dire need of accommodation and not belonging to poor and vulnerable class of persons that PIE designed to protect—Justice and equity not requiring that respondents be protected from their unlawful conduct—Applicant having been spoliated—Applicant restored to possession of property.

The applicant, a construction company, brought an application in a High Court, based on the mandament van spolie, against the owners of certain immovable property for an order that they be restored to possession of the property. By virtue of a contract between them in terms of which the applicant was to construct a house on the property, the applicant had been in possession of the property. However, prior to the completion of the construction and prior to the applicant handing over the property to the respondents, the respondents had taken possession of the property. At the time, there existed a dispute between them regarding the quality of the applicant's workmanship and the outstanding money due to the applicant. The respondents contended, *inter alia*, that, on the applicant's own version, they were 'unlawful occupiers' as defined in s 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), that they were therefore protected from eviction by the provisions of PIE and that the common-law remedy of a mandament van spolie was not available to the applicant in circumstances in which PIE applied.

Held, that the respondents were affluent private owners of property of which they had taken possession whilst embroiled in a dispute over workmanship and money. In utilising the provisions of PIE, they sought to shield themselves from their own unlawful conduct. The protection under PIE was clearly not intended to protect affluent property owners who deliberately placed themselves in unlawful occupation of their own property. (Paragraphs [9]–[10] at 330G–H.)

Held, further, that PIE was directed at ensuring that justice and equity prevailed in relation to all concerned in the eviction process. Justice and equity did not require that the respondents in the present matter be protected from their unlawful conduct. The respondents were not in dire need of accommodation and did not belong to the poor and vulnerable class of persons that PIE was designed to protect. (Paragraph [11] at 332A–C.)

Held, further, that PIE was therefore not applicable in the present matter. (Paragraph [12] at 332D.)

Held, further, on the facts, that there had been a spoliation. (Paragraph [14] at 332F.)

Held, accordingly, that the applicant had to be restored to possession of the property. (Paragraph [15] at 332G.)

Annotations:

Reported cases

City of Cape Town v Rudolph and Others 2004 (5) SA 39 (C): distinguished

Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA): considered

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC): dicta in paras [10] and [11]–[14] applied

Wormald NO and Others v Kambule [2005] 4 All SA 629 (SCA): applied.

Statutes

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 1: see *Juta's Statutes of South Africa 2005/6* vol 6 at 2-453.

Application for restoration to possession of an immovable property on the basis of a mandament van spolie. The facts appear from the reasons for judgment.

A R G Mundell for the applicant.

M A Lennox for the respondents.

Tshiqi J:

[1] The applicant, a construction company, urgently seeks to be restored to possession of the immovable property situated at 463 Rooibekkie Lane, Featherbrooke Estate, Krugersdorp (hereafter referred to as 'the property'). The second and third respondents currently occupy the property. The application is founded on the mandament van spolie. The date of the alleged spoliation is 20 January 2006. The first respondent is the owner of the property. The second respondent is a director of the first respondent. The third respondent is the wife of the second respondent. The second respondent, acting on behalf of the first respondent, entered into a contract with the applicant in terms of which the applicant was to build a house on the property. Before the construction of the house had been completed and before the applicant had handed over possession of the property, the second and third respondents took possession of the property. They did so by obtaining a duplicate set of keys without the knowledge of the applicant, who was at that stage still in possession of the original set of keys of all the doors to the property.

[2] At the time the respondents took possession of the property, there was a dispute between the parties about the quality of the workmanship and outstanding money due to the applicant. The applicant unsuccessfully attempted to prevent the respondents from taking possession of the property.

[3] It is in dispute whether the applicant was in undisturbed possession of the property and whether the second and third respondents unlawfully deprived the applicant of such possession. However, the second and third respondents (hereinafter referred to as 'respondents') have raised the point that, on the applicant's version, and assuming that the respondents took occupation of the property unlawfully as the applicant contends, the respondents are unlawful occupiers as defined in s 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter referred to as 'PIE'). Consequently, it was further submitted, as the respondents are protected by the provisions of PIE, the common-law remedy of a mandament van spolie is not applicable in circumstances in which PIE applies.

[4] Section 1 of PIE contains the following relevant definitions:

'"(B)uilding or structure" includes any hut, shack, tent or similar structure, or any other form of temporary or permanent dwelling or shelter;

"evict" means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and "eviction" has a corresponding meaning;

"owner" means the registered owner of land, including an organ of State;

"person in charge" means a person who has or who at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question;

"unlawful occupier" means a person who occupies land without the express or tacit consent of the owner or person in charge or without any right in law to occupy such land excluding a person who is an occupier in terms of the Extension of Security and Tenure Act 1997 and excluding a person whose informal right to land but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.'

[5] The applicant, on the other hand, seeks the common-law remedy of the mandament van spolie on the basis that PIE does not apply.

[6] Counsel for the respondents has referred to a judgment of Selikowitz J in *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C), where the Court dealt with the issue (amongst others) whether a mandament van spolie is available where PIE applies.

[7] In considering the meaning of the term 'unlawful occupier' as defined in s 1 of PIE, the Court referred with approval to the dissenting judgment of Olivier JA in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at paras [40]–[41] in which he considered the meaning of 'unlawful occupier' as follows:

'C. The term "unlawful occupier": The problem of its meaning

[40] The definition of "unlawful occupier" in PIE appears, on a first perusal, to be clear and unambiguous. But this appearance is illusory and deceptive, and

Courts have struggled to fathom its correct meaning and in the process to demarcate the purview of PIE: To whom is it applicable and to which categories of property?

[41] The problem inherent in the expression "unlawful occupier" is that it is latently capable of two expositions. The verb "occupy" can legitimately be used in two senses, viz firstly, "to hold possession of . . . reside in; to stay, abide"; or, secondly, "to take possession of (a place) by settling in it, or by conquest" (see *The Shorter Oxford English Dictionary sv* "occupy"). On the face of it, the words "a person who occupies land without the express or tacit consent of the owner . . ." means anyone who now continues in occupation without the necessary consent irrespective or whether that person originally took occupation of the land with or without the necessary consent. But the word can also refer to a specific act, viz the taking of possession or occupation without the necessary consent.'

[8] Selikowitz J found that the respondents, as 'squatters' or 'land grabbers', fell foursquare within the definition of an 'unlawful occupier' as defined in PIE. He went on to find that there was no 'warrant for depriving them of the *protection for which the Legislature enacted PIE*' (at 69G–H) (my emphasis). In this context, he went on to hold that the mandament van spolie was not available to the Council because, in his opinion,

'the framing of an order in terms which refer to "restoring possession *ante omnia*" to the person from whom it was despoiled is simply another way of effectively evicting the spoliator. To permit an applicant to use the mandament to evict a person who has established a home on the land and who would otherwise qualify as an "unlawful occupier" would, as in the case of the other common-law remedies, overlook the wording and purpose of PIE and would permit the statute to be undermined by a simple device.'

[9] This application poses a totally different set of facts to those on which the *Rudolph* judgment was based. What must be asked in this application is whether the grant of a spoliation order in this application would 'permit the statute to be undermined by a simple device'. The answer must be no. The respondents in this matter are the affluent private owners of the property which they occupied in the midst of a dispute surrounding workmanship and money. In utilising the provisions of PIE, the second respondent seeks to shield himself against his own unlawful conduct.

[10] The protection under PIE was clearly not intended to protect affluent property owners who deliberately place themselves in unlawful occupation of their own property. The purpose and meaning of PIE and how it is to be applied by our courts is dealt with in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC). After pointing out the evils of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), Sachs J, speaking for the Court at para [10] at 223D–224B, said:

'PISA, accordingly, gave the universal social phenomenon of urbanisation an intensely racialised South African character. Everywhere, the landless poor flocked to urban areas in search of a better life. This population shift was both a consequence of and a threat to the policy of racial segregation. PISA was to prevent and control what was referred to as squatting on public or private land by criminalising it and providing for a simplified eviction process. The power to enforce politically motivated, legislatively sanctioned and State-sponsored eviction and forced removals became a cornerstone of apartheid land law. This

marked a major shift, both quantitatively and qualitatively (politically). Evictions could be sought by local government and achieved by use of criminal rather than civil law. It was against this background, and to deal with these injustices, that s 26(3) of the Constitution was adopted and new statutory arrangements made.'

[11] Section 26(3) of the Constitution provides as follows:

'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Sachs J went on to deal with PIE as follows (at 224C–225B):

'The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

[11] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. *Its provisions have to be interpreted against this background.*

[12] PIE not only repealed PISA but, in a sense, inverted it: Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies, while reducing common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgment of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.

[13] Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable. At the same time, the second part of the title established that unlawful occupation was also to be prevented. The courts now had a new role to play, namely to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex, and constitutionally ordained, function: When evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned.

The broad constitutional matrix for the interpretation of PIE

[14] In this context, PIE cannot simply be looked at as a legislative mechanism designed to restore common-law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects. Nor is it just a means of promoting judicial philanthropy in favour of the poor, though compassion is built into its very structure. *PIE has to be understood, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix.*'

(My emphasis.) As the Constitutional Court says, the 'manifest objective' of PIE is to overcome the abuse permitted by PISA and to ensure that the eviction of unlawful occupiers takes place in a manner consistent with the Constitution. In essence, what the Constitutional Court has held is that PIE is directed at ensuring that justice and equity prevail in relation to all concerned in the eviction process. Justice and equity do not require that the respondents in this matter be protected from their unlawful conduct. In my view, the respondents are not in dire need of accommodation and do not belong to the poor and vulnerable class of persons whose protection was foremost in the Legislature's mind when PIE was enacted. (See *Wormald NO and Others v Kambule* [2005] 4 All SA 629 (SCA).)

[12] Whilst it may be argued that the definition of unlawful occupier does not draw a distinction between different kinds of unlawful occupiers, nor classify different categories of unlawful occupiers, what should not be overlooked is the objective of PIE as stated succinctly in the Constitutional Court by Sachs J, in the *PE Municipality* case (*supra*). In the circumstances I find that PIE is not applicable in the present matter.

[13] A mandament van spolie is a common-law remedy. The reason behind the granting of a spoliation order is that no man is allowed to take the law into his own hands and to dispossess another illicitly of possession of property. If he does so, the court will restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. (See Jones and Buckle *The Civil Practice of the Magistrate's Court in South Africa* 9 ed vol 1 ('The Act').)

[14] It follows that the court in spoliation proceedings need not enter into the question of the rights of the parties before the spoliation took place. The Court needs to concern itself with whether there has indeed been a *spoliation*. In the present matter there has been a spoliation.

[15] I accordingly grant the following order:

1. That the applicant's possession of the property known as erf 463, Featherbrooke Estate, Extension 1, at 463 Rooibekkie Lane, Featherbrooke Estate, Krugersdorp, be restored.
2. That the first, second, third and fourth respondents be ordered to take all necessary steps to ensure that the applicant is placed in undisturbed possession of the property.
3. That the costs of this application be paid, jointly and severally, by the first, second and third respondents.

Applicant's Attorneys: *Viljoen Inc.* Respondents' Attorney: *Marie-Lou Bester.*

MINISTER OF WATER AFFAIRS AND FORESTRY v STILFONTEIN GOLD MINING CO LTD AND OTHERS

WITWATERSRAND LOCAL DIVISION

HUSSAIN J

2005 July 25 2006 May 15 Case No 2005/7655

Constitutional law—Human rights—Enforcement of—Contempt of court proceedings—To enforce environmental obligations under s 24 of Constitution—Courts to come to assistance of State in enforcing environmental obligations of mining companies and their directors—Contempt of court proceedings effective method of enforcing environmental imperatives contained in s 24—Mining company failing to comply with Court order compelling compliance with directives issued in terms of s 19 of National Water Act 36 of 1998—Company and its directors guilty of contempt of Court.

Company—Proceedings by and against—Contempt of court proceedings against company—Company failing to obey Court order ordering compliance with directives issued under environmental legislation—Directors resigning en masse*—Resignation neither* bona fide *nor in best interests of company—Directors prevented from discharging their duties to company and its members—Company consequently disobeying Court order—Courts to assist State in enforcement of environmental obligations of companies and their directors—Both company and its directors guilty of contempt of Court.*

Environmental law—Protection of the environment—Enforcement of environmental legislation—Courts to assist State in enforcement of environmental legislation—Contempt of court proceedings to be used to enforce compliance with constitutional environmental obligations—Constitution, s 24.

Environmental law—Protection of the environment—Protection of water resources—Enforcement of legislation—Mining company failing to comply with directives issued under s 19 of National Water Act 36 of 1998—Court order directing compliance ignored—Contempt of court proceedings instituted against company and directors—Courts to come to assistance of State in enforcing environmental obligations of companies—Contempt of court proceedings effective method of enforcing environmental imperatives contained in s 24 of Constitution—Company and directors found guilty of contempt of Court.

The applicant sought an order declaring the first to fifth respondents to be in contempt of Court for failing to comply with an order of the High Court in which the first respondent had been compelled to comply with certain directives issued by the applicant in terms of the provisions of s 19(3), read with s 19(1), of the National Water Act 36 of 1998. The second to fifth respondents (the respondents) were directors of the first respondent who, by the time of the hearing of the present matter, had resigned *en masse*. The first and sixth to tenth respondents were gold mines which all operated in the same geographic area. The applicant's directives were aimed at

THE SOUTH AFRICAN LAW REPORTS

DIE SUID-AFRIKAANSE HOFVERSLAE

NOVEMBER 2013 (6)

MACLEOD v KWEYIYA

SUPREME COURT OF APPEAL

MTHIYANE DP, TSHIQI JA, MAJIEDT JA, PLASKET AJA and SALDULKER AJA

2013 FEBRUARY 28; MARCH 27

CASE No 365/12
[2013] ZASCA 28

Prescription—*Extinctive prescription—Debt—Commencement of prescription—Knowledge of debt—When deemed—Imputation of constructive knowledge aimed at negligent, not innocent, inaction—Test for negligence—Whether knowledge could in prevailing circumstances have been acquired by exercise of reasonable care—Failure of 25-year-old to timeously bring claim for damages against attorney for under-recovery of her RAF claim (settled when she was 13) not negligent since based on reasonable belief that attorney and guardian would act in her best interests—Prescription Act 68 of 1969, s 12(3).*

Prescription—*Extinctive prescription—Debt—Commencement of prescription—Knowledge of debt—When deemed—Onus on debtor claiming prescription to allege and prove deemed knowledge—No negative inference to be drawn from creditor's failure to testify where no evidence to rebut—Prescription Act 68 of 1969, s 12(3).*

The proviso to 12(3) of the Prescription Act 68 of 1969* seeks to prevent negligent—not innocent—inaction. The constructive knowledge contemplated therein is established if it can be shown that the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. Courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself. A defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt.

* Section 12(3) is quoted below in para [9].

This burden shifts to the plaintiff only if the defendant has established a prima facie case. (Paragraphs [9]–[10] and [13] at 6A–7D and 7J–8D.)

In this case the particular circumstances were as follows: The respondent (K) was injured in a motor vehicle accident when she was 3 years old. Appellant (M) is the attorney who, instructed by K's mother, instituted a claim against the statutory insurer on K's behalf, which was settled when K was approximately 13 years old. She became aware of the settlement amount fortuitously when, on or about 19 April 2006 and in response to a related enquiry, M's candidate attorney emailed certain documents to her relating to the claim. On 8 April 2009, when she almost 25 years old, she instituted action against M, alleging that the settlement was a significant under-recovery of her true damages, and that by accepting it M had acted in breach of contract and in breach of his duty of care. K stated in her particulars of claim that she only became aware of M's negligence when she consulted her attorneys on 4 February 2009. M's special plea of prescription, which specifically relied on constructive knowledge, was dismissed by the high court.

In an appeal the SCA identified two interrelated issues: firstly, whether K could reasonably have known the facts from which her debt against M arose before 19 April 2006; and secondly, whether an adverse inference should be drawn from K's failure to give evidence about her state of mind, circumstances or conduct during that period. As to the first issue, the court stated that the question was not whether she could or could not have obtained the documents from her mother or M, but rather whether she was negligent or innocent in failing to do so. The court concluded that it was reasonable for K to have trusted that her mother and M were acting in her best interests, and that there was no conceivable reason why that belief would change merely because she had attained majority. It was accordingly held that there was no basis to arrive at a conclusion that K was negligent. (Paragraphs [7] and [14]–[15] at 5D–E and 8D–9A.)

As to the second issue, it was held that the factors which M had suggested cumulatively required K to explain the delay, were neutral and established no basis for the contention that she should have appreciated earlier that she had a claim against the appellant. The court concluded that there was nothing in M's evidence that K needed to rebut, and equally no adverse inference could be drawn from her failure to testify. (Paragraphs [11] and [15] at 7E and 8G–9A.) The appeal accordingly failed.

Annotations

Case law

Claasen v Bester 2012 (2) SA 404 (SCA): referred to

Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A): referred to

Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA) ([1998] 2 All SA 571): referred to

Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A): referred to

Gericke v Sack 1978 (1) SA 821 (A): referred to

Gunase v Anirudh 2012 (2) SA 398 (SCA): dictum in para [14] compared

MEC for Education, KwaZulu-Natal v Shange 2012 (5) SA 313 (SCA): dictum in para [11] applied

Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika 2001 (1) SA 987 (SCA) ([2001] 1 All SA 107): referred to

Uitenhage Municipality v Molloy 1998 (2) SA 735 (SCA) ([1998] 1 All SA 140): referred to

Van Staden v Fourie 1989 (3) SA 200 (A): referred to

Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng 2009 (3) SA 577 (SCA) ([2009] 3 All SA 475): referred to.

Statutes

The Precription Act 68 of 1969, s 12(3): see *Juta's Statutes of South Africa 2012/13* vol 1 at 2-921.

PBJ Farlam for the appellant.
SP Rosenberg SC for the respondent.

An appeal from the Western Cape High Court, Cape Town, against the dismissal of a special plea of prescription (Gamble J).

Order

The appeal is dismissed with costs.

Tshiqi JA (Mthiyane DP, Majiedt JA, Plasket AJA and Saldulker AJA concurring):

[1] The issue in this appeal is whether the respondent's claim for damages against the appellant has prescribed. On 30 January 1988 when she was approximately 4 years old, the respondent sustained injuries and was rendered a paraplegic in a motor vehicle accident between two motor vehicles, a Valiant, in which she was a passenger, and a Toyota. The appellant is a practising attorney who was instructed by the respondent's mother to institute a damages claim in her personal capacity, and in her capacity as the respondent's guardian, against the statutory insurers of the two drivers. On 26 March 1993 the appellant issued summons in the Western Cape High Court, Cape Town, claiming an amount of R25 000 in respect of the Valiant, and an amount of R870 220 in respect of the Toyota.

[2] On 18 March 1996 the claim was partially settled and the settlement agreement was made an order of court. In terms of that order it was stated that an amount of R25 000 had already been received from the statutory insurer of the Valiant and that the insurer of the Toyota agreed to pay 35 % of any damages the respondent's mother could prove, both in her personal capacity and in her capacity as the respondent's guardian. The amount of R25 000 paid by the insurer of the Valiant would be taken into account when the damages claim against the insurer of the Toyota was quantified. In February 1997, subsequent to the order by the high court, the particulars in respect of the unsettled claim were amended, thereby increasing the claim to an amount of R2,3 million. In May 1997 the claim was settled at an amount of R99 500, which when added to the R25 000 amounted to R124 500. It is undisputed that the appellant was at all times at that stage acting on the instructions of the mother and that she accepted the settlement amount.

[3] On 5 March 1998 the appellant wrote a letter to the respondent's mother giving her a detailed account reflecting that she was entitled to receive an amount of R14 000 in cash; that payment in the amount of

R30 081,05 together with agent's fees in the amount of R27 337,90 was made for a house bought and registered in her name in Khayelitsha; and that several disbursements including experts and legal fees were also paid. The original title deed was enclosed. At the bottom the letter states: as you know, we had some difficulty with the final settlement but our Counsel advised that in the circumstances it was a good settlement.

[4] At the time of the settlement the respondent was approximately 13 years old, and almost 14 years old at the time the accounting was made to her mother. On 29 April 2005 she reached the majority age of 21 years. In early 2006 the respondent visited the offices of the appellant and was, according to the appellant, in quite a state because she had been kicked out of the house by her mother and wanted to know what she could do to get the house back. It is uncontroverted that the details of the claim were not discussed during that meeting and that they were in any event not available as the file had already been archived. The appellant could also not assist the respondent with the dispute because of conflict of interest. She was instead referred to the Legal Aid Board, was told there was no more money payable to her and was promised that the full documentation would be sent to her by Ms Stroud, the appellant's candidate attorney. There may have been another meeting between the respondent and Ms Stroud after the first meeting, but nothing turns on that. On 19 April 2006 Ms Stroud sent an email to the respondent enclosing the court order, a letter from the Road Accident Fund confirming the settlement amount paid, a breakdown of the payments made to the company that built the house and the detailed account sent to her mother. It was suggested in the letter that she should consult the Legal Aid Board, and its telephone numbers were furnished.

[5] On 8 April 2009, when she was almost 25 years old, and 11 years after the appellant had accounted to her mother, she caused a summons to be issued against the appellant in the Western Cape High Court, Cape Town. She alleged that, in settling the quantum of the claim against the statutory insurer of the Toyota, the appellant had acted negligently, in breach of contract and duty of care. She stated that the claim should have been settled at an amount of about R2,1 million. She quantified the monetary value of that amount (at the time she issued the summons) to be about R4,8 million less the settlement amount of R124 500, and claimed an amount of about R4,7 million. In her particulars of claim she anticipated a possible plea of prescription by stating that she only became aware of the terms of the settlement agreement when she received the email from Ms Stroud on 19 April 2006. She further alleged that she first consulted with her present attorneys on 4 February 2009, and that it was only then that she became aware that the appellant had acted negligently. She contended that prescription only began to run from either of those dates. In his plea the appellant denied knowledge of those facts and also filed a special plea of prescription contending that between 1997 (the time the claim was settled with the RAF), 1998 (the time the final account was rendered to the respondent's mother), by at

least April 2002 (when she was 18 years old) and by April 2005 (at the time she attained the majority age of 21 years), the respondent knew or could have reasonably known the identity of the debtor and the facts on which her debt against the appellant arose.

[6] During the hearing before Gamble J the issue of prescription was separated by the court and heard before the commencement of the main trial in terms of rule 33(4) of the Uniform Rules. The appellant testified and also led the evidence of Ms Stroud. The respondent did not testify and closed her case without calling any witnesses. The court concluded that it had not been shown that the respondent could reasonably have acquired knowledge of the facts material to her claim before 19 April 2006 and ruled that her claim had not prescribed. The special plea was consequently dismissed with costs. The appeal to this court is with the leave of that court.

[7] Two interrelated issues arise in this appeal: *(a)* whether the respondent knew or could have reasonably known the identity of the debtor and the facts on which her debt against the appellant arose before April 2006; and *(b)* whether an adverse inference should be drawn from the failure by the respondent to give evidence about her state of mind, circumstances or conduct during that period, or at any stage prior to the service of summons on 8 April 2009.

[8] As to the first issue the appellant contends that the plaintiff's mother knew or at least could reasonably have known the facts relating to the alleged debt as well as the identity of the debtor in May 1997 when the claim was settled or in March 1998 when the full account was furnished to her. On that basis, the argument continues, it should be inferred that there is at least a prima facie case that the respondent, who at all times lived with her mother, also had that knowledge or could have reasonably acquired it. Insofar as further information was needed, it could have been obtained from the appellant who was at all times accessible from 1996 onwards. The contention by the appellant amounts to an assertion that the respondent should have been suspicious of her mother and the appellant, and that she should have demanded to know the details of the settlement and should then have been able to establish at that stage if there was negligence on the part of the appellant. He asserts that she would have been in a position to sue him within one year of turning 21 years old. The respondent, on the other hand, submits that it was perfectly innocent and reasonable for her at the age of 12—when the settlement agreement was concluded—to trust that her mother and the appellant had acted in her best interests. Once she reasonably formed that belief when she was 12, there was no reason for her to alter that belief without new evidence. There was no reason for her to actively search for information implicating her mother or the appellant. However, when she by chance obtained information about the settlement on 19 April 2006, she sued the appellant within three years.

Prescription

[9] In terms of s 11*(d)* read with s 12(1) of the Prescription Act 68 of 1969, civil debts prescribe three years from the date the debt is due.[1] Section 12(3) of the Prescription Act, which is at the heart of this matter, delays prescription in certain circumstances. It reads:

> 'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

In order to successfully invoke s 12(3) of the Prescription Act either actual or constructive knowledge must be proved.[2] Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor. The appellant places no reliance on actual knowledge but relies on constructive knowledge. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The test is what a reasonable person in his position would have done,[3] meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription.[4] What is required is merely the knowledge of the minimum facts that are necessary to institute action and not all the evidence that would ensure the ability of the creditor to prove its case comfortably.[5]

Evidentiary burden

[10] This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case. In *Gericke v Sack* 1978 (1) SA 821 (A) at 827D–G the court stated:

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[1] In order for the debt to be due under s 12(1), it must be immediately claimable (see *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532G–I), or, in other words, the various components of the cause of action should have fully accrued (see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838–839).

[2] *Gericke v Sack* 1978 (1) SA 821 (A) at 826A–827B.

[3] *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) ([1998] 2 All SA 571) at 209F–G.

[4] *Gunase v Anirudh* 2012 (2) SA 398 (SCA) paras 14–15; *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) ([1998] 1 All SA 140) at 742A–C.

[5] *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B–F; *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) ([2001] 1 All SA 107) paras 11–13; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) ([2009] 3 All SA 475) para 37; *Claasen v Bester* 2012 (2) SA 404 (SCA) paras 10–16.

> '(I)t will at times be difficult for a debtor who pleads prescription to establish the date on which the creditor first learned his identity or, for that matter, when he learned the date on which the delict had been committed.
>
> But that difficulty must not be exaggerated. It is a difficulty which faces litigants in a variety of cases and may cause hardship—but hard cases, notoriously, do not make good law. It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See *R, v Cohen*, 1933 T.P.D. 128. However, the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by INNES J., in *Union Government (Minister of Railways) v Sykes*, 1913 A.D. 156 AT P. 173, that
>
> "less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required".
>
> But the fact that less evidence may suffice does not alter the onus which rests on the respondent in this case.'

[11] Bearing in mind the fact that the appellant bore the onus, there is no basis, on the facts of this matter, to conclude that it was necessary for the respondent to lead evidence in rebuttal. The facts are largely common cause. There was nothing in the appellant's evidence that the respondent needed to rebut. Equally, no adverse inference can be drawn from her failure to testify.

[12] In her particulars of claim the respondent alleged that she first became aware of the terms of the settlements on or about 19 April 2006 when the appellant's candidate attorney emailed certain documents to her. She further alleged that it was only on 4 February 2009, when she consulted her attorneys, that she first became aware that the defendant had acted negligently, or had possibly acted negligently, in breach of contract and in breach of his duty of care. And she also alleged that she—

> 'first had knowledge of the facts from which the debt owing to her arises . . . on 4 February 2009 [the date of the consultation with her attorneys]; alternatively . . . on 19 April 2006 [the date on which she received the email from Stroud].'

Her contention amounts to this. She needed more than just the knowledge that her claim had been settled to be able to appreciate the alleged negligence. She at least needed to appreciate that there was a substantial under-recovery. That appreciation entailed not only knowledge of the minimal facts of the claim but also an appreciation that those facts afforded her a claim against the appellant.

[13] It is the negligent and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself. In *MEC for Education, KwaZulu-Natal*

v Shange 2012 (5) SA 313 (SCA) para 11 this court had to consider whether a 15-year-old learner who had been hit with a belt on the side of his eye by his teacher acted reasonably in waiting more than five years to institute action against the teacher's employer. As in the present matter, the plaintiff became aware of the possibility of a claim by chance. He had initially accepted the teacher's explanation that it was an accident. A family friend noticed that he was wearing an eye patch and suggested that he should approach the Public Protector. An advocate in that office advised him of the possibility of a claim against the teacher. Snyders JA held that the delay was innocent, not negligent. She stated:

> 'He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act.'

[14] Similarly, in this matter the respondent visited the offices of the appellant merely because she had a dispute with her mother pertaining to the occupancy of the house which had been bought with some of the money that had been received as the settlement amount. The visit did not concern the details of the settlement amount. There is no suggestion that at that stage she was concerned about the quantum at all. The version of the appellant confirms that there was no discussion pertaining to the quantum of the claim, the cost of the house and the amount given to her mother. There is no basis to conclude that she should have appreciated that there was something wrong with the quantum of the claim nor with any other aspect of the claim at that stage. More importantly, there is no basis to conclude that she must have realised that there was an under-recovery nor that there was a possible claim for negligence against the appellant. She probably believed, innocently, that the settlement amount was the best under the circumstances. It was not unreasonable of her to trust her mother and the appellant's judgment. In all probability she thought that they had acted in her best interests.

[15] There is no conceivable reason why that belief would change merely because she had attained majority. The question is not whether she could or could not have obtained the documents from her mother or the appellant but rather whether she was negligent or innocent in failing to do so. There is no basis to arrive at the conclusion that she was negligent. There is also no basis to conclude that once she turned 21, without any intervening factor, she ought to have suddenly become suspicious or eager to know the details of the claim settled by her mother on her behalf nor to have felt a sudden urge to investigate it. It is logical that only some new knowledge or event would displace that belief. Counsel for the appellant has listed several factors which he suggested cumulatively required the respondent to explain the delay. All those factors are in my view neutral. There is no basis to conclude that she should have appreciated earlier that she had a claim against the appellant. It follows that prescription only began to run on 19 April 2006. The respondent does not need to explain the delays until 18 April 2009, as such period

was within the three-year prescription period. Therefore, the second of the two interrelated issues referred to in para [7] above must be decided in the respondent's favour. The appeal must accordingly fail.

[16] I make the following order: The appeal is dismissed with costs.

Appellant's Attorneys: *Norton Rose South Africa (Incorporated as Deneys Reitz Inc)*, Cape Town; *Webbers*, Bloemfontein.
Respondent's Attorneys: *Malcolm Lyons & Brivik Inc*, Cape Town; *Matsepes Inc*, Bloemfontein.

ROAD ACCIDENT FUND v DUMA AND THREE SIMILAR CASES

SUPREME COURT OF APPEAL

BRAND JA, MHLANTLA JA, LEACH JA, PLASKET AJA and SALDULKER AJA

2012 NOVEMBER 6, 27

CASE No 202/2012
[2012] ZASCA 169

Motor vehicle accident—*Claim against Road Accident Fund—Limits—'Serious injury' threshold for general damages—Decision on whether injury serious enough to qualify for general damages conferred on RAF, not court—Decision constituting administrative action and unreasonable delay in making it to be contested with administrative remedies—Claim for general damages premature until claimant has complied with procedure for determination of serious injury—Road Accident Fund Act 56 of 1996, ss 17(1) and 17(1A).*

Section 17(1) of the Road Accident Fund Act 56 of 1996 limits the RAF's obligation to compensate third parties for general damages (non-pecuniary loss) to those instances in which the claimant had suffered 'serious injury'. The Act does not provide an objective standard for deciding on the seriousness of injuries but stipulates that the assessment should be made by a medical practitioner on the basis of a method prescribed in reg 3 of the regulations made under the Act. In the present cases the high court had held that the claimants had suffered serious injuries and awarded general damages, even though the RAF had in each case rejected the claimant's RAF 4 (serious injury assessment) reports. In an appeal to the SCA the RAF contended that since the issue of seriousness had not been determined by a method prescribed in the regulations, the awards of general damages were invalid.

Held: The high court's approach to the seriousness issue was based on the premise that it was ultimately for the court to decide whether an injury was serious enough to satisfy the threshold requirement for an award of general damages. This was wrong since it was clear from reg 3(3)*(c)* that the

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 160/14

In the matter between:

WAYNE COUGHLAN N.O. Applicant

and

ROAD ACCIDENT FUND Respondent

and

CENTRE FOR CHILD LAW Amicus Curiae

Neutral citation: *Coughlan N.O. v Road Accident Fund* 2015 ZACC 10

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, and Tshiqi AJ.

Judgments: Tshiqi AJ (unanimous)

Heard on: 12 February 2015

Decided on: 20 April 2015

Summary: Decision on whether foster child grants are *res inter alios acta* — Deductibility of foster child grants from compensation for loss of support payable to foster children — Duty of the State — Rights of vulnerable children — Constitution Act — sections 27 and 28 — Children's Act 38 of 2005 — Sections 1, 156(1)(e) and 181 — Foster child grants are not predicated on death of a parent — Nature and purpose different – Foster child grants not payable to the foster child but to the foster parent — Sections 18(2) and (3) of the Road Accident Fund Act 56 of 1996

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Western Cape Division of the High Court, Cape Town):

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Supreme Court of Appeal is set aside.
4. The respondent is ordered to pay the costs in the Supreme Court of Appeal and this Court, including the costs of two counsel, where applicable.

JUDGMENT

TSHIQI AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ and Nkabinde J concurring):

Introduction

[1] This is an application for leave to appeal against the whole judgment and order of the Supreme Court of Appeal in terms of which a decision of the Western Cape Division of the High Court, Cape Town (High Court) against the respondent, the Road Accident Fund (RAF), was set aside.

[2] The issue is whether foster child grants paid to the foster parents of three children, on behalf of whom the applicant acts, after the death of their mother as a result of a motor vehicle accident, are deductible from compensation payable by the

RAF for loss of support to those children. The curator on behalf of the children contends that the foster child grants are not deductible. The RAF contends that they are, for failure to do so would amount to double compensation.

[3] The High Court held that the grants were *res inter alios acta*[1] and that the children were entitled to the full amount of the damages suffered as loss of support of their mother. The Supreme Court of Appeal held a contrary view. It held that, on the facts presented, it was satisfied that but for the death of the children's mother, the foster parent would not have claimed the foster child grants and that the foster child grants are deductible. It upheld the appeal by the RAF.

Parties

[4] The applicant is Mr Wayne Saleem Coughlan N.O., a practising advocate and member of the Cape Bar. He brings this application in his representative capacity as curator *ad litem*[2] to claim damages in respect of past and future loss of support on behalf of the three children: Mr Jeslin Shelaine Williams born on 22 February 1988, Ms Alfreda Kim Beyers born on 8 August 1992, and Mr Elton Jason Beyers born on 22 May 1995. All the children have now reached the age of majority. Their mother Ms Noelle Margaret Beyers (Ms Beyers), then a pedestrian, was killed in a road accident in June 2002. Their father predeceased their mother.

[5] The respondent is the RAF, a juristic person established under the Road Accident Fund Act[3] (RAF Act). The RAF provides compulsory cover to all users of South African roads against injuries sustained or deaths arising from accidents including motor vehicles within the borders of South Africa. This cover is

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[1] *Res inter alios acta* is a common law doctrine which holds that a contract cannot adversely affect the rights of one who is not a party to the contract. '*Res inter alios*' is taken to mean: A matter between others is not our business.

[2] A curator *ad litem* is a legal representative appointed by a court to represent, during legal proceedings, the best interests of a person who lacks the mental capacity to make decisions for themselves. A curator may be appointed for a child or for a person who is mentally or physically incapacitated.

[3] 56 of 1996.

in the form of indemnity insurance to persons who cause accidents, as well as personal injury and death insurance to victims of the accidents and their families.

[6] The Centre for Child Law (Centre) was admitted to the proceedings as an *amicus curiae*.[4] It was established by the University of Pretoria and is a law clinic registered with the Law Society of the Northern Provinces. Its main objective is to establish and promote child law and uphold the rights of children in South Africa, within an international and regional context, and in particular to use the law and litigation as an instrument to advance such interests. It has been allowed to present both oral and written submissions on the deductibility of foster child grants from damages awards and also on a separate but related issue concerning the deductibility of child support grants.

Factual background

[7] Prior to her death, Ms Beyers was imprisoned for a brief period during which the children were placed in the care of her parents, Mr and Mrs De Long. Upon her release from prison Ms Beyers initially resided at her parental home together with the children and her parents. She managed to find employment as a builder, on a temporary basis, at a salary of R80 per day. From March 2002 she moved from her parental home and resided at her own home with one of the children, Alfreda, until her death in June 2002. She was responsible for the maintenance of all her children.

[8] After Ms Beyers died, her parents applied to the Children's Court to be appointed as foster parents to the children and were so appointed in August 2002 in terms of the Child Care Act.[5] As a result of the appointment they became entitled to receive foster child grants in terms of the Social Assistance Act.[6]

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[4] Friend of the Court.

[5] 74 of 1983.

[6] 59 of 1992, replaced by the Social Assistance Act 13 of 2004.

[9] The RAF has admitted liability to compensate the children for 100% of the proven damages arising from the death of their mother. The parties agreed that the total quantum of the loss of support for all three children is an amount of R112 942. At the time of institution of the action, the foster child grants received by the foster parents were in the amount of R146 790.

Litigation history

In the High Court

[10] The High Court was required to determine whether the foster child grants paid fell to be deducted from the agreed amount for the loss of support, or whether those payments were to be considered as *res inter alios acta*, and therefore not deductible. The question was presented as a stated case and the only evidence that was led was that of the foster mother, Mrs De Long.

[11] The curator contended that foster child grants are payable to people who elect to become foster parents and not to the child and are to be considered as *res inter alios acta* and therefore not deductible. For that contention reliance was placed on *Makhuvela v Road Accident Fund*,[7] where the Gauteng Local Division of the High Court stated that the primary purpose of foster child grants is the realisation of the constitutional rights of the child through the intervention of the foster parent. And that the grant is not payable to the child but to the foster parent who may spend the whole or part of it on the foster child.

[12] The curator also contended that the enquiry to determine which benefits are deductible and which are *res inter alios acta* should entail considerations of public policy, reasonableness and justice. In support of that submission he placed reliance on the case of *Zysset & Others v Santam Limited*,[8] where it was held that a court faced with the enquiry must take into account two conflicting policy considerations: that a

[7] *Makhuvela v Road Accident Fund* [2009] ZAGPJHC 18; 2010 (1) SA 29 (*Makhuvela*) at para 8.

[8] *Zysset & Others v Santam Limited* 1996 (1) SA 273 (C) at 278B-D and 278H – 279C.

dependant should not receive double compensation on the one hand and a wrongdoer should on the other hand not be relieved of liability because of fortuitous benefits received by the dependant.

[13] The RAF submitted that the collision was a direct cause for the foster parents applying for the grant. Foster care grants as well as the funds from the RAF emanate from National Treasury and if the grants are not deducted, the plaintiff would be given double compensation at the expense of the tax-payer.

[14] For that contention the RAF relied on the Supreme Court of Appeal judgment in *Road Accident Fund v Timis*.[9] *Timis* was concerned with child support grants, and in finding that these should be deducted from the damages for loss of support, the Court found that the children received the social grant because they had lost their father, a breadwinner, and that the child support grants were directly linked to the death of the father. Further, that funds paid out in terms of the RAF Act and the Social Assistance Act are funded by the public through two state organs. Not to deduct the child support grant would amount to double recovery and it was not the purpose of the legislation to compensate the dependants twice.

[15] The High Court rejected the RAF's reliance on *Timis*, which it did not follow on the ground that *Timis* was dealing with child care grants. It found that on the evidence presented before it, there were sufficient grounds for the children to be placed in the foster care of the grandparents even before the death of their mother as they were in need of care. It further held that the death of their mother only formalised their placement as foster children under their grandparents.

[16] The High Court held that the death of their mother did not cause the grandparents to take care of the children, but that the need for the children to be cared for was there even before their mother's death. The High Court held further that the

[9] *Road Accident Fund v Timis* [2010] ZASCA 30; 2010 JDR 0284 (SCA) (*Timis*).

later formalisation and appointment of the grandparents as foster parents and the subsequent grants were to enable them to comply with the obligations they already had prior to their mother's death. The High Court concluded that the foster child grants were *res inter alios acta* and ordered the RAF to pay the proven damages together with the costs of the action.

In the Supreme Court of Appeal

[17] The RAF lodged an appeal against the order of the High Court to the Supreme Court of Appeal. It argued that the High Court had incorrectly relied on *Makhuvela* in its finding that the foster child grants were not paid to the children but to the foster parents and were therefore not deductible. It urged the Supreme Court of Appeal instead to follow its judgment in *Timis*, and to extend its reasoning to foster child grants.

[18] The Supreme Court of Appeal considered the case it had to determine to be, firstly, whether there is any real distinction between the child support grants made in *Timis* and the foster child grants made in *Makhuvela*. And secondly, to determine the general principles relating to the deduction of amounts paid to dependants by reason of the death of a breadwinner from awards for loss of support against the RAF or its predecessor funds.

[19] The Court upheld the appeal. It found that there was no difference in substance between the two kinds of grants. It then considered the facts of the matter and found that there was no evidence showing that the grandparents needed additional funds for the support of the children before the death of their mother, nor that they would have applied for the grants if she had not died. That Court concluded that as the grandparents were appointed as foster parents after the death of their daughter, but for her death, the foster parents would not have claimed the foster child grants.

[20] The Court also stated that its finding does not mean that there is any general principle precluding an award of damages for loss of support where dependants have

had the benefit of social support grants. Further, it stated that the facts should determine whether there has been an actual financial loss caused by the death. Where there is evidence that social support grants are warranted, and that double compensation will not ensue, an award of damages may well be appropriate.

[21] That Court set aside the decision of the High Court. It replaced it with an order stating that the foster child grants already paid to the foster parents of the children are to be taken into account in assessing the damages to be awarded for their loss of support. Since that amount exceeded the one agreed to be payable by the RAF, no order as to payment was made.

In this Court

Jurisdiction

[22] The question whether foster child grants are deductible from compensation for loss of support payable to foster children raises important constitutional issues. It concerns the support of vulnerable children, whose rights are enshrined in the Constitution including in terms of sections 27 and 28.[10] There is no doubt that this Court has jurisdiction to entertain this application.

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[10] Section 27 of the Constitution states the following:

"(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment."

Section 28 of the Constitution states the following:

"(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

Application for leave to appeal

[23] The enquiry before the High Court and the Supreme Court of Appeal was limited to the facts of the present dispute between the curator and the RAF. It entailed whether the foster child grants already paid to the three children in this matter are deductible from the award of damages payable by the RAF for the loss of support to those children. The curator argues before us that the facts of a particular matter are of no moment because the payment of foster child grants is not dependent on the death of a parent or on the resultant claim for loss of support, but on a child's situation of need, regardless of the cause of the need. In some cases the need will arise as a result of the death of a parent from a motor vehicle accident, in some instances through the negligence of a third party and in some the need may arise even if the parent is still alive but unable to take care of the child.

[24] If this Court is minded to agree with the curator, then the pertinent question to be raised is whether, following the death of a parent as a result of a motor vehicle

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(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years."

accident, foster child grants are deductible from compensation payable by the RAF for loss of support to those children.

[25] An answer to that broader enquiry will lay down a general principle applicable not only to the individual children in this matter but to all children who have a claim for loss of support arising from the death of their parents, and who are placed under foster care where the foster parent receives a foster child grant.

[26] The Centre urges this Court to broaden the enquiry and, if it is inclined to accept the proposition by the curator and set a general principle applicable to the deductibility of foster child grants, it should extend that principle to child support grants because there is no distinction between the two kinds of grants.

[27] As the Supreme Court of Appeal did not deal with the general principle now facing this Court, the legal position concerning the deductibility or otherwise of foster child grants from claims for loss of support is not settled. The public importance is underpinned by the fact that children most affected are poor and vulnerable. They are children whose parents are either deceased or not able to take care of them. The application for leave must therefore succeed.

Merits

Issues

[28] The curator contends:

(a) The state has a duty under section 28(1)(b) and (c)[11] of the Constitution to ensure that children like the children of Ms Beyers are appropriately cared for. It can do so either by providing the care itself or by encouraging and enabling others to do so. Whichever of those options it

[11] Id.

chooses when it fulfils those duties, cannot be equated to compensation for patrimonial loss and consequently no double compensation arises.

(b) In the event this Court finds that double compensation arises, the payment of foster child grants to foster parents is *res inter alios acta*.

[29] The RAF submits that there is no inflexible rule that finds application when determining whether foster child grants are *res inter alios acta* for purposes of quantifying damages for loss of support and that the facts of each matter must be determinative. In this case it was as a result of the death of Ms Beyers that the child grants were paid to Mr and Mrs De Long, as foster parents.

[30] The RAF further submits that the foster child grants paid to the children served the very purpose that an award of damages would do, that is, providing the children with the financial support lost as a result of the death of their mother and that in the circumstances the children did not suffer any loss that would entitle them to an award of damages.

[31] Regarding the effect of *Timis* on this matter, the RAF contended that the Supreme Court of Appeal considered itself bound by *Timis* and that, to the extent that the Supreme Court of Appeal in *Timis* held that the deduction of child support grants would not render the children destitute, such a finding could only have been made with reference to the children's constitutional rights in terms of sections 27(1)(c), 28(1) and 28(2). Regarding the reasoning in *Makhuvela* that the foster child grants are not paid to the child but to the foster parent, the RAF contends that the payment is inextricably linked to the needs of the child and, although paid to the parent, must be utilised for the needs of the child.

[32] The Centre supports the contentions of the curator and also submits that this Court should find that the decision in *Timis* was incorrect. Regarding the invitation by the Centre to broaden the enquiry, the RAF concedes that the two kinds of grants are

interrelated; that this Court should make a determination applicable to both and also make a pronouncement on whether *Timis* was correctly decided.

Does the payment of grants amount to double compensation?

[33] In order to answer that question I propose to address:

(a) The state's constitutional obligation in terms of sections 27 and 28 to children in need of care;

(b) The nature and purpose of foster child grants vis-a-vis that of compensation for loss of support;

(c) Whether the foster child grant accrues to the foster parent and not the child as alluded to in *Makhuvela*; and

(d) Whether there is any causal link between foster child grants and compensation for loss of support.

State's constitutional obligations to children in need of care

[34] The state is obliged in terms of sections 27(1)(c) and (2) of the Constitution to take reasonable legislative measures, within its available resources, to provide everyone with access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

[35] In terms of section 28(1)(b) every child has the right to family care, parental care, or to appropriate alternative care when removed from the family environment. Section 28(1)(c) provides that every child has the right to basic nutrition, shelter, basic health care services and social services. Section 28(1)(d) provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.

[36] In *Government of the Republic of South Africa and others v Grootboom and others*[12] this Court stated that sections 28(1)(b) and (c) ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The Children's Act,[13] Child Care Amendment Act[14] and Social Assistance Act are some of the legislation aimed at giving effect to those rights.

[37] Section 156(1)(e) of the Children's Act lists various options that are open to the Children's Court if it finds that a child has no parent or care-giver or has a parent or care-giver but that person is unable or unsuitable to care for the child:

> "(i) foster care with a suitable foster parent;
> (ii) foster care with a group of persons or an organisation operating in a cluster scheme;
> (iii) temporary safe care, pending an application for, and finalisation of, the adoption of the child;
> (iv) shared care where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods; or
> (v) a child and youth care centre designated in terms of section 158 that provides a residential care programme suited to the child's needs".

The system of foster care is thus listed as one of the means through which the state fulfils its obligations to a child who is in need of care, but it is not the only option available in terms of section 156(1)(e). The state also has the option to place the children in youth care centres.[15] If the contention by the RAF is that the award of damages is deductible from the foster child grants, then it begs the question whether the cost of the service the state incurs for placing children in youth centres is also deductible. As the answer to that question is in the negative, it means that there is

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[12] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 76.

[13] 38 of 2005.

[14] 96 of 1996.

[15] It is interesting to note that paragraph 3 of the UN Guidelines for the Alternative Care of Children makes it clear that family placements are the preferred option and are to be supported by the state.

differential treatment between children in foster care and those placed in youth care centres. That differentiation would be irrational.[16] There is thus no basis for differentiation between children in foster care and youth care centres.

Foster care is unrelated to damages for loss of support

[38] The Children's Act provides that the purposes of foster care are to—

> "(a) protect and nurture children by providing a safe, healthy environment with positive support;
> (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and
> (c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity."[17]

[39] The Children's Act also provides that 'care' in relation to a child, includes where appropriate—

> "(a) within available means providing the child with—
> (i) a suitable place to live;
> (ii) living conditions that are conducive to the child's health, well-being and development; and
> (iii) the necessary financial support;
> (b) safeguarding and promoting the well-being of the child;
> (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;

[16] It is also inconsistent with an approach that favours family as a placement option and the objectives of paragraph 108 of the UN Guidelines on the Alternative Care of Children which states:

> "The forms of financing care provision should never be such as to encourage a child's unnecessary placement or prolonged stay in care arrangements organized or provided by an agency or facility."

[17] Section 181 of the Children's Act above n 13.

(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;

(e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;

(f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;

(g) guiding the behaviour of the child in a humane manner;

(h) maintaining a sound relationship with the child;

(i) accommodating any special needs that the child may have; and

(j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child".[18]

[40] It is evident from these provisions that foster care is expansive and extends beyond mere money and encompasses parenting, love, care, nurturing, discipline and other benefits of raising a child in a family environment. In preferring foster parenting, the state is able to attempt to provide children with as many of the benefits of family life as possible. Family life is not measurable and cannot be quantified.

[41] On the other hand, compensation by the RAF is calculated on the basis of monetary income and is aimed at placing a child in a position in which they would have been if the parent had not died. It is primarily meant and calculated to compensate the child for loss related to his or her material needs. The other aspects that go hand in hand with the notion of care are not taken into account. Of course the RAF's argument is limited to the monetary component of the foster care grant, which it contends should be subtracted from the compensation to which the fostered children are entitled. Nevertheless, the non-monetary dimension of fostering reveals the inappositeness of comparing a grant designed to encourage fostering with compensation for the loss of a parental breadwinner.

[18] Id at section 1.

[42] In *Jooste v Botha*[19] the Court recognised that there are two discrete aspects of a parent-child relationship: an economic aspect of providing for the child's material needs; and an intangible aspect of providing for his or her psychological, emotional and developmental needs.

[43] The loss of provision for material needs can be adequately compensated in money, which has the effect of placing a child in the same position as he or she would have been, but for the delict. However, parental care cannot be compensated for by the payment of money nor can it be readily met by institutional care.

[44] It follows that an award for damages for loss of support is no substitute for foster parenting and there is no basis to deprive a child of compensation for loss of support because they are in foster care.

A foster child grant is not paid to the child but to the foster parent

[45] It is the foster parent who is entitled to receive the grant. This is underpinned by the Regulations, which provide that a foster parent is eligible for a foster child grant if the child is placed in his or her custody; and the foster child grant lapses on the death of the last living foster parent.[20] It forms part of the patrimony of the foster parent. The foster parent may spend it in the manner she wishes, provided it is in the best interests of the child. The child has no claim to it. As stated in *Makhuvela*:

> "A foster child grant may obviously be used to support the child, but its primary purpose is the realisation of the constitutional rights of the child through the intervention of the foster parent. It is given to the foster parent who may spend the whole or part of it on the foster child.
>
> . . .

[19] *Jooste v Botha* 2000 (2) SA 199 (T); 2000 (2) BCLR 187 (T) at 201E-F.

[20] Regulations for the Social Assistance Act, GN R898 *GG* 31356, 22 August 2008. See especially regulation 7 and 28(3).

> There may well be some or other connection between their appointment and the death of the child's father. That is not decisive of the case. The grant is payable to the foster parent and not to the child."[21]

[46] Payment for loss of support on the other hand is payable to the child in order to compensate the child for the patrimonial loss suffered by the loss of the monetary contribution that the deceased parent would have made towards the support of the child. It forms part of the patrimony of the child. It amounts to an income replacement resulting from the death of the parent as a result of a motor vehicle accident. There is no conceivable basis on which to deduct payments made to foster parents (that the child has no claim to) from the child's award for compensation for loss of support.

Is there a causal link?

[47] The Social Assistance Act provides that eligibility for a foster child grant is dependent on a child being in need of care.[22] The need to appoint a foster parent is thus not predicated on the death of a parent but on the child being in need of care, whatever the cause. A child may have a living parent, but nevertheless be in need of care even if the parent has not died.

[48] The approach advanced by the RAF that foster child grants are deductible from compensation for loss of support would lead to intolerable anomalies and to results that are illogical, unjustifiable and inconsistent with the Constitution. This can best be illustrated through the examples that follow.

[49] The first example is that of a child who is placed in foster care, and whose compensation for loss of support is reduced in the manner proposed by the RAF. If the foster parent subsequently dies, the foster care comes to an end. If another foster parent does not step into the shoes of that parent, and the child is placed in a child and

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[21] Above n 7 at paras 8-9.

[22] Social Assistance Act above n 6 at section 8.

youth care centre the child's compensation from the RAF will not be increased to allow for the fact that the foster child grant has come to an end. That claim would have been finalised and in terms of *Evins v Shield Insurance Co Ltd* [23] the child would be precluded from claiming even though that loss manifests itself only after the conclusion of the original action. The result is that the child would have been prejudiced by the fact that he or she was initially placed in foster care.

[50] One more telling example is if we consider a case where the parent does not die from a motor vehicle accident, but from some other delict where the child is entitled to claim for loss of support. It would be illogical that that child could claim damages for the delict and the foster parents receive the foster care grant but the child in this case, whose parent died in a motor vehicle accident, cannot. This example is especially persuasive because the purpose of the RAF is to step into the shoes of the wrongdoer and therefore should be liable the same as any wrongdoer.

[51] In sum, the payment of compensation for loss of support to foster children does not amount to double compensation: the nature and purpose of the grant is different from compensation, these grants arise from the constitutional obligations of the state to provide for children in need of care, they are not paid to the children and they are not predicated on the death of a parent. In the light of the conclusion that there is no double compensation, it is not necessary for me to deal with whether the payments are *res inter alios acta*.

[52] That then brings me to the invitation by the Centre, which was supported by the RAF and the curator, to deal with child support grants.

Is there a distinction between child support grants and foster child grants?

[53] I accept the invitation by the parties because child support grants are a matter of public importance, particularly to vulnerable people and to children. I find it in the

[23] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835E; [1980] 2 All SA 40 (A) at para 53.

interests of justice that I consider this issue although it is not part of the original dispute between the parties. Moreover, none of the parties before us is prejudiced by dealing with *Timis*.

[54] The Centre submits that there is no distinction in principle between the two kinds of grants except for the fact that the means test is not applicable to foster child grants. The RAF readily conceded that the means test is not applicable to foster child grants, that the two kinds of grants are interrelated and that this Court should pronounce on *Timis*. I am minded to agree. Section 5 of the Social Assistance Act sets out the criteria for eligibility for all social grants including child support and foster child grants. In terms of section 6, eligibility for a child support grant is dependent on whether the parent is the primary care giver to the child and, in terms of section 8, eligibility for a foster child grant is dependent on whether the child is in need of care.

[55] The import of the means test is that foster child grants are payable for as long as the child is placed in foster care irrespective of the level of income of the foster parent.[24] On the other hand, child support grants are payable only to parents below a certain level of income.[25] Other than that, there is no other distinguishing feature between those two kinds of grants. Their nature and purpose is to provide for children in need of care, and in both instances the grant is payable to the foster parent or the primary care giver who then utilises it as a contribution for the purpose of caring for the child. In both instances the grants are not predicated on the calamity of death of the parent.

[56] That then brings me to whether *Timis* was correctly decided. In *Timis* the Supreme Court of Appeal stated:

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[24] Annexure C to the Social Assistance Act above n 6.

[25] Annexure B id.

> "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."[26]

[57] That reasoning is not sustainable. It fails to acknowledge the different roles that the state assumes when it makes the payments. In cases of child support grants, the state assumes the role of a caregiver as enjoined by the Constitution. When it pays compensation for loss of support through the RAF it steps into the shoes of the wrongdoer. It is irrelevant that the money is paid by two state organs because its objectives are completely different and the state, when it makes the payment, does so to fulfil a myriad of obligations. Thus the fact that child support grants, foster child grants and damages from the RAF are paid from National Treasury is of no moment.

[58] Like foster child grants, child support grants are not predicated on the death of a parent. The fact that the state assumed responsibility for the support of the children after the death of the breadwinner should not have been held to be a determining factor on whether the caregiver qualified for the child support grant or not.

[59] The purpose of the RAF is to give the greatest possible protection to claimants.[27] A deduction of either foster child or child support grants would undermine that purpose. A reading of the RAF Act suggests that those grants should not be deductible. The RAF Act expressly provides that[28] double compensation for

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[26] Above n 9 at 13.

[27] See *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at para 20; and *Engelbrecht v RAF* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 23.

[28] Sections 18(2) and (3) state the following:

> "(2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was

persons who are entitled to claim under the Compensation for Occupational Injuries and Disease Act[29] should be deducted from compensation by the RAF but there is no equivalent reference to social grants.

[60] I conclude that the outcome in *Timis* was incorrect. Child support grants are for the reasons stated above on the same footing with foster child grants and should not be taken into account when an award of damages for loss of support is made.

Order

[61] I make the following order:

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Supreme Court of Appeal is set aside.

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being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the *Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993)*, in respect of such injury or death—

(a) the liability of the Fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

(b) the Fund or such agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder.

(3) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of a member of the South African National Defence Force, other than a person referred to in subsection (2), and the third party is entitled to compensation under the Defence Act, 1957, or another Act of Parliament governing the said Force in respect of such injury or death—

(a) the liability of the Fund or such agent in respect of the bodily injury to or death of any such member of the said Force, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent and any lesser amount to which that third party is entitled by way of compensation under the said Defence Act or the said other Act; and

(b) the Fund or such agent shall not be liable under the said Defence Act or the said other Act for the amount of the compensation to which any such third party is entitled thereunder."

[29] 130 of 1993.

4. The respondent is ordered to pay the costs in the Supreme Court of Appeal and this Court, including the costs of two counsel, where applicable.

For the Applicants:	G M Budlender SC and A D Maher instructed by Lester & Associates.
For the Respondent:	M Salie SC and S Witten instructed by Robert Charles Attorneys.
For the Amicus Curiae:	S Budlender instructed by the Centre for Child Law.