



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 9

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 Act³ (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

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

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 *Makhuvella 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 *Makhuvella v Road Accident Fund* [2009] ZAGPJHC 18; 2010 (1) SA 29 (*Makhuvella*) 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.

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 Act¹⁴ 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

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

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:

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 that²⁸ double compensation for

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 Act²⁹ 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.

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.