

SOUTH AFRICA / JUDGMENT

J.K.K v Maloi N.O (26365/2016) [2021] ZAGPPHC 36 (21 January 2021)

[2021] ZAGPPHC 36

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

26365/2016

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES

/ NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

21/1/2021

CASE NO:

26365/2016

In the matter

between: J[....]
K[....] K[....]
Plaintiff
And
EMMA
MMATHAPELO MALOI
N.O
Defendant
Delivered.
This
judgment was handed down electronically by circulation to the
parties' representatives by email. The date and time for
hand
down is deemed to be 10h00 on 22
January 2021.

JUDGMENT

RANCHOD, J

Introduction

- [1] The issue in this matter is whether there was a universal partnership between the plaintiff and – during his lifetime – the late Mr W[....] M[....] (the deceased) who died on 3 November 2008. (His full names according to the Letters of Executorship are W[....] M[....] M[....].)
- [2] The defendant, who was the customary law wife of the deceased, is sued in her capacity as the duly appointed executrix of the deceased's estate.
- [3] The plaintiff instituted this action more than seven years after the deceased died. At the end of the trial her case was summed up in her counsel's heads of argument as follows:-

3.1 '5.1 It is not disputed by the plaintiff that the deceased and the

defendant was (sic) in a relationship before the plaintiff met the deceased in 1993. The defendant only registered their marriage civilly a month after the death of the deceased. It is the plaintiff's case that she and the deceased met in 1993 and started a relationship, and that she and the deceased decided in January 1995 to move in together.

3.2 5.2 It is the plaintiff's case that she and the deceased were two

adults who shared an emotional, physical and financial relationship like that of a married couple who either chose not to get legally married from 1 January 1995 until 3 November 2008. Plaintiff and the deceased shared a mutual obligation of support for the necessities of life. It was agreed by plaintiff and the deceased that they will live together this way as husband and wife.'

- [4] The evidence tendered by the three witnesses for the plaintiff and three for the defendant may be summarised as follows hereunder.

- [5] However, before dealing with the evidence it would be appropriate to deal with the plaintiff's counsel's contention that the defendant's plea was a bare denial and that the version in evidence given by the defendant at trial was not the same version as pleaded. It was an ambush at trial. Hence, says plaintiff, any version put to the plaintiff by the defendant at trial should be disregarded.
- [6] There is no all-embracing test to determine whether a pleading contains 'sufficient' particularity.[1] The degree of precision or particularity required depends on the circumstances of each case.[2] In *Sterling Consumer Products*[3] it was held:
- 'that a defendant may plead a bare denial of each and every allegation of fact alleged in a plaintiff's particulars of claim provided, firstly, that such denial does not give rise to ambiguity or lack of clarity and provided, secondly, that such denial is not evasive but answers the point of substance.'
- [7] It is apparent that the plaintiff claims against the estate of the deceased on the basis that a universal partnership existed between her and the deceased from some time during 1995 (when they 'commenced living together as husband and wife'[4]) until the deceased died on 3 November 2008. Plaintiff then pleads facts relating to the time when she lived together with the deceased.
- [8] In her plea, the defendant denies knowledge of plaintiff's allegation that she began living with the deceased from 1995 onwards until his death. The defendant also denies knowledge of the plaintiff's allegations as to what she and the deceased did that led to the existence of a universal partnership.[5] The defendant denies that a universal partnership came into existence on the basis of the facts pleaded in sub-paragraphs 5.1 – 5.7 of the particulars of claim.[6] The defendant also denies plaintiff's allegations as to what the tacit terms of the universal partnership were.[7]
- [9] As I said, the defendant is sued in her capacity as executrix of the deceased's estate. It is common cause or not in dispute that the defendant was married to the deceased in accordance with customary law. They were never formally divorced.
- [10] During the course of the trial the defendant testified that she and the deceased had separated in 1993. In the circumstances, the defendant's denial of any knowledge of an alleged universal partnership (which allegedly came into existence in 1995) and its terms cannot be faulted and the submission that defendant's version at trial should be disregarded is, in my view without merit. The defendant does not bear the onus and there was no duty on the defendant to plead a version with regard to the alleged universal partnership and its terms when she has no knowledge thereof.

Factual

background

[11] The action relates to a period of 13 years of alleged cohabitation between the plaintiff and the deceased and the existence of an alleged tacit universal partnership between the said parties during the abovementioned period.

[12] The facts admitted between the parties that are common cause:

12.1 The parties to the action;

12.2 The court's jurisdiction;

12.3 The deceased died of natural causes.

[13] The disputes relate to the following issues:

13.1 The existence of the alleged tacit universal partnership;

13.2 The terms of the alleged universal partnership;

13.3 The assets forming part of the alleged universal partnership;

13.4 Costs of the action.

[14] The plaintiff claims half of the deceased's estate in terms of prayers 2 and 3 on the basis that she held equal shares in the alleged universal partnership and is a creditor for half of the shares of the deceased's estate. However, in paragraph 10 of her particulars of claim she avers that it was tacitly agreed that the profits would be divided in proportion to the amounts contributed by each party. More about this later on.

Plaintiff's case

[15] Three witnesses testified for the plaintiff viz plaintiff herself, her daughter Ms M[....] K[....] and Mr Motoko Modiba who is a taxi operator.

[16] The plaintiff's testimony during evidence in chief may be summarised as follows:

16.1 She and the deceased started dating in 1993, moved in together during 1995 in a house at [...] and started living together as husband and wife.

16.2 They only discussed the possibility of marriage and then "agreed" to the partnership, because

she had future plans and was also assisting her mother in building a house.

16.3 They had a good relationship and lifestyle that was maintained by both herself and the deceased. She was working as a registered nurse and the deceased was conducting a taxi business.

16.4 While living in the main house, they built a second structure (on the same land) that had a bedroom, bathroom and a double garage, because there were too many vehicles parking outside.

16.5 They put a ceiling in the main house (as the house had none) and made renovations and bought furniture, a TV stand (room divider), sofas, coffee table, dining room suit, two bedroom suites, oven and a stove.

16.6 They purchased taxis, a Nissan Sani which was exchanged for a Mercedes Benz, and a Toyota Avanza which was

exchanged for a Toyota Verso. It was for personal use and business use. The taxi business was a partnership to make a profit for both the deceased and herself.

16.7 They opened 3 bank accounts and equally deposited money in them for all purposes and investments.

16.8 In 1997 a child was born, being M[...] K[...], and she, the deceased and the minor child lived together in the house. She and the deceased both maintained the minor child and paid her expenses.

16.9 She assisted the deceased by attending taxi meetings, doing banking, checking of money, bought motor vehicle

spares and parts, liaised with taxi drivers and attended to repairs of the vehicles with the deceased.

16.10 The deceased paid for her vehicle's tracker, they attended social functions together, they were introduced as a couple and the deceased referred to her as his "wife".

16.11 She looked after the deceased when he was sick, cared for him and paid his funeral expenses.

16.12 The plaintiff testified that she only took over the taxi business after the deceased passed away.

16.13 When the plaintiff was asked by her counsel if she knew anything about the deceased's previous marriage she said no, she only knew that he had paid lobola.

[17] The following emanated during cross examination:

17.1 The plaintiff testified that she instructed her attorney to amend her pleadings after summons was served to read that "they pooled their respective resources equally", "a biological child of the deceased" and a whole new paragraph containing the alleged terms of the universal partnership. It was put to the plaintiff that she changed her version to suit her alleged claim.

17.2 The plaintiff could not answer what type of universal partnership she alleges came into existence.

17.3 The plaintiff conceded that when she moved into the house at [...] in 1995, the house was already built and she did not contribute anything towards the building costs.

17.4 The plaintiff was taken through her further particulars of claim wherein she stated that ALL furniture was bought subsequent to 1995. She said she does not have any proof of this. When the plaintiff was asked to tell the court under oath that before she moved into the house, the deceased had no plates to eat out of, knives or forks to eat with, no chairs to sit on and no table to sit at, and she answered “yes”.

17.5 It was put to the plaintiff that a witness will testify and deny her version in that that witness and the

deceased lived in that house which they built after 1985 and the testimony that there was nothing in it except a bedroom suite and a sofa is highly improbable. The plaintiff did not answer.

17.6 The vehicles that the plaintiff testified about in evidence in chief are different from the vehicles that are pleaded in the papers, except that the only constant vehicle referred to is a “taxi”.

17.7 The plaintiff conceded that the vehicles were for personal and business use by the deceased and that before the alleged cohabitation the deceased already had a taxi business. She further stated that she was an employed nurse when she met the deceased.

17.8 The plaintiff testified that the taxis were registered in the deceased’s name while the private vehicles

were registered in her name. It was put to the plaintiff that it is highly unlikely that the vehicles were registered in her name since she failed to discover the registration documents to prove ownership.

17.9 The plaintiff was referred to her pleadings and her evidence in chief regarding both parties allegedly pooling

their resources equally and opening three bank accounts. In the plaintiff’s reply to the defendant’s request for further

particulars, the plaintiff stated that the accounts were opened during the universal partnership, but she could not remember the

dates. She said the source of the funds were from the taxi industry, her own salary and bonuses and were applied in all three bank

accounts.

17.10 It was pointed out to the plaintiff that the investment account with account number [...] was opened on 22 August 2008 as stated by the investment confirmation (that the plaintiff herself discovered in her own discovered documents) in the name of the deceased. It was put to the plaintiff that if they had pooled their resources equally as alleged she would have known the date and seen it from the confirmation of the bank. It was further put to her that the account is in the name of the deceased and she did not contribute anything. The plaintiff became argumentative at this point.

17.11 When the plaintiff was confronted with FNB Silver Cheque Account with account number 518 120 230 95, she conceded that the account is in the deceased's name. She further conceded that when she made a deposit into an account she used either her name or surname. It was pointed out to the plaintiff that her three deposits amount to a mere R8,500.00 out of the total of R40,829.49 in that specific account. The plaintiff admitted this fact.

17.12 One of the three deposits was made only after the deceased passed away and another on the day the deceased passed. Only one small deposit of R3,000.00 was made by the plaintiff five days before the deceased died.

17.13 In contrast, the deceased had made eight cash deposits into that account totaling R22,000.00 into that specific account.

17.14 When the plaintiff was confronted with Money Market Investment Account with account number 6212 593 7435 she admitted

that the account is in the deceased's name and that only two amounts of R1,000.00 each were deposited into it.

17.15 It was put to the plaintiff that having cohabited with the deceased for thirteen years, she only presented bank statements

for four months of the three accounts and to which she only contributed R8,500.00 to one of the accounts and nothing to the other

two accounts. It was further put to the plaintiff that she is not entitled to claim a universal partnership. At best she has a small claim for enrichment. The plaintiff responded by being rather argumentative.

17.16 The plaintiff said she looked after the deceased when he was ill because she loved him. If you love someone, you buy him or her gifts, food, clothing, accommodation and pay for their education. It was put to the plaintiff that this evidence of hers is that of a love relationship and not a universal partnership.

17.17 The plaintiff testified that she was employed as a registered nurse during her cohabitation with the deceased. She had her own bank account and used her salary to maintain herself and her child after the deceased passed away.

17.18 The plaintiff testified that before she cohabited with the deceased, she knew nothing of the taxi business and the deceased explained and taught it to her.

17.19 It was put to the plaintiff that she occasionally accompanied the deceased on trips to repair the taxis and occasionally brought spares home as a favour. That she attended social functions with the deceased is what people do that are in a love relationship. The plaintiff responded by stating: "That is not true, that is the 'skill' that I brought into the partnership."

17.20 The plaintiff acknowledged that her vehicle tracker from Altech Netstar was paid for by the deceased and it is in the

deceased's name.

[18] Under re-examination she said: 'The aim of the partnership was for the mutual benefit of us.'

M[....] K[....]'s (Plaintiff's daughter's) evidence

[19] Ms K[....] testified during evidence in chief that:

19.1 she was born in 1997 and the deceased was her father;

19.2 she resided at [...] and grew up in the house with her mother and her father (the deceased).
The plaintiff

and the deceased co-parented well;

19.3 her mother (the plaintiff) and the deceased attended social gatherings together and at family functions of the deceased, she (M[....] K[....]) was accepted;

19.4 she grew up in a home where her mother (the plaintiff) and the deceased loved each other and her mother (the

plaintiff) helped the deceased count his money and advised the deceased on his financial affairs;

19.5 when they went out and she wanted clothes, the deceased would pay for them.

[20] The following emanated during cross examination:

20.1 The witness admitted only being 11 years of age at the time the deceased passed away and only lived a child's

life, attending school, doing homework and playing with friends.

20.2 It was put to the witness that she did not have the knowledge of what assets belonged to whom during those 11 years and she cannot speak regarding the parties' intention with regards to an alleged universal partnership. The witness

answered that she grew up in a happy home and that her mother and the deceased loved each other.

Motoko Modiba's evidence (taxi operator)

[21] Mr. Modiba testified as follows during evidence in chief:

21.1 He worked as a taxi operator (driver) since 1992 for the deceased at the [...];

21.2 He would tell the plaintiff if there was a problem relating to running the taxis and the plaintiff and the

deceased would sort out the problem.

21.3 At the end of the day of working as a taxi operator, he would give the deceased or the plaintiff the earnings of that day depending on who was found at the house on that specific day.

21.4 The plaintiff attended social functions with the deceased.

21.5 The plaintiff paid for the funeral of the deceased.

[22] The following emanated during cross examination:

22.1 When the witness started working for the deceased, the taxi business was run by the deceased alone.

22.2 He conceded that his driving instructions came from the deceased, that he reported to the deceased, that the deceased paid his salary and that the deceased was his employer.

22.3 The witness stated that the deceased attended the taxi association meetings and that anybody could attend these meetings including drivers, family, children etc. He stated that after the taxi meeting there was a social meeting where the people would relax and enjoy the evening, which the plaintiff attended.

The defendant's case

[23] The defendant herself, Mrs. Agnus Novela (the deceased's cousin) and Mr. Michael Mangena (secretary of the [...]) testified for the defence.

The defendant's evidence:

[24] The defendant testified as follows during evidence in chief:

24.1 She was born in the year 1959 and the deceased in the year 1955.

24.2 She got married in 1981 to the deceased. She gave consent to

be married. The marriage was discussed between the elders. R400.00 lobola was paid by the deceased to marry her. They had a celebration,

a sheep was slaughtered, and she was handed over as the bride to the deceased and the people were festive and danced.

24.3 After the wedding, she and the deceased lived in Oukasie while applying for land in 1985. The land is situated at [...]. On the application for land form, next to the word "vrou", her details are provided and it was signed by the deceased.

24.4 She and the deceased built a six room house and a double garage on the land acquired. The double garage was used for the taxis.

24.5 She herself made the bricks using a specific form, for the house to be built (she described them as "mampara

bricks"). Her income and the deceased's earnings were used to build the house.

24.6 She and the deceased resided in the house after they built it. It was a complete, fully furnished house. It had ceilings, chairs, beds, cutlery and crockery.

24.7 She had a canteen and contributed her income each month to the deceased's taxi business that started in the early 1980s.

24.8 The first vehicle that the deceased bought when he and the defendant had saved enough money was a kombi (taxi). After that purchase they acquired other vehicles as well.

24.9 She resided with the deceased as husband and wife for twelve years until 1993. The deceased took her to Majukane saying she should run a store there. When she left, she did not take anything from their house with her. She then lived in Majukane, until the deceased passed away in 2008.

24.10 There were no children born of the marriage.

24.11 The defendant currently lives in the house at [...] that she and the deceased built. She moved back in the year 2015 and upon re-arrival she found the same property (furniture, chairs, bedding, cutlery and crockery) that she put in the house originally.

24.12 The deceased never asked her for a divorce. She registered their customary union marriage after the deceased died to

obtain his surname. The brother of the deceased and their family accompanied her when the registration took place.

[25] Cross examination was short. The only material aspect was that the doctors that tested the deceased and the defendant regarding conceiving of biological children were both medical doctors and traditional doctors.

Agnus Novela's evidence:

[26] Mrs. Novela testified that the deceased is her aunt's son and they grew up in the same house and were very close to one another. In essence, she confirmed the evidence of the defendant that she (defendant) was married by customary rites to the deceased; and that they resided in a shack while they were building the house at [...] and that the defendant currently resides there. She testified further that the defendant had herself made the bricks used to build the house which was large and had six rooms. The defendant and the deceased had furnished the house which included a TV, sofa, beds, steel cupboards, a fridge and so on. Mrs Novela testified that she regularly visited the defendant and the deceased twice a week as she

lived nearby. She said the deceased was a taxi owner. The defendant was a food vendor who would give her income to the deceased each month. When defendant left the house, she took nothing with her. She left a fully furnished house.

- [27] Mrs. Novela further testified that after the defendant left in 1993 she (Mrs. Novela) continued visiting the deceased as they were close to each other. On each of these visits she found the deceased alone there. She said after 1993 a double garage was built for the deceased's taxis.
- [28] Although she did not know the plaintiff she claimed that the deceased did not contribute anything to the plaintiff.
- [29] She attended the funeral of the deceased together with the M[...] family but did not see the plaintiff's family there as she did not know them.
- [30] Mrs. Novela stated that the deceased's family contributed towards the funeral costs of the deceased and the taxi association contributed R20,000.00 while the plaintiff did not contribute any amount.
- [31] Under cross examination she denied any knowledge of the deceased's family accepting the child M[...] as daughter of the deceased and said she did not even know the child. She was also asked if she had told defendant's attorneys that she used to visit the deceased twice weekly. She said she did. Asked why this was not put to the plaintiff she said she did not know. She said the plaintiff was lying if she said she lived with the deceased from 1995 up to the time of his death. She said the plaintiff was not honest about her alleged contribution to the deceased's business.

Mr. Michael Mangena's evidence

- [32] Mr. Michael Mangena testified and confirmed the defendant's testimony that she and the deceased had built the house at [...] and he was living two houses away at house number 534. He said the defendant made the bricks used to build the house which and it was well furnished. He knew there was cutlery and crockery in the home as the deceased would serve him and others food and drinks. Mr. Mangena also testified that the deceased had a taxi business prior to 1993. He himself is a taxi owner and is one of the founders, together with the deceased, of the [...] and is currently its secretary. He said he knows the plaintiff. She was the deceased's girlfriend. He denied that the plaintiff ever attended the taxi association's

meetings or any social gatherings as the association did not host such gatherings. He further testified that the taxi association

contributed R20,000.00 towards the deceased's funeral.

- [33] Under cross examination he testified that the plaintiff did live with the deceased at [...] but could not recall when she moved in with him. He said the deceased had a number of girlfriends. Questioned about the alleged contribution of R20,000.00 by the taxi association towards the deceased's funeral costs he said because the constitution of the association provides for it, it must have been paid. He does not know to whom as he was incarcerated at the time.

- [34] The witness was referred to an application form completed by the deceased for membership of SANTACO (South African National Taxi Council)[8] where the deceased states that the plaintiff is his spouse. The form is dated 9 March 2005. The witness responded that he was still of the view that plaintiff was only the deceased's girlfriend. All he knew was that the defendant was the deceased's wife.
- [35] Under further cross examination he said he could not dispute that the plaintiff lived with the deceased until he died. He said the house had been completed when plaintiff came to live there. He was not in a position to dispute that plaintiff financially contributed to the deceased. He was aware of the second structure on the property but was not able to testify as to who contributed to the building of it.

Discussion

- [36] The plaintiff's evidence raises a number of questions about her credibility. Whilst under cross examination she testified that she allegedly instructed her attorney to amend her pleadings after the summons was served to read that "they pooled their respective resources equally", "a biological child of the deceased" and a whole new paragraph containing the alleged terms in paragraph 7 (7.1 to 7.5) of the universal partnership.
- [37] She insisted on her version, even when confronted with improbabilities such as:
- 37.1 All household goods and furniture was bought subsequent to 1995 and that before she moved into the house the deceased had no crockery or cutlery, no chairs to sit on and no table to sit at.
- 37.2 The vehicles that the plaintiff testified about in evidence in chief differ from the vehicles that are pleaded
- on the papers except that the only constant reference to a vehicle is the term "taxi".
- 37.3 In a period of 13 years of cohabitation she only presented four months of bank statements of three bank accounts to which she only contributed an amount of R8,500.00 out of the R40,829.49 to one of the accounts. There is no evidence of any other amount contributed by the plaintiff to any of the three accounts. The evidence then is that the plaintiff contributed only R8,500.00 out of the total of R401,533.35 of the three accounts discovered by herself. The deposits by the plaintiff were made after the deceased passed away; on the day of his death; and the remaining deposit five days before his death.
- 37.4 All the bank accounts and taxis were registered in the deceased's name.
- 37.5 Liaising with taxi drivers while being in full time employment as a registered nurse seems improbable – more so as she testified that the nurses were not allowed to have their phones whilst on duty.

37.6 During her employment as a registered nurse she had the time to do daily money checking of the taxi business and bank same. Mr Modiba testified that the deceased was his employer, paid his salary, he reported to the deceased and after a day of driving he would give the days' earnings to either the deceased or the plaintiff. It depended on who he found at the house.

37.7 When questioned regarding the taxi business, she answered – 'The taxis was a partnership to make a PROFIT for both of us.' When it was put to the plaintiff that the occasional help she offered the deceased was because of the love relationship, she answered 'That is the SKILL that I brought into the partnership.' Asked about the aim of the partnership, she answered – 'The aim of the partnership was for the MUTUAL benefit of us.'

- [38] The use of the exact wording of three of the requirements of a universal partnership as stated by Pothier raises concern. A witness will testify to the facts and not legal conclusions as was apparent from the evidence of the plaintiff.
- [39] One cannot but be concerned whether the plaintiff was coached. She was an inflexible, defensive and at times argumentative witness.
- [40] I find defendant to be a credible witness. She was candid and, in my view, truthful insofar as her relationship with the deceased was concerned and that she and the deceased built and furnished the house. She did not extend her version beyond the realm of her experience in relation to certain time periods when the plaintiff allegedly cohabited with the deceased, when she could easily have tailored her evidence in this regard.
- [41] The evidence of Ms. M[....] K[....] (the plaintiff's child who was 11 years old in 2008 when the deceased passed away) was not of any material assistance to the court on the core issue of whether there was a universal partnership between the plaintiff and the deceased.
- [42] Mr. Motoko Modiba's evidence in chief was that the plaintiff attended social functions with the deceased and that she paid for the funeral of the deceased. Again, this does not assist the plaintiff. Under cross examination he said his instructions relating to the driving of the taxis were from the deceased to whom he reported. The deceased was his employer who paid him his salary. This evidence does not support the plaintiff's claim.
- [42] The evidence of the defendant's witness Mrs. Agnus Novela I find credible insofar as it related to the circumstances surrounding the building of the main house is concerned. She also testified that she regularly (twice a week) visited the deceased and could confirm that the house was furnished by the defendant and the deceased. Counsel for the plaintiff asked her whether she had mentioned this to defendant's legal representatives as it was not put to any of the plaintiff's witnesses. She replied she had informed them and cannot say why it was not put to plaintiff and her witnesses. I do not think this omission detracts from her evidence that she was the deceased's cousin and that she regularly visited him as she lived nearby. However, she did not explain how she could say with certainty that the deceased did not contribute anything towards the plaintiff. She also did not elaborate on how she knew that the plaintiff did not contribute towards the deceased's funeral costs. I am of the view

that these issues are not materially germane to the question whether there was a universal partnership between the

plaintiff and the deceased.

[43] Mr. Michael Mangena (as did Mrs. Novela) testified that the defendant had made the bricks used to build the house. The plaintiff does not deny this. Her evidence was that the ceiling was not inserted and it was she and the deceased who did so. When considering the totality of the evidence, I am not convinced that plaintiff contributed at all to the building of the house. But even if she did it does not add much weight to her allegation of a universal partnership when considered

in the light of the other issues I have referred to earlier.

[44] Mr. Mangena's categorical statement in evidence in chief that the Lethlabile Taxi Association contributed R20,000.00 towards the funeral costs of the deceased turned out under cross examination to be mere speculation on his part. He also said he could not dispute that plaintiff financially contributed to the deceased.

[45] It is so that in the SANTACO application form the deceased stated that the plaintiff was his spouse. Again, that is not helpful in the context of the totality of the evidence.

[46] In my view, there are a number of reasons to doubt the reliability of the version of the plaintiff. She was unable to explain inconsistencies such as averring that she and the deceased "pooled their resources equally", but that all the taxis are registered in the deceased's name, all the bank accounts are in the deceased's name. She made a rather small deposit of R8,500.00 out of the total of R401,533.35 of the three discovered bank accounts by herself and that too a few days before he passed away, on the day of his death and again very shortly thereafter. All household goods and furniture was bought after the year 1995 which would mean that the deceased had no household goods or furniture for a number of years before that. That seems highly improbable.

[47] The question ultimately comes down to whether it is probable that the plaintiff and the deceased indeed pooled their resources equally in an alleged universal partnership and thus entitling her to an equal share in it.

[48] I conclude that the plaintiff's version, both as pleaded and testified to, is highly improbable in the circumstances. The most probable explanation is that the plaintiff was the deceased's girlfriend and nothing more.

[49] In terms of the Recognition of Customary Marriages Act, the marriage between the deceased and the plaintiff is a valid marriage at customary law and existed at the commencement of the Act. Both the deceased and the defendant were above the age of eighteen, there was consent by both parties, the marriage was discussed by the elders, lobola was paid, a sheep was slaughtered, the defendant was handed over as the bride to the deceased and there was a celebration and the people danced at the wedding. Thus a valid

customary marriage was concluded between the deceased and the defendant in the year 1981.

[50] The customary marriage between the deceased and the defendant was registered after the death of the deceased. The legislation is clear on that aspect in that failure to register a customary marriage does not affect the validity of that marriage. The customary marriage between the deceased and the defendant was not dissolved by a court by decree of divorce, therefore the deceased and the defendant were lawfully married until the day of the deceased's death.

Conclusion

[51] I find that the plaintiff has failed to discharge the onus of proof on a balance of probabilities and accordingly dismiss her claim against the defendant with costs.

JUDGE OF THE HIGH COURT

Appearances:

Appearance for plaintiff:

Adv WJ Saaiman

Instructed by Moshate More Attorneys

c/o P More Attorneys

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Appearance for defendant:

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JW Wessels & Partners Inc.

811 Francis Baard Street

[1] *Nationale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 798.

[2] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107.

[3] *Sterling Consumer Products v Cohen and Other Related Cases* [2000] 4 All SA 221 (W) at 227 para [11].

[4] Particulars of claim, at para 4.

[5] Para 5 of particulars of claim.

- [6] Para 6 of particulars of claim.
- [7] Para 7 of particulars of claim.
- [8] Caselines bundle 0012-13 – plaintiff’s discovered documents.
-

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