

SOUTH AFRICA / JUDGMENT

L.D.P v Road Accident Fund (2017/6462) [2021] ZAGPJHC 442 (23 February 2021)

[2021] ZAGPJHC 442

COURT

South Gauteng High Court, Johannesburg

BEFORE

Windell

CASE / FILE NUMBER

2017/6462

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2017/6462

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

23/2/2021

In

the matter between: L[...]
D[...]
P[...]
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

WINDELL J:

INTRODUCTION

- [1] This is a dependant's action against the Road Accident Fund ("RAF") for loss of support caused by the death of S[...] A[...] R[...] ("hereinafter referred to as "the deceased" or "S[...]"). The plaintiff alleges that she was the deceased's permanent life partner and that he owed her a legal duty to support; The RAF disputes that there was an agreement between the plaintiff and the deceased creating a legal obligation between the parties.
- [2] The plaintiff is the biological mother and natural guardian of C[...] G[...] R[...] ("C[...]") who was born from the relationship between the plaintiff and the deceased. The plaintiff therefore institutes the claim for damages in her personal and representative capacity.

THE DISPUTE

- [3] On 30 July 2020, this court granted an order wherein the following was recorded:

"PART A:

2.2. It is recorded that an agreement has been reached between Mr. Fannie Kola, representative of the Road Accident Fund, herein after referred to as the Defendant, and Mr. Henk Schouten, Counsel for the Plaintiff, and Mr. Stephen Flowers, Plaintiff's attorney of record....

2.3. The Defendant admits the Deceased's duty of support towards the minor child, C[...] G[...] R[...] ('the minor child), and thereby concedes the Plaintiff's claim in her representative capacity on behalf of the minor child.

2.4. The parties agree to the following nett figures, as per the Actuarial Calculation by Mr. GW Jacobson (Defendant's Actuary), dated the 29th of July 2020:

2.4.1. "Should it be found that there existed a legal duty of support between the deceased and the Plaintiff in her personal capacity:

2.4.1.1. The Plaintiff's claim in her personal capacity amounts to R 5 478 588 (Five Million, Four Hundred and Seventy-Eight Thousand, Five Hundred and Eighty-Eight Rand only);

2.4.1.2. The Plaintiff's claim in her representative capacity amounts to R 1 200 864 (One Million, Two Hundred Thousand, Eight Hundred and Sixty-Four Rand only).

2.4.2. Alternatively, should it be found that no such legal duty existed, the Plaintiffs claim in her representative capacity amounts to R4 149 803.00 (Four Million One Hundred and Forty-Nine Thousand Eight Hundred and Three Rand only)."

2.5. The only issue which remains in dispute is whether a duty of support existed between the Deceased and the Plaintiff ('the issue')."

[3] Both the plaintiff and the RAF adduced evidence. The plaintiff testified and called six witnesses: Mr Taylor; Archbishop Gill; Mr Parsad; Ms H[...]; Mrs D[...] P[...] and Mr D[...] P[...]. The RAF called two witnesses, S[...]’s father, Mr A[...] R[...] and his sister, Ms B[...] R[...]. What follows is a summary of their evidence.

THE RELEVANT FACTS

[4] The plaintiff met S[...] in 2005. Three months later they started a romantic relationship. In 2006, S[...] bought his first house, and in January 2007 the plaintiff moved in with him.

[5] S[...] was a very traditional man. A man of integrity and impeccable manners. S[...] paid for all the household expense,

which included the bond repayments, the utilities account and the internet. The plaintiff managed the household, cooked and packed

lunch for S[...]. They discussed and planned their future. They both wanted to have kids someday..

[6] Both S[...] and the plaintiff worked in IT, but for different companies. In 2010, they decided to “put their eggs in one basket” and the plaintiff joined S[...] in his newly established business, Bay Drive Trading 77 (Pty) Ltd trading as Konica Minolta Central.

[7] In February 2011, the plaintiff and S[...] attended a concert of the popular rock band U2. During the concert, S[...] went down on one knee and proposed. The plaintiff said yes. In March 2011 S[...] went on a “boys weekend” to Mpumalanga, and whilst there he took a detour and visited the plaintiff’s parents to ask their permission to marry the plaintiff. They gave him their blessing. Sometime during 2011, the plaintiff fell pregnant. The couple was delighted. Soon after S[...] put his house on the market and bought a bigger house with a garden to make room for the baby. They moved in and set up the baby room.

- [8] The plaintiff's birthday is in August. In August 2100, on her birthday, S[...] gave her a diamond and asked her to marry him and "change her surname". The plaintiff said yes unequivocally. S[...] took her to a place by the name of the "Diamond Exchange" to choose a ring for the diamond. The diamond was quite expensive and S[...] decided to make two identical rings. One with the diamond and the other with a cubic zirconia. S[...] subsequently also changed his relationship status on Facebook to "engaged".
- [9] The baby shower was in November 2011. It was attended by both S[...] and the plaintiff's families. The plaintiff was wearing her ring and everyone was aware of the engagement, including S[...]’s parents and sister.
- [10] A photo of the plaintiff and S[...] sister was taken on the day of the baby shower and presented at court. The photo clearly shows the plaintiff wearing a diamond ring on her ring finger. The plaintiff also displayed the ring on her hand to the court.
- [11] The plaintiff stopped working at the end of 2011. The baby, a boy named C[...], was born on 9 January 2012. S[...] bought the plaintiff a new luxury motor vehicle as he was concerned about the plaintiff's and C[...]’s safety. The plaintiff did not go back to work and stayed home to look after the baby. The plaintiff as well as C[...] were registered on S[...]’s medical aid as dependants.
- [12] On 13 August 2012 S[...] sent an email to "Cape Stay" to book accommodation online for him, the plaintiff and Connor. In the email, he referred to the plaintiff as his spouse. Tragically, three days later S[...] was involved in a car accident and passed away.
- [13] Archbishop Gill testified that he knew S[...] very well. They first met through business in 2007 (S[...] put together a proposal for the school Archbishop Gill was employed at) and a friendship developed over the years. They spoke "a lot" and about "many things" including the baptism of C[...] and formalizing S[...]’s relationship with the plaintiff. On the day of S[...]’s passing, Archbishop Gill had sent S[...] an email to arrange a date to discuss the marriage. He testified that S[...] referred to the plaintiff as his fiancé, that they had a stable relationship and that S[...] was highly affectionate towards the plaintiff.
- [14] Mr Taylor was S[...]’s colleague and friend. He gave the eulogy at S[...]’s funeral. He testified that he met S[...] in 2009 and that they soon became friends. He stated that S[...] got engaged to the plaintiff in the same year he (Taylor) got married. They shared a passion for motor bikes and spoke on the phone almost daily. He testified that S[...] was a "traditional guy" and was the breadwinner, whilst the plaintiff maintained the household.
- [15] Mr Parsad testified that he knew S[...] and the plaintiff very well. He joined the trip to Mpumalanga during which S[...] asked the plaintiff's parents for her hand in marriage. He was also involved in the buying of the diamond for the plaintiff. His involvement included speaking to people in the diamond industry and phoning around in getting the perfect stone. He was both S[...]’s colleague and friend and stated that the couple was engaged and very much in love.

- [16] Mrs A[...] D[...] P[...] and Mr D[...] D[...] P[...] are the plaintiff's parents. They testified about several things: the time S[...] visited them to get their blessing for the marriage; the engagement; the engagement ring; the baby shower and the nature of the relationship between S[...] and the plaintiff. Mrs D[...] P[...] stayed with the couple for a period of two weeks after C[...] was born and thereafter at least one week every month. She observed how they "operated". They were a family unit and S[...] supported the plaintiff and C[...]. The plaintiff was a stay at home mum and S[...] was responsible for almost all of the household expenses. Mrs Hepburn, the plaintiff's aunt, corroborated their evidence in all material aspects.
- [17] S[...]’s father, Mr A[...] R[...], testified on behalf of the RAF. He stated that he was not aware of the engagement between the plaintiff and S[...]. He was also not aware that S[...] asked the plaintiff's parents' permission to marry the plaintiff. He stated that he never saw the engagement ring and was not aware that Stephen had conversations with Archbishop Gill about marrying the plaintiff. He however acknowledged that the plaintiff and Stephen had been in a "co-habiting relationship" for a long time. He testified that S[...] always treated the plaintiff with respect and "did what was expected of him".
- [18] Ms B[...] R[...] also testified. She is S[...]’s sister and worked alongside the plaintiff and S[...] at S[...]’s business. She had a close relationship with her brother and was not aware of the engagement. She was shown the photo of herself and the plaintiff, taken on the day of the baby shower, wherein it can clearly be seen that the plaintiff was wearing an engagement ring. She was unable to give any meaningful explanation as to why she did not notice the ring.

THE LAW

- [19] The question that needs to be answered is if the deceased in his lifetime owed the plaintiff a legal duty of support. Whether a duty of support exists will depend on the circumstances of each case.
- [20] The common law was extended in *Paixao v RAF*[1] to provide for a dependant's action in permanent heterosexual relationships. The salient facts on which the court found that there was a permanent life partnership were sketched out in the judgment by Cachalia JA on behalf of the court. Ms Paixao and the deceased became friends in 2002. Their relationship grew as did the bond between the deceased and her daughters. The deceased paid for Ms Paixao daughter's wedding as he wanted to be part of their family and he felt responsible for them. He moved in with them in 2003. They executed a joint will and nominated each other as the sole heirs of their entire estate. He supported them financially and paid for everything which included the university fees of Ms Paixao's daughter. He planned to marry Ms Paixao and they travelled to Portugal to meet his parents. They pooled their resources when Ms Paixao was retrenched and were accepted by their relatives, community and friends as a family unit. They had been living together for 6 years before he passed away. The learned Judge remarked as follows:

“I appreciate that it is not always easy for defendants in the fund’s position to refute evidence of a plaintiff dependant’s

assertion that the deceased had undertaken a duty to support him or her. But this concern, I think, is overstated. A plaintiff’s

assertion, without more, that he or she was in life partnership, cannot be taken as sufficient proof of this fact. (In this case the fund conceded that the relationship was a life partnership.) Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics – particularly a reciprocal duty of support – to a marriage. Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other. The implied inference to be drawn from these proven facts must be that the parties, in the absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments – ie a duty to support – to each other. Courts frequently undertake this exercise without much difficulty – as this and other cases such as *Amod*, *Satchwell* and *Du Plessis* demonstrate. Life partnerships therefore do not present exceptional evidential difficulties for defendants.”

[21] The matter of *Satchwell v President of the Republic of South Africa and Another*[2], referred to in *Paxio supra*, dealt with same sex relationships. The Constitutional Court took the following facts into consideration in determining whether the duty of support existed between the parties.

“[25] Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death. It appears probable that they have undertaken reciprocal duties of support.”

[22] In order for the plaintiff’s claim to succeed there must be proof that there was an agreement between the parties that created a binding legal obligation. The agreement may be made expressly or tacitly. A tacit agreement is inferred from the surrounding

circumstances and conduct of the parties.[3] It is for the court to decide whether a contract probably came into existence.[4]

[23] In order to merit recognition, a relationship must have attained a sufficient (but indefinable) core of stability and commitment. The Constitutional Court held in *National Coalition for Gay and Lesbian Equality v Minister of Home affairs* [5]that:

“[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense

indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such

facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took

part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership.”

[24] In *Volks NO v Robinson*[6], the court observed that some people may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners. [7] The parties in *Volks supra*, inter alia, lived together for 16 years. The court was satisfied that the relationship satisfied the threshold criteria recognized in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* matter.

CONCLUSION

[23] It is clear from the evidence that the plaintiff and S[...] were in a long standing permanent life partnership. They were factually engaged to be married at the time of S[...]’s untimely passing. They lived together as husband and wife, although not yet married. They also had their ups and down (like most couples). On all the relevant proven facts and circumstances, I am satisfied that they clearly had an expressed and/ or tacit agreement of mutual support to one another.

[24] I am satisfied that the plaintiff discharged the onus in proving a legally enforceable duty of support on the part of the deceased.

[25] In the result the following order is made:

1. The Draft Order marked “X” is made an order of court

L. WINDELL

JUDGE OF THE HIGH COURT

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be.....

APPEARANCES

Attorneys for the plaintiff: Munro, Flowers & Vermaak Counsel for the plaintiff: Advocate H. Schouten Representative for the defendant: Mr Fannie Kola Date of hearing: 26 January 2021 & 27 January 2021 Date of judgment:

[1] 2012 (6) SA 377 (SCA)

[2] 2002

(6) SA 1 (CC)

[3] Mc Donald v Young 2012

(3) SA 1 (SCA).

[4] See Paixoa supra at par [18].

[5] 2000 (2) SA 1 (CC)

[6] 2005 (5) BCLR 466 (CC)

[7] At par [120]

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