

SOUTH AFRICA / JUDGMENT

Meage v Road Accident Fund (1809/16) [2019] ZAGPPHC 338 (26 July 2019)

[2019] ZAGPPHC 338**COURT**

North Gauteng High Court, Pretoria

BEFORE

Phahlane

CASE / FILE NUMBER

1809/16

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Source record**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA****GAUTENG DIVISION, PRETORIA****CASE NO: 1809/16****26/7/2019****In****the matter between:****NALEDI
CLAUDIA MEAGE
PLAINTIFF
and
ROAD
ACCIDENT
FUND
DEFENDANT****JUDGMENT****PHAHLANE, AJ**

[1]. In her particulars of claim, Ms Naledi Claudia Meage (Plaintiff) is relying on the existence of a customary law marriage entered into between herself and the deceased Thulane Shongwe (herein referred to as the deceased), to establish the right to claim for loss of support for herself. However, this matter comes before me for a determination of the existence of a customary marriage between the plaintiff and the deceased.

[2]. The plaintiff led evidence to prove the existence of the customary marriage between herself and the deceased. She testified that the marriage was concluded on 26 December 2013 when the family of the deceased came to her home to pay an amount of R6 000.00 for lobola. Out of the R6000.00, her family requested that R3000.00 be taken as damages because she conceived a child before marriage. It was then agreed that the balance of the R3000.00 would be for lobola. The lobola negotiations were carried out by her family and the deceased's family. The deceased's family was represented by the deceased's father Doctor Shongwe, the deceased's uncle, his brother, his aunt and another person that she was seeing for the first time. She said her family was represented by her mother Sylvia Meage, her aunt, her grandmother and her uncle Reason Maroga

[3]. At the time of the negotiation, she was sitting in the bedroom. She was later called and asked who the money should be given to and she said it should be given to her aunt Philia Meage. The plaintiff testified that after the lobola was paid, there was a celebration. Later that day, she left with the father of the deceased and his aunt, going to the deceased's home. The reason according to her, was that the deceased's father requested that she should come and stay with them so that the deceased's family can be able to support the child. She explained that when leaving for the deceased's home, she was accompanied by her mother and aunt. When the deceased died, she was staying at his parental home. The plaintiff testified that she was eighteen years old when the lobola was paid for her and the deceased was also eighteen years old.

[4]. She however struggled to tell the court when exactly the deceased passed away- meaning, she did not know the date of the deceased's death. After a while, she then said the deceased died on 29 March

2014. The plaintiff was not working when the deceased passed on.

[5]. Under cross-examination, the plaintiff said she forgot the name of the deceased's aunt who was part of the lobola delegation because she was not in good terms with her. She said she did not bother to ask the deceased the name of the person whom she was seeing for the first time and was part of the delegation. The lobola letter which is on page 10 of the Index: Quantum Bundle, was shown to the plaintiff. She testified that she was seeing the lobola letter for the first time and she has never read it. She said her attorneys of record talked about the letter and she never thought it was important for her to read it. The lobola letter is dated 26/13/2013. She explained that she does not know who crafted the lobola letter. The letter was translated to read:

"The lobola agreement. The Shongwe's came to the home of Claudia, coming to ask for the bride's hand in marriage. They paid damage of R3000.00 and also paid R3000.00 for lobola. One cow is R1000.00

Witness to Claudia's family: Sylvia Meage and Elena Dibakwane Witness to Shongwe family: Thandi Shongwe and Simon Shongwe".

[6]. It was put to her that the name of 'Doctor Shongwe' is not on the lobola letter because there was no lobola paid for her. Further that the lobola letter was given to the defendant by the plaintiff's attorneys and such is a fabrication. She responded by saying that she agrees with some of the aspects which are on the letter and the people who were present, save for the name Elena Dibakwane whose surname should read - Meage. She said her aunt Philia Meage and her uncle Reason Maroga's names were also missing from the letter but denied that those names were missing because there was no marriage. When asked about the date appearing on the /obola letter, she said the date is a mistake because a year does not constitute of thirteen months. To the question why she did not mention the R1000.00 for the cow which appears on the lobola letter, the plaintiff responded by saying she did not think it was important to mention this aspect.

[7]. The plaintiff also explained under cross-examination that when leaving for the deceased's place on this day, she left with the father of the deceased in his motor vehicle. Her mother and aunt accompanied her and the deceased's father was driving. She said though there was a celebration, no photos or videos were taken. She testified that after the death of the deceased she went back home and her parents started taking care of her and the child. The family of the deceased stopped taking care of her. They did not give her the reason why they were not taking care of her anymore. She said she just assumed that maybe it was because they had problems - meaning, the father of the deceased became blind.

[8]. The plaintiff testified that she met with her lawyers through the father of the deceased. She explained that when she came into contact with them, the deceased's father came with the attorneys while she was at the fruit and vegetable market where she had an interview with them. She explained that the deceased's father talked a lot with them. In her own words, she said 'Mr Shongwe was leading the whole discussion and purely speaking, I had no say'. She said she just signed the Power of Attorney. The plaintiff further testified that she had no say in what was discussed and this was the only time she

met with the lawyers. She said she has never been to the attorney's office in Pretoria. She further told the court that she never told the attorneys about her relationship with the deceased or the lobola. She does not know where the attorneys got the information that lobola was paid for her.

[9]. The plaintiff also testified that at the time of the accident and death of the deceased, the deceased was working as a taxi driver for Mr Mdu Hlabane (Hlabane). She explained that when she met with the deceased for the first time, he was working in a wiring business (ie. working with wires) and later became a taxi driver. She only met with the deceased in 2010 and the deceased was not working for his father. The deceased worked for Hlabane before she had a child and he worked for Hlabane until he passed on. Plaintiff was confronted about the certificate of service signed by the deceased's father stating that he was the deceased's employer. She explained that the deceased worked for Hlabane on a full-time basis and it was only on Sundays when he was off duty and free, that he would work for his father. She did not know how much the deceased was earning. In her own words she said "Mr Hlabane was my husband's boss". She said she started working at a salon in June 2018 and is earning R1500.00 per month.

[10]. The next witness was Doctor Joseph Shongwe (Shongwe) who is the father of the deceased. He said he became blind in April of 2018. He testified that the plaintiff, whom he called makoti, was married to the deceased on 26 December 2013 when lobola was paid for her. Shongwe said he was one of the five people who went to the plaintiff's family home to pay lobola for her. He testified that R6000.00 was paid, of which R3000.00 was for lobola and the other R3000.00 was for damages. He explained that in their culture, damages are paid for a woman when she gets pregnant before she is married. He explained that the R1000.00 written on the lobola letter represented the cow which the Shongwe's were supposed to bring to the family of the plaintiff.

[11]. According to him, the celebration did not happen on the same day when the lobola was paid. He does not remember the date on which the celebrations occurred. He testified that after the lobola negotiations, they took the makoti along because she belongs to them. Shongwe testified that the purpose of crafting the lobola letter was to serve as prove for the two families and for when the couple want to unionise their marriage at the magistrate court, and it was especially for '[instances like this]' - meaning in instances or circumstances such as the current matter before the court.

[12]. Shongwe testified that the date of 26/13/2013 as depicted on the lobola letter is an error. He told the court that he does not know the name of the person who crafted the lobola letter but it was written by a family member of the plaintiff. When asked about the surname of the plaintiff, he said it is "Meape or something like that". He explained that the plaintiff's surname is not important to him but what is important is that she was his makoti. Shongwe testified that the deceased was employed by him as a driver and a mechanic doing maintenance. He said he knew Mr Mdu Hlabane and insisted that the deceased never worked for Hlabane, and has never left his employ to work for another person. He had three taxis when the deceased passed away on 30 March 2014.

[13]. Shongwe confirmed the contents of the employment certificated dated 05/05/2017 and signed at Kanyamazane which has his P.O. Box address and the salary of the deceased being R1700.00 per week. He confirmed signing the employment certificate but was however surprised that the certificate was signed at Kanyamazane and not at Kabokweni. There is another employment certificate which is dated 19/10/2015 and the date of employment is 01/03/2011. It was put to him by the plaintiff's counsel that there is a difference between the two employment certificates with regards to the salary earned by the deceased, as well as the date of commencement of employment and that the handwriting seems to be the same as well as the signature of the employer who happens to be the deceased's father. The witness responded by saying it was difficult for him to confirm the signature on the second employment letter because he cannot see it as he is blind.

[14]. Regarding the visit made by the assessor Mr Molokwane to his home, Shongwe testified that somewhere around 2015 Mr Molokwane came to his house and the plaintiff was not present because she was visiting her parental home. He said Molokwane arrived very late at his house and he never asked about the lobola letter but he promised to come back and he never did.

[15]. Under cross-examination, Shongwe still could not tell the court the surname of the plaintiff and he said it was "Meebe or something like that". He then came up with another surname when asked who drafted the lobola letter. In his response, Shongwe said that he does not know the name of the person who wrote the lobola letter because this person is one of the family members of "Meafe". He explained that what was important at the time of drafting the letter, was to read the document to see if it coincides with the negotiations or agreement. Thereafter they would append their signatures. To the question - how would they find the person who crafted the 'document' in case this person has left out critical information, Shongwe responded by saying: "that is why it is important that before signing, all parties agree that what is written in the document, is what has been agreed upon. They do not just sign without verifying the details". Shongwe also told the court that in the area where he lives, when lobola is negotiated and concluded, the tribal chief has to be informed, and such chief would issue a certificate confirming that there was lobola paid.

[16]. He confirmed that the lobola marriage is a contract between the two families and that they were happy that only four people could sign the lobola letter as witnesses. Shongwe said he only realized the error on the lobola contract regarding the date after he was called by Mr Shabangu's office - which is the plaintiffs attorneys.

[17]. Shongwe testified that he has been to the plaintiff's attorney several times to consult and that on three occasions, the plaintiff was present. When confronted with the plaintiff evidence that she has never been to Pretoria to the attorney's office but that she only consulted with the attorneys in the street, Shongwe responded by saying he does not know why the plaintiff was denying being in the office of her attorneys. He insisted that he was telling the truth and that his version is correct.

[18]. The witness was confronted about a report that was made by himself, his wife and the plaintiff's mother to Molokwane, that the plaintiff and deceased were never married. Shongwe said that was not true. He said they told Molokwane that the deceased has another child who was at the time with the social worker but they did not know the name or particulars of the child. Shongwe said Molokwane was more concerned about the deceased's children. He confirmed that Molokwane was taking notes when he had an interview with him and his wife. He further confirmed that after the interview, Molokwane requested them to sign the form where he was making notes. He testified that he was satisfied and happy with what Molokwane wrote on his report because he read the report himself before signing it. In his words, he said "I read what he wrote before I signed. I went through the document". Shongwe testified that he cannot dispute a note made by Molokwane, that his son was not married to the plaintiff but that he knows they were married. Counsel for the defendant read out two sentences from the statements/report compiled by Molokwane which stated that 'deceased was not married and another saying he earned R1800'. Shongwe said he totally disagree with that. He said Molokwane

promised them that he would come back to collect the lobola letter and talk to the plaintiff, but he never did.

[19]. The next witness was Sylvia Meage (Meage). She is the mother of the plaintiff. She testified that when the plaintiff fell pregnant, she went to stay with the deceased at his grandmother's place. She said on 26 December 2013 the Shongwe's came to the Meage family to pay lobola for her daughter. An amount of R6000.00 was paid. She said the R1000.00 written on the lobola letter meant that one cow cost R1000.00. Meage testified that in terms of her culture, many people can be present during the lobola negotiations but only the important people need to sign the lobola letter. She testified that there was a celebration immediately after the negotiations and after the festivities, they accompanied the makoti to her in-laws. The people who accompanied the makoti was herself, her sister Philia Meage and other people who were there. They used a double cab belonging to Doctor Shongwe. It was put to her that Doctor Shongwe told the court that the lobola letter was crafted by one of her family members. Her response was that two letters were drafted, whereby each delegation crafted their own letter.

[20]. She explained that her brother Reason was responsible for drafting a letter on behalf of the Meage family while Doctor Shongwe drafted a letter on behalf of the Shongwe's. She explained that after the letters were drafted, both parties signed the letters. According to her, the letters are exactly the same, they resemble each other. She said the Shongwe's took their letter when they left that day. Meage testified that she did not tell the claimant's attorneys that there were two letters. She said she cannot blame Shongwe for saying that someone else drafted the lobola letter because of the condition in which he finds himself in.

[21]. It was put to her that the lobola letter constitutes a contract and that if it misses one of the important elements, it is deemed to be invalid. Further that the 13th month nullifies the contract. She insisted that the letter is a valid contract. The witness was shown page 13 of Annexure A which is titled: Assessor's report and compiled on behalf of Becker Mzimela Investigations.

[22]. Becker Mzimela Investigations are assessors briefed by the defendant on behalf of the Fund to investigate claims. Meage confirmed her particulars which included her identity number as they appear on page

13. She confirmed that her home language is North Sotho as stated in the report. Annexure B of this report is on page 14 and it reflects, among others, the information that:

- (a) The minor child is still at home and resides with us.
- (b) He is presently visiting his paternal family.
- (c) The deceased was not married to the claimant

[23]. Meage testified that she does not know Becker Mzimela Investigations & Assessors and has never given anyone a statement and that she never signed the statement shown to her by counsel. The plaintiff closed its case.

[24]. The defendant called Thembeni Margaret Ngomane (Ngomane) as its first witness. She is the mother of the deceased and is unemployed. Her evidence basically corroborated that of other witnesses called on behalf of the plaintiff as far as saying the deceased was married because

lobola was paid, but did not explain what really happened on the day of the lobola negotiations. She testified that on the day Molokwane came to her home, she was busy in the kitchen. Molokwane and Shongwe were sitting in the dining room. She was only called to come and sign the statement. She testified that she could not refuse to sign when called to sign by Shongwe. She explained that she could not refuse the instructions of Shongwe as he is the elder in the family and she is the child.

[25]. Ngomane confirmed her signature on page 24 of the assessor's report. It was put to her that Molokwane will tell the court that before she signed the statement, he had explained the contents of the statement to her in her own language and further that she and her husband Shongwe, signed the statement affirming that there was no marriage between the claimant and the deceased. The information which appears on page 23 of the report reveals that Ngomane Thembeni confirm that she is the mother of the deceased Shongwe Thulani Innocent. The box which states that '-I confirm that the deceased was not married at the time of the accident', - has been ticked. On the part relating to the relative or person who assisted with the lobola arrangement, the answers provided is - NIA (ie. not applicable)

[26]. Phetolo Bethuel Molokwane was called as the second witness for the defendant. He testified that he works as an assessor on behalf of the Road Accident Fund. He is currently working at KG Investigations. At the time of doing investigations with regards to the matter before court, he already had ten years' experience as an assessor. He previously worked for Mankgoke Assessors where he was trained to be an assessor - that is in 2005-2006. He is a teacher by profession and has underwent training to become an assessor while he was still a teacher. In 2012 he resigned from his teaching post and continued to work as an assessor. From 2012-2013 he worked for Steven Black Investigation/Assessors and between 2013 and 2016, he worked for Becker Mzimela Investigations until it came under liquidation. He then worked for TNN Assessors which was in a partnership with Alexander Forbes and had a contract with the Road Accident Fund (RAF). In 2017 when the contract between Alexander Forbes and RAF ended, he joined Senzeo Assessors and left them in September 2018 when they reduced fees for assessors. He then joined KG Investigations where he is currently employed. Molokwane testified that while still working as a teacher, he worked part time for Mankgoke Assessors where he was trained to be an assessor.

[27]. With regards to the matter before court, he testified that when he was given a mandate and realized that the claim was for Quantum, the requirement which he had to comply with was that he had to get instructions from the plaintiff's attorneys for permission to proceed with his investigation. He called the plaintiff's attorney and he was assisted by a lady called Linah. He told Linah that he was investigating quantum in the Meage matter and he is looking for the claimant's number. Linah gave her the number of the claimant but when he called this number, the person who answered the phone informed him that she is the mother of the claimant. He told her that he got the number from their attorney and he wanted to come and discuss the issues pertaining to this matter. He was then given the address and upon arrival, he found the claimant's mother and her grandmother. The claimant's mother is Sylvia Meage.

[28]. Molokwane testified that he asked about the relationship between the deceased and the plaintiff and in particular, whether they were married or whether they were just in a relationship; whether they had children; whether the deceased had other children apart from the claimant's child; whether the claimant was working; and whether the deceased was working before he passed on. He also enquired about other things relating to the estate - for example, whether there was a letter of authority; whether deceased contributed to the workman's compensation; whether the children were receiving grants; as well as the qualifications of the deceased. Molokwane explained that though the family of the plaintiff is staying in the Seswati infested area, he was conversing with them in North Sotho because their home language is North Sotho. He further testified that he was told by the mother and grandmother of the claimant that the deceased was never married to the claimant but they have a child together.

[29]. He said while receiving this information, he reduced it into writing by making a statement to that effect. He said he explained to both the mother and the grandmother of the claimant the contents of the statement and he thereafter requested them to sign. When he was finished with them, they gave him the directions to the deceased's place. He went there and he found the deceased's father and mother. He introduced himself and explained the reasons for his visit. He asked them about the relationship between the deceased and claimant. They told him the deceased was their child and that the claimant was the girlfriend of the deceased. They also explained that the deceased has another child with a different woman who brought the child to them and vanished into thin air. The deceased's parents also explained that they were busy making arrangements to have the child adopted and that this child was at that time, with the social workers. He was told that the deceased was working in the family business.

[30]. Molokwane testified that the father of the deceased is the one who completed the certificate of service because he said he is the one who employed the deceased. The deceased's father signed the certificate on the same date of the 19th October 2015. The witness said the certificate of service is self-explanatory but he explained to the father what was needed in the form. He said page 18 of the report (which I will deal with later in my judgment) was completed as a result of the interview he had with the father of the deceased. Molokwane said they were communicating in Seswati because they stay in Kabokweni which is an area where the people speak Seswati. He explained that the reason why he spoke to them in iSiswati was that when he arrived, he greeted them in Seswati and their conversation continued in Seswati - otherwise they would have used a different language if they were not Swati speaking.

[31]. Molokwane further testified that he only went to the deceased place once. He said he received everything that he needed on this day and there was no need to go back. He denied that he made a promise to the family that he would come back. He also disputed the deceased's father's evidence that he was told about the deceased and the claimant being married. He also denied that he was informed that there was a lobola letter somewhere and that he had promised to come back to obtain that letter. According to him, if upon enquiry he is told that there is a marriage, he would immediately request either the marriage certificate; lobola letter; or a letter from the chief. He explained that in instances where he is told that the people are married but

that the letter from the chief or the lobola letter is misplaced or lost, he would make a note of that, and if he is told that there was no marriage, he would make a note of that as well and there wouldn't be a need to pursue the matter any further.

[32]. The witness said he was also given the same information by Thembeni Margareth Ngomane who is the mother of the deceased - and that is the fact that the deceased was not married. He informed the court that he went to the Shongwe's during the day because he is not allowed to do house visits at night. He disputed the evidence of the mother of the deceased that he came at night and he was in a hurry, and further that he did not explain the contents of the statement to her. The evidence of Molokwane is also that he talked to the brother of the deceased telephonically and he indicated that on the part of the statement where a person is supposed to append a signature, by inserting the words -"telephonic statement" to indicate that the interview was done telephonically.

[33]. Under cross-examination, he confirmed that he had been an assessor with ten years' experience when he conducted investigations. To the question whether there is training or qualifications that is needed for one to be an assessor, he responded by saying that he has never come across any documentation that allows one to practice as an assessor. He explained that one does not need to have formal qualifications as a pre-requisite to be an assessor. He further explained that all that is required is for a person to do formal theoretical and practical training. He confirmed that he was trained at Mankgoke assessors.

[34]. When asked if he is an expert assessor, he explained that he cannot say that even though he had undergone training and does not have papers to prove it. However, he explained that with the experience he has acquired over the years, he considers himself to be an assessor because of the extensive knowledge he has working as an assessor. He explained that one can be an assessor by virtue of the training and experience in a particular field or by having qualifications.

[35]. The witness testified that the people who are also taken as assessors, are former police officers because of the experience they have in relation to investigations. It was put to him that a notice served by the defendant in terms of Rule 36(9)(8) stated that the defendant intends to call BECKER MZIMELA INVESTIGATIONS the ASSESSOR, as an expert witness at the hearing of this action. Further that it was actually Becker Mzimela Investigations that was supposed to give evidence and not the witness since his name does not appear on the Rule 36(9) notice.

[36]. Molokwane testified that after doing his investigations, he went to the office and sat with the clerk named Julia, who assisted him in compiling a report. He explained to Julia what he found out from the investigation and the report was compiled on 22/10/2015.

[37]. Molokwane testified that he was trained to take statements and that the format of the statement they use does not cater for a witness to sign, safe for the person who is being interviewed. He also testified that he did not commission the statement because that is how they work at his office, unless a special request is made to get a statement commissioned. He only functions the way in which the office operates and what he is expected to do in terms of his mandate. The witness was taken to task about the statement of Sylvia Meage not being signed;

commissioned; and witnessed. He explained that Sylvia Meage's statement which he was shown in court was missing a page where the deponent had signed and that he did not compile a bundle for the court because he thought that all the court documents were in order as the parties were supposed to discover. It had appeared that the grandmother of the plaintiff had in her statement signed by making a cross and Molokwane explained that such was made because the deponent could not write.

[38]. To the question why he did not go to the chief to enquire about the marriage, he responded by saying that the family told him that there was no marriage, and as such, there was no need to go to the chief. He explained that if on the 19 October 2015 he could have been told there was a marriage and that the lobola letter was misplaced for example or that they did not have it, he would put a note of that in the statement and go to the chief because the office of the chief always keep records.

[39]. Molokwane also testified that he has dealt with matters from plaintiffs law firm before and their matters have been settled. I need to mention that the plaintiffs attorneys were at all times present during court proceedings and this aspect was never disputed. Molokwane confirmed to court that the claim for the deceased's children was settled on 5 December 2018 as a result of the investigations he made. He ended his evidence by telling the court that after visiting the two families, he made a statement to that effect which was compiled with his report.

This concluded the evidence of the defendant.

Evaluation of the Evidence

[40]. Before I address the issue for which I am expected to make a determination on, I will first start with the issue regarding the employment of the deceased as it was brought to my attention. This aspect also formed the basis on which the deceased children's claim was settled as well as a foundation on which the plaintiff's claim relies. There seems to be a contradiction as to who exactly was the employer of the deceased. It is clear from the evidence of the plaintiff that the deceased worked for Mr Mdu Hlabane as a taxi driver from 2011 until the day he passed on in 2014. She testified that though she did not know how much the deceased was earning, the deceased worked for Hlabane on a full-time basis and it was only on Sundays when he was off duty that he would work for his father. She referred to Hlabane as her husband's boss.

[41]. Shongwe on the other hand testified that he was the employer of the deceased and denied that the deceased ever worked for Hlabane. He confirmed issuing and signing a certificate of service dated 05/05/2017 in which it is noted that the salary of the deceased was R1700.00 per week. Molokwane testified that on 19 October 2015 when he visited the Shongwe family household, Doctor Shongwe told him that he was the employer of the deceased and he (Shongwe) completed a certificate of service which appears on page 29 of his report where it is stated that the deceased was earning a salary of R1800.00 per week. According to Molokwane, this certificate of service was signed by Shongwe on the very same day. The plaintiff's counsel argued that this certificate of service should be disregarded by the court as it was not completed and signed by

Shongwe.

[42]. Shongwe informed the court that he lost his eyesight in 2018 and can therefore not confirm the signature which appears on page 29 of Molokwane's report. I have taken judicial notice of the signature appearing on the certificate of service signed by the Shongwe on 05/05/2017, as well as the signature on the certificate of service which appears on page 29 of Molokwane's report and dated 19 October 2015 to be the same. Not only does the signature appears to be the same, but also the handwriting on both documents appear to have been written by the same person. I am therefore satisfied that it was Shongwe who completed and signed the certificate of service on the 19th October 2015 when interviewed by Molokwane.

[43]. It is important to note that it was put to Shongwe by plaintiffs counsel during examination in chief that there is a difference between the two employment certificates with regards to the salary earned by the deceased, as well as the date of commencement of employment, and further that the handwriting seems to be the same as well as the signature of the employer who happens to be the deceased's father. What was put to Shongwe by counsel therefore confirms the evidence of Molokwane that Shongwe is the one who completed and signed the certificate of service on 19th October 2015.

[44]. It stands to reason that the argument put forward by the plaintiffs counsel that the court should disregard the certificate of service of the 19th October because Molokwane was not sure whether it was Shongwe who completed it or not, cannot stand. Having said this, the difference as regards the date of commencement of employment of the deceased as well as the salary he earned, raises a concern as to whether the deceased was indeed employed by his father Mr Shongwe or whether he was employed by Mr Mdu Hlabane as testified to by the plaintiff because if he was employed by Shongwe, then Shongwe would have known exactly when his son started working for him and how much he earned.

[45]. Turning to the issue of whether or not the plaintiff and the deceased were customarily married, in his closing argument, plaintiff's counsel argued that the plaintiff, by her evidence and as corroborated by her witnesses, has established that she was married to the deceased by customary law. He submitted that the court should reject the evidence of the defendant as the defendant failed to produce proper evidence that there was no marriage between the plaintiff and deceased.

[46]. I do not agree with the submission made by counsel that the defendant failed to produce evidence that there was no marriage entered into between the plaintiff and the deceased. The burden of proof falls on the plaintiff to prove the existence of the marriage on a balance of probabilities. I say this by virtue of the principle as laid down in *Pillay v Cretchner*[1] that the basic rule in civil cases is that the onus lies with the plaintiff - or that the party who alleges must prove. This court held that:

"The burden or onus of proof in its ordinary sense is a metaphorical expression for the duty which one or other of the parties has, of finally satisfying court that he/she is entitled to succeed on his claim or defence, whichever it may be.

The true and original sense of the notion ie. the incidence of the onus tells us who must satisfy the court, but that is not all that we need to know. The degree or standard of satisfaction; the quantum of proof, that is required by the court in order to be satisfied must necessarily be provided by the party who bears the onus".

[47]. A perusal of the Pre-trial minutes dated 17 October 2018 at paragraph 2.1 indicates that that the plaintiff has made an undertaking that the plaintiff bears duty to begin and the onus of proof. In principle, if however the plaintiff through evidence cannot satisfy the court that this court must grant an order in her favour, then the court needs to look at the rebuttal that comes from the side of the defendant.

[48]. The plaintiff and her witnesses testified that there was a customary marriage on 26 December 2013 when lobola was paid for her. What was peculiar with her evidence was that she did not know the date on which the deceased died, nor did she know the age of the deceased at the time the lobola was paid for her. She told the court that she cannot remember the date on which the deceased passed away because she tried to block it out of her memory. When it was put to her that it was highly improbable that she could not remember the day which brought sorrow to her, she struggled on several occasions to give an answer and when pressed further, she just laughed it off and still could not tell when exactly the deceased passed away.

[49]. The plaintiff testified that when the lobola was paid for her, both herself and the deceased were eighteen years old. She said she was born on 18 September 1995. She further testified that the deceased was born on 19th October 1989 . Which means that the deceased was 24 years old at the time the alleged lobola was paid for her. One would expect that if the plaintiff was closer to the deceased as she claimed, she would have been in a position to tell a simple thing as his age, assuming that they were of the same age, born on the same year when the lobola was paid.

[50]. The plaintiff and her mother Sylvia Meage testified that after the lobola was negotiated, there was a celebration while the deceased father told the court that the celebration occurred on a different date and not on the same day of the lobola negotiations. Plaintiffs counsel argued that the case of the plaintiff is not based on the lobola letter but that the letter serves to prove that there was something which happened, in other words, there was a marriage. However, the aspect of marriage cannot be looked at in isolation. The events of the day of the supposed marriage cannot be shrugged off under the carpet without considering all the aspects which would assist this court when evaluating the other evidence placed before it.

[51]. Meage testified that there were two lobola letters drafted on that day. Of importance, she testified that the letter on behalf of the Shongwe family was drafted by Doctor Shongwe. On the other hand, Shongwe's evidence was that the letter was crafted by a family member of the plaintiff. It is worth noting that Shongwe emphasized the importance of the lobola letter. Through his own admission and evidence, he said he knew that there was a possibility that

matters such as [this], might end up in court. I must say, counsel for the plaintiff was not happy when clarification was sought from Shongwe to explain what he meant by saying "matters such as [this]". Counsel objected to and did not want Shongwe to answer the question without giving reasons for his objecting.

[52]. It is difficult to understand why Shongwe would want to distance himself from being the author of the lobola letter if he was really part of the negotiations, given the fact that he understands and appreciates the importance of the letter. He also testified that when there is a marriage in the area where he stays, the chief has to be notified and he in turn will issue a certificate proving the existence of a marriage.

[53]. Normally when the two families come together, there are certain customary and cultural practices which are observed and followed such as a token for opening the negotiations (go kokota or pula molomo); followed by asking for the bride (go kopa sego sa metsi); an agreement on the number of beast payable as lobola (which has in modern times been replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (go laiwa) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders for example. See *Moropane v Southon* (755/12)(2014] ZASCA 76. These practices are also followed in the North-Sotho (Pedi) as well as the Swati culture. The Meage's and the Shongwe's are Pedi's

and Swati's respectively. The evidence I have before me is silent on those aspects. The only evidence before this court is that lobola was paid.

[54]. When one looks at the lobola letter and the evidence of both Meage and Shongwe, there is mention made of a R1000.00 for the cow which does not fit into the puzzle of the amount of lobola paid which is R6000.00 and which the plaintiff did not testify about. Though Meage and Shongwe explained what the amount of R1000.00 represent, it is unclear as to whether this amount was only mentioned in passing in the lobola letter or what was to happen with either the cow or its value, or whether this cow would have been brought at a later stage or not. All three of these witnesses only talks about the lobola being R6000.00

[55]. The lobola letter, though argued by the defendant that it did not come through the proper rules of court as it was served very late on the defendant (ie. on 8 October 2018), and that the plaintiff should have been barred in terms of Rule 35(4) from relying on the evidence that was not discovered, counsel did not object when this document was introduced by the plaintiff and counsel ended up cross-examining on it. On the same token, I still could not understand why the plaintiff's counsel argued that the case of the plaintiff is not based on the lobola letter while he introduced it.

[56]. It is on record that the date written on the lobola letter is 26/13/2013. Relying on the case of *Nkosi v RAF NOS 487 (2005); 495 (2001) (SCA)*, counsel on behalf of the defendant argued, and rightly so, that it is trite law that when a document is in dispute and defective, the author of that document has to be called to come and testify. He further argued that this error brings about three issues of concern which are:

1. Whether indeed the plaintiff was eighteen years old when lobola was paid for her. Put differently, that it cannot be said with certainty that the plaintiff had already reached the age of majority on the alleged day of the marriage.
2. That the lobola letter constitutes a binding contract which is nullified by the error
3. That the author of the letter is the only person who can testify to its authenticity and rectify the error, and submitted that if the letter is accepted by the court, it be treated as hearsay evidence.

[57]. If one takes into account the lobola letter in order to determine the age of the plaintiff at the time when the lobola was paid, it becomes difficult to know whether she had attained the age of majority or not. All the witnesses have said the lobola negotiations were concluded on the 25th of December 2013 . Shongwe denied being the author of the letter. The only person who could have testified and rectified the date was not called to give evidence. The plaintiff gave the wrong age of the deceased on the day of the supposed marriage, and it becomes difficult to say with certainty how old she was herself - given the fact that the only document which the witnesses were examined and cross-examined on and maybe relied upon, is defective as regards the date of the lobola negotiations.

[58]. A customary marriage as defined by the Act is regarded as a marriage concluded in accordance with customary law. Customary law on the other hand is defined in the Act as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people. Therefore, in order for a customary marriage to be recognised as valid, it must comply with the provisions of the Act. The so-called jurisdictional requirements for a valid customary marriage as stipulated in s 3(1) of the Act are that:

1. For a customary marriage entered into after the commencement of the Act will be valid -
 - (a) the prospective spouses -
 - (i) must both be above the age of 18 years; and
 - (ii) both consent to be married to each other under customary law; and
 - (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[59]. If this court accept the date of 26 December 2013 as being the correct date of the negotiations, it follows that the first requirement in terms of s3(1)(a)(i) has been complied with as the plaintiff had just turned eighteen years and two months at the time when the customary marriage was entered into. There is no doubt in my mind that the reason why the plaintiffs counsel introduced the lobola letter was to prove his case. Be that as it may, the plaintiffs counsel already submitted that the plaintiffs case is not based on the lobola letter but on the viva voce evidence led by the witnesses. I agree with this submission because the determination of a customary marriage in terms of s3 of the Recognition of Customary Marriages Act 120 of 1998 (the

Act) is not dependant on the lobola letter.

[60]. Though discovered, the lobola letter was not admitted into evidence as to the truthfulness of its contents, and it is for this reason that it does not constitute admissible evidence as to the facts contained in it. At the same time, this letter does not assist the court in making a determination as to whether the plaintiff was eighteen years of age at the time when the lobola was paid or whether indeed the customary marriage was concluded between the deceased and the plaintiff. I am of the view that the defendant would clearly be prejudiced should this letter be elevated beyond its limited status and as such, the lobola letter is rejected.

[61]. The plaintiff's counsel had in his closing argument submitted that the handing over ceremony of the bride to the groom's family has been complied with as part of the requirements as contemplated in s3 of the Act. The handing over ceremony is not listed as part of the requirements in terms of the Act. Neither is the payment of the lobola listed as a requirement for the coming into existence of a customary marriage. Although the payment of lobola to the bride's family forms part of the evidentiary material to prove the conclusion of a customary marriage, payment is not conclusive proof of the existence of a customary marriage. See in this regard *Motsoatsoa v Roro and Others* 2011 (2) ALL SA 324 (GSJ) at 18

[62]. The plaintiff testified that after the lobola was paid, there was a celebration and later that day the deceased's father requested that she should come and stay with them so that they can take care of her child. Her evidence is corroborated by that of her mother Sylvia Meage who confirmed that after the negotiations, there was a celebration and that the plaintiff left with the deceased's father on the same day to go and stay over at the deceased's family home. However, Shongwe testified that there was no celebration on this day but that it happened on another day which he could not remember. There is therefore a clear contradiction as to whether there was a celebration on the day of the alleged lobola negotiation followed by the handing over of the claimant to the Shongwes.

[63]. It is trite that when faced with two mutually exclusive versions, the Court has to resolve the factual disputes by making findings on the credibility of the various factual witnesses, their reliability and the probabilities. See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others*[2]

[64]. This court will reiterate on what was said by the Supreme Court of Appeal in the matter of *Moropane v Southon*[3] that:

"In order to resolve this impasse, the trial judge has to consider and weigh the probabilities to determine which version is more probable than the other. She also has to consider the credibility and reliability of the various witnesses. The test to be applied in such a case was enunciated lucidly as follows in *National Employers' General Insurance v Jagers*[4]

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster KO-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Gainer* (Supra). I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects

constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[65]. Having regard to the above dictum, I have to evaluate the evidence of the witnesses and also consider whether in the current matter, the alleged ceremony can be said to have been completed by the handing over of the bride (makoti, in this case, the plaintiff). On the question whether the handing over of a bride is an element of a customary marriage, the Full Court of the Free State Division, Bloemfontein answered the question in *Rasello v Chali & Others*[5] where Molemela J, as she then was, said the following at paragraph [18]:

".....Although the Recognition of Customary Marriages Act does not include transfer of the bride in the requirements for a valid customary marriage, I accept that this, being an old Sesotho custom that is still widely recognized, it is a custom contemplated in section 3(6) of that Act and is thus an essential requirement for validity of a customary marriage. It was so accepted by the court in the case of *Fanti v Boto* (supra) on the basis of many authorities. Delivery of the bride entails that the bride will be accompanied to the groom's family by her own delegation, which will then formally hand her over to the groom's family. Olivier, Bekker et al in their work *Indigenous Law* describe delivery of the bride as "the transfer of the bride by her family group to the family of the man".

[66]. See also *Moropane v Southon*[6] supra where the Supreme Court of Appeal dealt with and decide on the essential requirements of a valid customary marriage.

[67]. I therefore have to make a determination on whether a request by Shongwe that the plaintiff should go with them to their home so that they can take care of her child, constitutes the handing over of the bride to the groom's family as required by custom - Put different, whether the request qualifies as being a delivery in terms of the requirements of the customary marriage.

[68]. The court stated in *Msutu V RAF*[7] that: " It is indeed so that in the true African context, marriage is not a bond between the man and the woman but it is a bond between their families" . The two families would therefore come together as one and have to know each other (my emphasis). It had appeared from the evidence of all the witnesses, save for the plaintiffs mother, that when the Shongwe's left with the plaintiff to go and stay at their family

home, she was going there for the first time. While Meage on the other hand testified that when the plaintiff fell pregnant, she went to stay with the deceased at his grandmother's place. This would mean that when the alleged lobola was paid, the two families already knew each other and formed some kind of a relationship.

[69]. What is disturbing is that in the midst of all these, the father of the deceased was at pains remembering the surname of the plaintiffs family. Shongwe told the court that he regarded the plaintiff as his own daughter and treated her as such. However, he did not know the surname of the one person whom he calls makoti and a daughter. He gave three different surnames and explained that the surname of her makoti is not important, but that what is important is that his son was married to her. The question posed to Shongwe during examination in chief was as follows:

Question: Do you know the plaintiff who was here - Naledi?

Answer: Yes, I know the plaintiff. She is Naledi ' Meape' ... or something like that. She is my makoti

Under cross examination, the question was posed as follows:

Question: I heard you saying the plaintiff's surname is ' Meape' Answer: Yes, it is 'Meebe or something like that.

Question: The lobola marriage is a contract between two families..... It does not have the names of all the people who concluded it.

Answer: We were happy with only four people whose names appearThe contract was crafted by one of the family members from 'Meafe'.

[70]. This is one of the aspects that raise an eyebrow and cannot be ignored. It goes towards the credibility of the witness and one wonders (1). if really there was a relationship between the Meage and the Shongwe family; (2) If the plaintiff was a makoti who stayed in the same house with Shongwe and his son the deceased; (3) or if plaintiff was a like daughter as Shongwe testified. There is no indication or evidence that the plaintiff was delivered as a makoti in the true sense of the word. There is also no evidence that there was an agreement between the two families that the plaintiff, - by leaving with the Shongwes, would constitutes or qualify to having been handed over or delivered as a makoti. The only evidence before court is that the move was solely for the benefit of the child, where he would be taken care of by his paternal grandparents. This leaves grave doubt as to whether the requirement of a celebration coupled with the handing over has been fulfilled. With this doubt in mind, I am wary of coming to a conclusion that there was a celebration or that the plaintiff was handed over.

[71]. The evidence of the plaintiff together with that of her witnesses, Sylvia Meage and Doctor Shongwe, is not sufficient to establish the existence of a customary marriage where lobola was paid, followed by a celebration and the handing over of the plaintiff to the deceased's family home. Regarding the demeanour and credibility of the plaintiff as a witness, I find that she did not perform better during her cross examination and upon questions by the court. She was evasive and unconvincing with her responses, and when she was unable to answer tough questions, she would just laugh.

[72]. In my view, it does not seem that the plaintiff was handed over as required by custom and I find that the requirement in terms of s3(1)(b) was not met. I say this taking into consideration the evidence of Molokwane which i now turn to deal with.

[73]. Molokwane testified that when he visited the plaintiffs family home, he was informed by both the plaintiffs mother and grandmother that the plaintiff and the deceased were not married. He made a note of that in a statement which is contained in page 16 of his report. Molokwane further testified that before requesting both the mother and the grandmother to sign, he explained the contents of the statement to them. The grandmother signed by making a cross where she was supposed to append her signature. The pair gave him the directions of going to the deceased's family and upon arrival there, he found both the mother and the father of the deceased.

[74]. He testified that he was also given the same information by the deceased's father Doctor Shongwe and the deceased's mother, that the plaintiff and the deceased were never married. Equally so, he made a note of this information in the statement which formed part of his report. Page 18 and 19 of the report reveals the following information:

"Shongwe Doctor who is the father of the deceased Shongwe Thulani Innocent confirmed that the deceased was not married at the time of the accident. There is a part which requires the information of the relative or person who assisted with the lobola arrangement, the answer thereto is: N/A (not applicable). The statement also reveals that the deceased and Meage Naledi Claudia were living together at the time of the accident. That the deceased and Meage Naledi Claudia had a child named Shongwe Thandolwethu born 2012/06/19 and was not in school. At the time of the accident, the deceased was working at Shongwe taxis in Kabokweni earning R1800.00 per week. The claimant was unemployed".

[75]. Molokwane testified that he completed the statement at the same time he was interviewing Doctor Shongwe, the father of the deceased. An oath appears on page 21 at the end of the statement which says: "I the undersigned herewith declare that this statement was made by me and was done to the best of my knowledge and belief, I made this statement voluntarily. I agree to the contents of this statement and was read back to me in SESWATI. Signed at KA-BOKWENI this 19th day of October 2015". There is a signature there and the Molokwane testified that it was the deceased father who signed. The certificate of service which appears on page 29 of this statement is also signed.

[76]. I interpose to state that I have taken judicial notice of the two signatures on page 21 and 29 respectively and they appear to be exactly the same, meaning that they were signed by the same person. Molokwane testified that he also explained the contents of the statement to both Shongwe and Ngomane before they could sign. Page 24 of the report contains an oath and a part where a signature has to be made. This signature on page 24 was confirmed by Ngomane as her own when she was shown the statement during her testimony.

[77]. I want to reflect back to what was put to Shongwe that Molokwane will come and tell the court that the deceased and the plaintiff were not married, according to the report which he received from Shongwe and his wife. Shongwe responded by saying: "I cannot dispute that molokwane can tell the court that my son was not married to the plaintiff, but when he came to my house he met me and my wife and the child and we told him that my makoti was not at home, she went to visit at her parental house".

[78]. Shongwe testified under cross-examination that Molokwane wanted to confirm if the accident had occurred. In his words, he said "he was taking notes when asking questions and we gave him the particulars and documents of the children. He was more concerned

about the children. He even wrote that the other child is with the social workers and at the time we did not know the name and

particulars of the child. I read what he wrote before I signed. I went through the document before I signed'. This then confirms the evidence of Molokwane that before Shongwe and his wife appended their signatures on his report, they were conversant with the contents of the statement he was writing before they could sign.

[79]. Regarding the evidence by Shongwe that Molokwane promised to come back to his home, Shongwe testified in chief that Molokwane never asked about the lobola letter but that he promised to come back. Under cross-examination, Shongwe said the reason why Molokwane promised to come back was because he was coming to talk to the plaintiff and get the letter. These are two conflicting statements. If Molokwane never asked about the lobola letter, how then would he make a promise to come back to obtain a letter that he was never told about in the first place. Molokwane's evidence is that he never made any promises to return to the Shongwe household and explained that there was no need for him to go back because he received all the information that he was looking for and most importantly, he was informed that the plaintiff and the deceased were never married. It is therefore highly improbable that Molokwane would make a promise to Shongwe and as such, the evidence of Molokwane is accepted in this regard.

[80]. The general considerations that are important when a court weighs up the evidence or when it evaluates the evidence at the end of a trial is to first weigh the evidence as a whole. In essence, a trier of facts must have regard to all considerations which reasonably invite clarification. In doing this, the court should take the following into consideration, among others: all probabilities; reliability and opportunity for observation of the respective witnesses; the absence of interest or bias; the intrinsic merits or demerits of the testimony itself; inconsistencies or contradictions and corroboration. It is however important to distinguish inferences and probabilities from conjecture and speculation. No proper inference can be drawn unless there are objective facts from which to infer the other facts. Probabilities must likewise be considered in the light of proven

facts.

[81]. It is important to note that Molokwane confirmed to court that the children of the deceased, one of whom is the child of the plaintiff, have already been compensated as a result of the investigation which he did or conducted when he visited the Shongwe and Meage family household on the 19th October 2015 - meaning, the claims of the minor children of the deceased Thulane Innocent Shongwe have already been settled on 5 December 2018. This witness was taken to task about the children's birth certificate in that he stated in his report that he obtained copies of the birth certificates while in fact, he did not. This aspect was immaterial to pursue because the claim for both of the deceased's children have already been settled through Molokwane's investigations.

[82]. Plaintiff's counsel put to Molokwane that the notice served by the defendant in terms of Rule 36(9)(8) stated that the defendant intends to call BECKER MZIMELA INVESTIGATIONS the ASSESSOR as an expert witness at the hearing of this action. Further that it was actually Becker Mzimela Investigations that was supposed to give evidence and not the witness since his name does not appear on the Rule 36(9) notice. It was also put to him that he did not compile a report but that it was compiled by Julia who works at Becker Mzimela. This notion cannot be true because it became clear from the explanation of this witness that what the clerk (Julia) at his office did, was to type in the information on the computer as he relayed it to her. It would

therefore be wrong to conclude that the report was compiled by Julia and not Molokwane himself.

[83]. When Molokwane did investigations in this matter, he worked for Becker Mzimela Investigations. It appears from the compiled assessors report that Caveonet Investments (Pty) Ltd was trading as Becker Mzimela Investigations. It is therefore clear that Becker Mzimela Investigations is a company which has agents working as assessors. Mr Molokwane was employed by this company as an assessor and I can therefore not understand how the plaintiff's counsel would expect the company itself to be in court by asking the witness such a question. Having said this, it is important to note that when this matter was postponed on 5 April 2019, it was specifically to have Mr Molokwane to be present in court to come and give his evidence. Plaintiff's counsel knew on that day that no one else from Becker Mzimela Investigations, other than Molokwane, had to give evidence as an assessor on behalf of the defendant. No objections were raised as to his qualifications or position as an assessor. Even when Molokwane was called to the witness stand, no objections were raised by the plaintiff that Molokwane does not have the locus standi to be presenting evidence on behalf of the Fund.

[84]. I should mention that it was put to Meage that Molokwane was given the go ahead by the plaintiff's attorneys to go and see her (Meage), a point which was never disputed by Meage or the plaintiff's counsel. I could therefore not understand why counsel for the plaintiff put to Molokwane that he is not an expert when his own instructing attorney did not have a problem giving Molokwane the go ahead to do his duties as an assessor. Molokwane is an experienced assessor, and when he is given permission by the plaintiff's attorneys to go and assess/investigate whether the plaintiff was married to the deceased or have children with the deceased, - which investigation is the basis of the claim by the plaintiff, and the basis on which the claim for the children of the deceased was settled, then his evidence and his position as an assessor cannot be rejected or ignored. With no objections raised, this court accepts the evidence of Molokwane in the position in which he testified as an assessor.

[85]. Molokwane came across as a satisfactory and reliable witness. He was never evasive or hesitant in his responses. He gave a clear and coherent account of the events of the 19th October 2015. He appeared to be a credible and reliable witness. His evidence is accepted and I therefore find that Sylvia Meage, Elinor Dasea Meage who is the plaintiff's grandmother; Doctor Shongwe and Margaret Thembeni Ngomane, all four reported to Molokwane that the deceased and the plaintiff were never married, which report was reduced to writing and signed by the them after the contents of which were explained to them by Molokwane.

[86]. The Declaration of Consent which appears on the RAF 1 form, which is a form for lodging a claim on behalf of the claimant is blank in that the capacity of the claimant is not stated. The plaintiff was not confronted about the document though it was shown to her mother. Be that as it may, the court cannot ignore or turn a blind eye to the fact that this very document is silent as regards the capacity of the claimant, especially taking into consideration the fact that her capacity as the customary wife of the deceased is in dispute. The document (RAF 1) has been signed, and I presume, by the claimant and a witness.

[87]. It is important to note that the plaintiff testified that she only met her attorneys through Shongwe when she was at the fruit and vegetable market. Her evidence was that Shongwe was leading the discussion and she had no say in what was discussed. She also testified that she never told the attorneys about her relationship with the deceased and she never told them that lobola was paid for her. She was given the power of attorney to sign and she did. Shongwe on the other hand testified that he has been to the plaintiff's attorneys on several occasions to consult and on three of the occasions, the plaintiff was present. The plaintiff testified that she has never been to her attorneys' office in Pretoria. This situation really raises a concern and a question as to why would Shongwe consult with the plaintiff's attorneys if he is not the claimant or plaintiff. The only inference I can draw from this part of evidence is that the plaintiff did not lodge a claim against the Fund herself even though she is cited as the plaintiff.

[88]. Regarding the telephone interview which Molokwane had with the brother of the deceased, Molokwane testified that he believed that he was speaking to the right/correct person because the father of the deceased took his phone and called the brother of the deceased personally and thereafter, handed the phone back to him so that he can talk to the brother. Molokwane explained that the parents of the deceased first spoke to him (the brother) and told him that he (Molokwane) wanted to talk to him and he did. Molokwane also explained that this was his guarantee that he was speaking to the right person. This part of evidence was never disputed and as it stands unchallenged, it is accepted as the truth.

[89]. Before addressing the evidence of Ngomane, I first want to state that when the trial commenced, both parties informed the court that the witnesses for the plaintiff which will not be called to give evidence on behalf of the plaintiff, will be made available to be called as witnesses on behalf of the defendant. However, when that was supposed to happen, it became a problem. Counsel for the defendant informed the court that the plaintiff's counsel refuses to call the deceased's mother on behalf of the defendant. In response to this, the plaintiff's counsel said he did not see any need of calling this witness because calling this witness will be time consuming as it had already gone passed normal court working hours (ie. The time was 16:30). Plaintiff's counsel informed the court earlier that he had to fly to the Eastern Cape on the same day, and I believe he was worried about missing his flight. The court then gave a directive that this witness be called and it took more than twenty minutes for her to arrive while court was informed that she was sitting outside the court building in her motor vehicle.

[90]. Ngomane testified that the deceased was married to the plaintiff because lobola was paid. She explained that Molokwane was in the dining room with Shongwe during the interview and she was only called to come and sign the documents which Molokwane had. She confirmed her signature which is on page 24 of the report. She said Molokwane asked about the particulars of the children of the deceased. That was basically the evidence of this witness.

[91]. I interpose to state that the reason why Ngomane was called, was to give clarification to some aspects relating to the statements made by Shongwe which were in dispute and to which Shongwe could not be of any help because he is visually impaired. Counsel on behalf of the plaintiff argued that the court should reject the evidence of the defendant but that it should

accept the evidence of Ngomane as she confirmed that there was a customary marriage between the plaintiff and the deceased. I have already made a ruling that I accept the evidence of Molokwane as being truthful, credible and reliable. The evidence of Ngomane on the other hand did not assist the court in any way, and more specifically, with regards to the interview between Shongwe and Molokwane because she explained that she was busy in the kitchen and was only called by Shongwe to come and sign the statement which was taken by Molokwane during the interview.

[92]. Having considered both arguments and on the analysis of the evidence, and having regard to the legal requirements of a valid customary marriage, I come to a finding that there was no valid customary marriage entered into between the plaintiff and the deceased.

In the result I grant the following order:

1. It is declared that no valid customary marriage exists between the Plaintiff and the deceased.
2. The plaintiff is liable to pay costs on a party and party scale.

P. D PHAHLANE

Acting Judge of the High Court Gauteng, Pretoria

For the Plaintiff : Adv. Phiyega

Instructed by

: SHABANGU B ATIORNEYS & ASSOCIATES

For the Defendant : Adv. Mojamabu

Instructed by

: MORARE THOBEJANE INC.

Date of Judgment : 26 July 2019

[1] 1946 AD 946 at 952

[2] 2003 (1) SA 11 (SCA) at 5

[3] Moropane v Southon (755/12) (2014] ZASCA 76 (Delivered 29 May 2014)

[4] 1984 (4) SA 437 (ECD) at 440D-441A

[5] A69/2012 (2013] ZAFSHC 182 (Delivered 23 October 2013)

[6] Moropane v Southon (755/12) [2014] ZASCA 76

[7] Msutu v Road Accident Fund , Case No: 181714/14 at para 39

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/meage-v-road-unknown-topic-agpphc-2019>

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