

SOUTH AFRICA / JUDGMENT

Paixao and Another v Road Accident Fund

(05692/10) [2011] ZAGPJHC 68 (1 July 2011)

[2011] ZAGPJHC 68

COURT

South Gauteng High Court, Johannesburg

BEFORE

RS Mathopo

CASE / FILE NUMBER

05692/10

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 05692/10

DATE:01/07/2011

In the matter between:-

PAIXAO, MARIA ANGELIN.....First Plaintiff

PAIXAO, MICHELLE ORLANDA SANTOS.....Second Plaintiff

And

ROAD ACCIDENT FUND.....Defendant

J U D G M E N T

MATHOPO, J:

- [1] This is an action for loss of support arising out of the death of Jose Gomes (Gomes) who was killed in a motor accident on the 02nd January 2008.
- [2] The First Plaintiff was in a relationship with Mr Gomes and lived with him but was not married to him.
- [3] The Second Plaintiff is the First Plaintiff's daughter she lived with the First Plaintiff and Mr Gomes. She was not formerly adopted by Mr Gomes.

- [4] The Plaintiffs contend that before and during the periods that they lived together with the deceased, he has undertaken contractually to maintain and support the plaintiffs and accordingly he was legally obliged to do so and he would have done so for the remainder of the First plaintiff's life and until the Second plaintiff had become self-supporting.
- [5] The First Plaintiff alleges that she is a party who should be placed in the same position as a widow who was legally married to the deceased. She contends that it is clear from the undisputed facts that she had an agreement with the deceased that he would (and has) supported her and her children and that this right is legally enforceable and worthy of protection. Further support for the agreement according to the plaintiffs, is to be found in the fact that the deceased paid for the wedding and honeymoon of the Second plaintiff and also paid for the school or university fees of the other daughter. According to the plaintiff this was also confirmation of the fact that they were a close, knit and stable family and regarded themselves as such.
- [6] The Defendant contends that neither the First nor the Second plaintiff by virtue of the fact that the First plaintiff was not married to the deceased and that the Second plaintiff was not legally adopted by the deceased are not entitled to claim compensation for loss of support from the defendant (Road Accident Fund) in terms of section 17 (1) of the Road Accident Fund Act No. 56 of 1966. Section 17(1) provides that the Fund is obliged to compensate "... any person (the Third Party) for any loss or damage which the Third Party has suffered as a result of ... the death of any other person.."
- [7] The trial of this issue came before me by way of a stated case in terms of Rule 33 (1) and (2) of the uniform rules of the court.

[8] The stated or the agreed facts may be summarised as follows:

8.1 The First Plaintiff is Maria Angelina Santos Paixao born on 10 June 1957.

8.2 The Second Plaintiff is Michelle Orlando Santos Paixao born on 26 February 1991.

8.3 The First Plaintiff was married to Manual Paixao

Three daughters were born of the aforesaid marriage namely:

- Fatima Regina Santos Paixao born the 07th September 1981.
- Marilize Roberta Santos Paixao born 17th September 1985.
- Michelle Orlando Santos Paixao born on the 26th February 1991 (The Second Plaintiff).

8.4 Manuel Paixao died on the 08th June 2000.

8.5 On the 29th October 2003, the First Plaintiff and Jose Adelino Do Olival Gomes who was born on the 29th October 1960 ("the deceased") commenced living together in a permanent life partnership with the First Plaintiff's

children (hereinafter referred to as “the period of co-habitation”).

8.6 On the 02nd January 2008, the deceased was killed in a motor vehicle collision in respect of which the Defendant accepted liability in terms of the Road Accident Fund Act No 56 of 1996.

8.7 Prior to and for a period during the “period of co-habitation”, the deceased was married to a certain Healdina De Jesus Carreira Melro according to the laws of Portugal, but were separated at the time.

8.8 The deceased and the said Healdina De Jesus Carreira Melro were divorced according to South African Law on the 10th June 2005.

8.9 The deceased and the said Healdina De Jesus Carreira Melro were divorced according to Portuguese Law in June 2007.

During the “period of co-habitation”:

8.10.1 The First Plaintiff did not work after the end of February 2004.

8.10.2 The deceased paid for food, clothing, medical care, all household expenses, holidays and university fees of the First Plaintiff’s second daughter Marilize Roberta Santos, as well as the school fees of the Second Plaintiff.

At the time of the death of the deceased, the relationship between the First Plaintiff and the deceased was a permanent life partnership.

Prior to as well as during “the period of co-habitation”, the First plaintiff and the deceased undertook to (and did) care for maintain and support each other and the deceased undertook to and did maintain and support the children of the First Plaintiff insofar as they need such maintenance and support.

The defendant did not accept the aforesaid contentions and required evidence to be led.

[9] At issue and the focus of the argument was

whether the deceased whilst still alive was under a legal duty to support the plaintiff which duty was enforceable by the plaintiff against the defendant and

whether that duty translate into a right of support which is worthy of protection by law and thus enforceable against third parties.

EVIDENCE

[10] The Plaintiffs and Ms Theresa Concalves, a friend of the deceased testified for the plaintiffs. The defendant led no evidence and challenged their evidence on the basis that there was in fact no legally binding contractual agreement entered into which could be elevated to a duty of support.

- [11] The First Plaintiff, Maria Paixao, a widow at that time testified that she met Mr Gomes at her house in 2003 and they became good friends. Mr Gomes told her that he was unhappy in his marriage. A love relationship developed between them and they visited each other. During January 2003 Mr Gomes informed her that he was leaving for Cape Town because of problems with his family. He returned during February/March 2003. In October 2003 the deceased was admitted in hospital for an operation. After his discharge he went to live with the First Plaintiff in Apex Benoni. When the First Plaintiff was retrenched in March 2004 Mr Gomes told her not to worry and undertook to look after her and her children. Mr Gomes paid for the university and primary school fees of her daughter and paid for the wedding and honeymoon of the Second Plaintiff.
- [12] Mr Gomes was divorced from his wife in South Africa on the 10th June 2005. On the 14th July 2005 the First Plaintiff and Mr Gomes signed a joint will nominate each other as heirs in their respective estates and also nominated the first plaintiff's children as heirs in the event of them dying simultaneously. Gomes divorced his wife according to the Portuguese laws in June 2007.
- [13] During cross examination she conceded that Mr Gomes undertook to take care of her and her children when she told him that she was retrenched. Furthermore conceded that Mr Gomes bought her a house in Benoni and it was registered in her name because Mr Gomes was not yet divorced.
- [14] She further conceded that they waited Mr Gomes to divorce first before signing the joint will. She again conceded that the purpose of the joint will was to protect Mr Gomes and her contributions to the house.
- [15] When asked why the statutory affidavit lodged with the Road Accident Fund together with the claim documents and the joint will were silent about Gomes undertaking or promise to marry her, she could not proffer any reasonable explanation save stating that Mr Gomes promised love and look after her and the children forever.
- [16] Fatima Paixao, the Second Plaintiff testified that she is the daughter of the First plaintiff and was not formally adopted by the deceased. She officially met the deceased in 2000 when he came to attend to some repairs at her mother's house in Primrose, Germiston. Mr Gomes grew close to her mother in 2002. She knew that the deceased was married and told her that he was unhappy for the last 24 years. During January 2003 the deceased left for Cape Town saying that he wanted to get away from his family. The deceased paid for her wedding and honeymoon because he told her that he felt responsible for her mom and her sister and wanted to help them. He also paid for the school fees or university fees of her younger sister stating that he wanted to be part of their family. Her evidence and that of the First Plaintiff largely coincided and they corroborated each other in all material respects.

[17] Ms Theresa Concalves testified that she was introduced to the deceased by the First plaintiff and also stated that the deceased told her that he was unhappy and that he wanted to marry the First Plaintiff. During the year 2003 the deceased was hospitalised at Flora Clinic and upon his discharge he went and lived with the First Plaintiff and her children. When the First Plaintiff lost her job the deceased undertook to look after her and her children. She socialised together with the deceased and the First

Plaintiff and the Portuguese community did not have any problem with them as a couple notwithstanding the fact that Mr Gomes was still married at that time. According to this witness the Portuguese community approved their relationship.

[18] The facts upon which the Plaintiffs rely on in support of their claims that the deceased had assumed a duty of support towards them are the following:

18.1 The deceased told the First Plaintiff that he wanted to live with her and her children and be part of their family;

18.2 The deceased said he would support her and her children insofar as they needed to be supported and that he did not want her to work.

18.3 The First Plaintiff had agreed to this. They moved in together after he became ill in October 2003 and the First Plaintiff nursed him for 2 months until he was able to return to work.

18.4 During the time they lived together from 29th October 2003 until the date of his death on 02nd January 2008, he in discharge of his obligations:

18.4.1 Purchased for the First Plaintiff a home. The property was registered in the First Plaintiff's name

18.4.2 Paid all monthly living expenses for the family

18.4.3 Paid all school fees and university tuition fees

18.4.4 Paid for the wedding and honeymoon of the First Plaintiff's eldest daughter Fatima

18.4.5 Entered into a Joint Will with the First Plaintiff making her and her daughter's his sole heirs.

18.4.6 Divorced his wife in both South Africa and Portuguese law so that he would be able to legally marry the First Plaintiff and confirmed his intention to do so.

18.4.7 Took the First Plaintiff to Portugal to meet his parents.

18.4.8 Arrangements were made with the deceased's sister for a wedding between the First Plaintiff and the deceased to be held on the 12th April 2008 in Portugal at the same time as the celebration of his parent's 50th wedding anniversary.

- [19] It was submitted on behalf of the plaintiffs that their case did not arise by virtue legal consequences of a marriage but based on a contractual relationship between the parties (that is the deceased and the First Plaintiff) which created a legal obligation on the deceased to maintain and support the First Plaintiff as well as the Second Plaintiff. Counsel further submitted that the unchallenged or uncontested evidence of the First Plaintiff that the deceased spoke to her, told her he wanted to live with her and her children and be part of the family and did not want her to work as he would maintain and support her and her family, as evidence that an express binding contract was created alternatively was expressed by the deceased and tacitly accepted by the Plaintiff on her own behalf and that of the Second Plaintiff. Counsel submitted that it makes no difference whether it was an express or tacit or a combination of both forms since a binding contractual agreement came into existence because the deceased had assumed a contractual duty of support towards the First and Second Plaintiff.
- [20] It was submitted on behalf of the plaintiffs that a contractual obligation whereby a party is bound to maintain and support has been recognised in our law following the decision of the Constitutional Court in *Satchwell v Republic of South Africa and Another* 2002 (6) SA 1 (CC) at paragraph 25 where Madala J said the following:

The law attaches a duty of support to various family relationship, for example, husband and wife and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case.

Right at the outset, I must state that reliance on this passage is misplaced. In the same judgment at paragraph 16 Madala said the following which negate the aforesaid paragraph:

“Same sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage. In my view, it is unnecessary to consider the position of heterosexual partners in this case (my emphasis). As was stated by this Court in the National Coalition v Home Affairs 15(15) case, the submission by the respondents that

... gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction”

It is quite inappropriate in these confirmation proceedings for this Court to decide on the rights of unmarried heterosexual life partners which raise quite different legal and factual issues (my emphasis). This matter was raised by the respondents in this court for the first time in their written submissions and it is, therefore, not appropriate for the court to consider it.

It is therefore clear that the position of heterosexual partners was left open and undecided by the Constitutional Court in the *Satchwell* case *supra*.

[21] Counsel further relied on the remarks by Skweyiya J writing for the majority in *Volks v Robertson and others* 2005 (5) CLR 496(cc) where he said the following:

“Whilst there was a reciprocal duty of support between married person no duty of support arises by operation of law between unmarried co-habitants and further added that to the extents that any obligation arises between co-habitants during the subsistence of the relationship,

these arise by agreement and only to the extent of that agreement”.

It is worth pausing at this stage to make what may seem to be an obvious comment. It is abundantly clear that the plaintiffs case is based on the agreement

and statement made by Skweyiya J.

[22] Another proposition contended for by the Plaintiffs is that, apart from the contractual relationship, the obligation to maintain and support is also created by the existence of a permanent life partnership between the parties where the relationship between them and the circumstances are such that the law will attach a reciprocal duty of support to such relationship. In support of the above proposition or argument, it was submitted that since the deceased lived together with the First Plaintiff and her children, cared and supported her children, purchased a home which was registered in the name of the Plaintiff and paid all the monthly living expenses for the family, this was sufficient evidence that a permanent life partnership existed between the deceased and the First plaintiff.

[23] On behalf of the Defendant it was submitted that the Plaintiffs failed to establish a legally binding agreement with Gomes which entitled them to compel him to support. Regarding the agreement between Gomes and the First Plaintiff to get married on the 12th April 2008, it was submitted that this does not give rise to a duty of support at all. As authority for his proposition Counsel

referred me to the case of *Van Jaarsveld vs Bridges* 2010 (4) SA 558 (SCA). A case dealing with inter alia with agreements to marry where it was held as follows:

“I do not accept the proposition that parties, when promising to marry each other, contemplate that a breach of their engagement would have financial consequences as if they had in fact married. They assume that their marital regime will be determined by their wedding (my emphasis). An engagement is in my view more of an unenforceable pactum de contrahendo providing deliberandi - a time to get to know each other better and to decide whether or not to marry finally.,

One had to distinguish in this regard between claims for prospective losses and those for actual losses. It is not easy to rationalise claims for prospective loses. One of the problems concerns the intended marital regime. It would be unusual for parties to agree on the marital regime at the time they promise to marry each other. If nothing was agreed, on what assumption must the court work? I believe that the court cannot work on any assumption, especially not one that the marriage would on the probabilities have been in community of property. And if the agreement was to marry in community, can one party not change her or his mind without commercial

consequences?

An arrangement to enter into an antenuptial contract is not binding because it must be entered into notarially. How can legal consequences flow from the refusal to enter into the notarial agreement? And what would the consequences be if the parties cannot agree on the detailed terms of the agreement? The matter becomes more complicated if one considers the claim for loss of support (my emphasis). In divorce proceedings the award is a matter of discretion; but in a breach of contract situation it becomes a matter of commercial entitlement. Imponderables abound. Prospective losses are not capable of ascertainment, or are remote and speculative and therefore not proper to be adopted on the anticipated length of the marriage and the probable orders that would follow on divorce, such as forfeiture and the like. I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective losses”.

- [24] Counsel further rightly submitted that no claim for loss of support exists purely because the parties agreed to maintain or support each other and argued that it is wrong to suggest that because a legally binding agreement exists between the parties, same should be elevated to a legally enforceable right worthy of protection against third parties. More crisply, he contended that it is quite clear that an agreement to get married does not establish any legal duty of support between the parties following the decision of *Van Jaarsveld supra*.
- [25] It was further contended by the Defendant, that the fact that they lived together and promised to marry each other did not establish any legal duty of support by Mr Gomes to the Plaintiff or third parties. Turning to the second agreement based on the evidence that Mr Gomes promised to “take care of” the Plaintiffs maintain and support them as amounting to a legally enforceable agreement to support them, it was submitted that such a promise cannot be equated or elevated to *animus contrahendi* thus amounting to a legally enforceable agreement between the parties. Counsel for the Defendant relying on the decision of *Robinson vs Randfontein Estate Gold Mining Company 1921 ADFH 161* submitted that such a promise was motivated by motives of gratitude amounting to a general promise binding on honour and conscience rather than a definite contractual undertaking enforceable at law. To negate any proposition of *animus contrahendi* relating to the promise it was contended further by the Defendant that if Gomes had reneged on the promise to support the Plaintiffs

they could not sue him in the circumstances. The promise or undertaking made by Mr Gomes was akin to an offer made within a family in circumstances which negative an intention to be legally bound and such undertaking or promises do not generate binding contracts because you cannot sue the estate of the deceased on the basis of such a promise.

- [26] The Defendant further contended that Gomes whilst still alive was not under any legal obligation to support the Plaintiffs and any suggestion that a promise made after his death could be elevated to a legally enforceable duty is misplaced because a mere contractual right of support (arising from the agreement as in the present case) on its own cannot give rise to

a claim for loss of support against third parties. It was finally submitted that it is fallacious to contend that once an agreement to support exist, the plaintiffs are entitled to claim for loss of support, because Mr Gomes whilst still alive was not under any legal obligation to support the plaintiffs and such right (if any) was not worthy of protection by law and enforceable against third parties.

- [27] In my view the contention by the plaintiffs that the evidence of the first plaintiff, that Mr Gomes promised to take care of her and her children was unchallenged, and therefore they have in discharging the onus that there was an agreement to marry. This contention is misplaced. It is now settled law that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In *Kent (Pty) Ltd v Power* 2002 (1) All SA 605 (w) Cloete J undertook a careful review of relevant cases and principles where the principle was endorsed and applied. In particular he referred to the statement made by Innes C.J. in *Stiffmen v Kriel* 1909 TS at 538 where he said the following:

“It does not follow that because evidence is uncontradicted, that therefore it is fine....”

The story told by the persons on whom the onus rest may be improbable as not to discharge it”

The above statement was quoted recently with approval by Theron JA in *Macdonald v Young* 2011 ZASCA 31

- [28] The mere fact that the parties motivated by love and support for each other made certain promises cannot be extended to a legal obligation either on the basis of a contract or otherwise. The Plaintiffs have misconstrued their position.
- [29] It cannot be argued successfully that promises made during the subsistence of a marriage relationship can prevail over the marital obligations of the other spouse (in this case Gomes wife). Such promises if any amount to nothing or are subsidiary to marriage obligations. If breaking such promises cannot afford a party a right of recourse against the guilty party it begs a question as to how can such promises be elevated to a legal obligation.
- [30] I agree with the defendant that a promise to maintain, care for, support cannot amount to a legally enforceable agreement to support the Plaintiffs. It is unsustainable to contend that on the basis of the promise Mr Gomes made to the Plaintiffs he could have been sued had he stopped providing for her and her children. Experience has taught us that people make promises, not intending that those promises should be construed or elevated to animus contrahendi. This case falls within that category. I am persuaded that even if there was an agreement (which I did not hold), a mere contractual right to support is on its own is not sufficient to give rise to a claim for loss of support and such a right cannot translate into a right of support which is worthy of protection by law and enforceable by the third parties. Consequently the submission by the Plaintiff’s counsel that once a legally binding agreement exists, it is sufficient for the loss of support claim to succeed is unsustainable and falls to be rejected. I am fortified in my view by the judgment of the court in *Union v Ocean Accident and Guarantee Corporate* 1956 (1) SA 577 at 586-6 (AD) where the following was

said:

“It is easy to imagine the absurdities that would arise if all persons contractually linked to the injured person could sue the careless injurer for the loss suffered by them. The case was put to us of the injured building contractor who in consequence of his injury has to discontinue his contract, so that his employees and the building owner and the architect and his sub-contractors and their employees are all put to some loss. Insurance companies would also be a wide class of plaintiffs who could bring actions persons issued by them were negligently injured or, presumably, killed is the extension of liability contended for were recognised. In fact it would be a rare accident that did not give occasion for a crop of actions at the suit of persons who had made contracts with the injured party” (my emphasis).

See also *Amod v Multilateral Vehicle Accident Fund* 1994 (4) SA 1319 (SCA) at paragraph 12. It is evident from the ratio of these decisions that the Plaintiff would not be able to get off the starting blocks and successfully establish a legally enforceable duty of support towards them. The instructive statement in *Ocean Accident* supra excludes a categories of such claims, which the Plaintiffs are now seeking to advance.

- [31] In my view, it is impermissible to elevate a promise to “take care of you” to a legally enforceable obligation. To the extent that Plaintiffs seek to rely on the promise made by the deceased to them, such a promise was not only vague, but one akin to an offer made within a family in circumstances which negative an intention to be legally bound. See *Christie* The law of contract in South Africa 5th Edition page 30. The promise (i.e. retrenchment) was an offer made to render assistance whenever called upon to do so. This is accordingly a promise made from motives of gratitude and it cannot ripen into a contract.
- [32] A careful analysis of the evidence reveals that Gomes out of sympathy felt obliged to assist with the payment of monthly expenses including the school fees of the children. The First Plaintiff in evidence stated that after her retrenchment Gomes told her not to worry and promised to take care of her and her children. The inference that can be drawn from such a gesture is that after the Plaintiff and her children had looked after him after his discharge from hospital, he felt obliged to repay their kindness by assisting them with the monthly expenses.
- [33] In the light of the foregoing I am convinced that the background circumstances surrounding the making of the said promise negate any intention to be contractually bound. Again if one carefully scrutinise the evidence of the First Plaintiff regarding the signing of the joint will, it is also abundantly clear that there was no *animus contrahendi*. The joint will according to the First Plaintiff was signed after his divorce in South Africa and also to protect their contributions towards the house. Another reason militating against the plaintiffs case is that the first plaintiff specifically stated in evidence that the reason why the property was not registered in the name of the deceased is because he was not yet divorced. Gomes only divorced according to Portuguese law in June 2007. This again negates any further suggestion by the Plaintiffs that the promise to support and maintain them was made with the necessary *animus contrahendi*. In the light thereof any suggestion that

because Gomes bought a house for the plaintiff, same should be construed as an intention to be contractually bound amounting to a legally enforceable obligation is devoid of substance.

- [34] Our law does not recognise a dependant's claim every time there is an agreement. I reiterate that the mere fact that if Mr Gomes had walked out of the plaintiffs they could not sue him as sufficient reason to disallow such a claim. The agreement or promise to support does not mean that Mr Gomes was bound to support them for the rest his life. To sanction such a situation would in my view be untenable. Our courts have consistently declined to recognise such claims. See: Amod *supra* at paragraph 26 and Du Plessis v Road Accident Fund 2004(1) SA 359 SCA at paragraph 43 where Cloete JA said the following:

"It is not necessary for purposes of this judgment to consider whether the dependant's action should be extended to unmarried persons in a heterosexual relationship or to any other relationship, and I expressly leave those questions open".

- [35] Examining the nature of the promise or undertaking between the parties, and the circumstances surrounding the making of the offer or promise, it cannot be contended that it was made *animus contrahendi*, this is particularly so because if the deceased had reneged on the promise no action would lie against him for breaking such a promise. See in this regard Van Jaarsveld *supra*. I do not think that the deceased by making such an undertaking or promise and repeating it to the Second Plaintiff or the witness, Theresa, intended it to be equivalent to a contract. Thus I am not persuaded that the deceased knew or at least foresaw that by making such promises same would be legally binding and enforceable against him and third parties.
- [36] I need to emphasise that in terms of common law marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of co-habitation and support. The formation of such relationship is a matter of profound importance to the parties and indeed to their families and it is of great social value and significant.

Skweyiya J writing for the majority in Volks *supra* quoted with approval the comments made in Dawood & Another v Minister of Home Affairs & Others [2000] ZACC 8; 2000 (3) SA 936 CC at paragraphs 30 to 31 as follows:

"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.

...

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage give rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function”.

He further stated that:

“Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in case of unmarried cohabitants (my emphasis)”

- [37] I accept that in some jurisdictions various forms of registered partnership have been introduced which treat partners as if they were married and extend benefits to them similar to the benefits enjoyed by married persons but this case does not fall within those categories. The position is different, the plaintiffs rely on the promise or the words “take care of you”, support, maintain and look after you and your children as the basis upon which the duty of support must be extended. This alleged promise according to the First Plaintiff was made shortly after she was retrenched. Evidently it was made to assure her and her children regarding their financial obligations. To attempt to elevate it as a legally binding agreement is not supported by evidence and falls to be rejected.
- [38] The claim of the Second Plaintiff who was not legally adopted by Gomes is also founded upon the same promise that he made to her mother, that he will look after them. In support of her claim the argument advanced was that Gomes paid for her wedding and honeymoon, as a basis upon which the duty of support was created. This argument is misplaced. In essence this would mean that if an employer undertakes or promises to pay and paid for the school fees of her domestic worker’s son, he/she will be bound by virtue of such promises or undertaking should he stop paying. Again what the argument for the Second Plaintiff boils down to is that if a third party causes the death of the employer, the domestic worker’s son would be entitled to claim for loss of support against the third party. This example in my view illustrates how farfetched and absurd the Plaintiff’s case is See: *Union v Ocean Accident supra*.
- [39] I have a serious misgivings about extending this principle to cater for the plaintiff in the present case. Payment of expenses does not serve as evidence of an intention to be contractually bound. In my view these facts alone or taken cumulatively with what Mr Gomes is allegedly said to have done for the Plaintiff, cannot and does not per se elevate them to a legally enforceable right. I am fortified by the submission that if Mr Gomes did not keep his side of the bargain, no action would lie against him or his estate at the instance of the plaintiffs.

[40] I have no doubt that extending the action of loss of support to cohabitants where one was party to a valid marriage would be an affront to the fabric of our society, trespass and seriously erode the institution of marriage. Any right thinking member of society would not countenance such conduct, this is particularly so because upholding such promise as constituting good law would not only directly affect the innocent spouse but also impacts on the proprietary or succession rights of the dependants of the deceased. Excluding the First Plaintiff cannot be construed as unfair discrimination because she was not married to the deceased and such a promise cannot prevail over other sound legal considerations. The Second Plaintiff was not formally adopted by Gomes, it seems to me that she sought refuge in fact that Gomes paid for her wedding and honeymoon. This case illustrates how misguided

sympathy and gratitude should not be elevated to a legal duty. Our law does not recognise such arrangement.

[41] The undisputed facts and evidence reveal that the promise to marry the First Plaintiff and take care of her and her children were all made during the subsistence of the marriage between the deceased and his wife. It was made in 2004 when the First Plaintiff was retrenched. The deceased divorced his wife in South Africa in 2005 and the Portuguese divorce was finalised in June 2007. The Plaintiff only lived with Gomes for a period of six months free from the bounds of matrimony until he met his death in January 2008. To allow such promise to supersede the marriage contract would amount to an oversimplification of the issues. Marriage is not a piece of paper. Couples enter the agreement fully cognisant of the legal obligations which arise by operation of law and rightly so, expect the law to protect them beyond the termination of marriage and even after death.

[42] I am not aware of any case and neither did Counsel for the Plaintiffs refer me to any authority which supports the plaintiffs' case. The only case which may seem closer to that of the plaintiffs is the *Verheem v Road Accident Fund* a judgment of Goodey AJ sitting in the North Gauteng High Court delivered on the 25th November 2010, where he sought to distinguish an earlier judgment of Ledwaba J in the matter of *Susara Meyer v Road Accident Fund* delivered on the 28th March 2006. The facts of these cases are clearly distinguishable from the present matter. Drawing an inference that the First

Plaintiff and Gomes undertook reciprocal duties of support is not stronger and is defeated by the evidence. I am not inclined to open the floodgates and extend the duty of support to a limitless class of persons and cast such duty wide and impracticable.

[43] For the abovementioned reasons, I conclude that the plaintiffs have failed to discharge the onus.

[44] I therefore make the following order:

44.1 The First and Second Plaintiffs' actions are dismissed with costs.

RS MATHOPO

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiffs : Adv B Ancer Sc

Instructed by : Norman Berger & Partners

For the Defendant : Adv. S Budlender

Instructed by : Lindsay Keller Attorneys

Date of hearing : 19 May 2011

Date of Judgment :

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