

SOUTH AFRICA / JUDGMENT

T obo Minor v Road Accident Fund (1322/2016) [2017] ZALMPPHC 13 (29 June 2017) [2017] ZALMPPHC 13

COURT

Limpopo High Court, Polokwane

BEFORE

Mokgohloa DJP

CASE / FILE NUMBER

1322/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 1322/2016

Not

reportable

Not

of interest to other judges

Revised.

29/6/2017

In

the matter between: T
 obo the
 MINOR PLAINTIFF
 And
 ROAD
 ACCIDENT
 FUND DEFENDANT

JUDGMENT

MOKGOHLOA DJP

1. This is a claim for damages resulting from the death of Mr Mpho Victor Gangashe (the deceased), who died in a motor vehicle collision

that occurred on 9 May 2015. The plaintiff claims in her personal capacity as well as in her capacity as the mother and guardian of her minor child.

2. In her particulars of claim, the plaintiff pleaded that the deceased had a legal obligation to maintain her and the minor child and that he had fulfilled that duty. The defendant on the other hand, disputed the plaintiff's locus standi in respect of her personal claim.
3. The issue to be determined in this trial is whether the plaintiff has locus standi to sue the defendant in her personal capacity for her loss of support and whether the deceased had a legal duty to maintain the plaintiff.
4. The plaintiff testified that she started dating the deceased in 2007. She moved in with the deceased during the middle of 2011 and stayed together in a rented flat in Midrand, Gauteng. In 2012 the plaintiff gave birth to the deceased's child and they moved into a bigger flat where they lived together until the death of the deceased.
5. She stated that the deceased was her partner, soul mate and the father of her child. They stayed together as husband and wife. The deceased supported her and the minor child. He paid rent for the flat and bought them groceries. They had planned to marry and were waiting for the plaintiff to obtain employment. They even planned to buy a house together.
6. It came out during cross examination that the plaintiff has a qualification in chemical engineering and she only has to do in

service training. She did courses in insurance and operation management. She is currently employed at Sanlam.

7. Mr Dakalo Meshack Gangashe, the deceased brother, confirmed that the deceased and the plaintiff were dating. According to him, the plaintiff and the deceased stayed together in Midrand from 2010 or

2011. They stayed together as a couple. He used to visit them frequently.

8. The legal basis for the entitlement of persons to claim from the defendant (RAF) due to the death of or bodily injury to any other person, is the existence of a legal duty of the deceased or injured person to support the claimant, without which the defendant would not be held liable for such a claim.[1]
9. It is accepted that whilst there is a reciprocal duty of support between married persons that arises by operation of law, no such duty exist in the case of unmarried cohabitants. The maintenance benefit in terms of Section 2
(1) of the Maintenance of Surviving Spouse Act[2] falls within the scope of the maintenance support obligation attached to a marriage. This Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance by operation of the law had he or she not died.
10. In *Paixão v Road Accident Fund*[3], the court gave recognition to the principle that two persons in a permanent life partnership could enjoy reciprocal duties of support despite the absence of a formal marriage relationship. Such duty of support could derive from a tacit agreement. Cachalia JA held:
“A plaintiff’s assertion, without more, that he or she was in life partnership, cannot be taken as sufficient proof of this fact. (In this case the fund conceded that the relationship was a life partnership.) Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics – particularly a reciprocal duty to support – to a marriage. Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other”.[4]
11. Although the court in *Paixão* stated that no reciprocal duty of support arises by operation of the law in the case of unmarried cohabitants, it also stated that this does not preclude such a duty from being created by agreement, tacit or express.
12. The case of *Satchwell v President of the Republic of South Africa*[5] dealt with same sex relationship. The court took the following facts into consideration in determining whether the duty of support existed between the parties:
“[25] ... Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death. It appears probable that they have undertaken reciprocal duties of support”
13. In *Du Plessis v RAF*[6] which also dealt with same sex relationships, the court was also tasked to consider if the plaintiff proved a legally enforceable duty of support on the part of the deceased. The court quoted the case of *Satchwell* supra with approval and stated the following:

“[14] In the present case the case for drawing an inference that the plaintiff and the deceased undertook reciprocal duties of support is even stronger. The plaintiff and deceased would have married one another if they could have done so. As this course was not open to them, they went through a ‘marriage’ ceremony which was as close as possible to a heterosexual marriage ceremony. The fact that the plaintiff and the deceased went through such a ‘marriage’ ceremony and did so before numerous witnesses gives rise to the inference that they intended to do the best they could do to publicise to the world that they intended their relationship to be, and to be regarded as, similar in all respects to that of a heterosexual married couple, i.e. one in which the parties would have a reciprocal duty to support. That having been their intention, it must be accepted as a probability that they tacitly undertook a reciprocal duty of support to one another.

[15] Further support for this finding is the fact that the plaintiff and the deceased thereafter lived together as if they were legally married in a stable and permanent relationship until the deceased was killed some 11 years later; they were accepted by their family and friends as partners in such a relationship; they pooled their income and shared their family responsibilities; each of them made a will in which the other partner was appointed his sole heir; and when the plaintiff was medically boarded, the deceased expressly stated that he would support the plaintiff financially and in fact did so until he died.

[16] In the light of the foregoing I am satisfied that the plaintiff proved that the deceased undertook to support him with the intention of being legally bound by such undertaking. The deceased, therefore, owed the plaintiff a contractual duty to support.”

14. In the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[7] the court held that:

“[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provisions for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. In order to apply the above criteria, those administering the Act are entitled, within the ambit of the Constitution and bearing in mind what has been said in this judgement, to take all reasonable steps, by way of regulations or otherwise, to ensure that full information concerning the permanent nature of any same-sex life partnership is disclosed.”

15. It is clear from the above cases that in order to merit recognition, a relationship must have attained a sufficient though indefinable

core of stability and commitment.

16. On that premise, Mr Rameetse on behalf of the plaintiff, submitted that the plaintiff had made a proper case for the relief sought. He submitted further that the evidence of the plaintiff proves that the relationship that existed between herself and the deceased was of a nature that established a reciprocal duty of maintenance and from which a tacit agreement of mutual support can be inferred.
17. Mr Mojamabu on behalf of the defendant, argued on the other hand that the facts that are alleged to establish the nature of the relationship that supposedly gave rise to the reciprocal duty of maintenance are not only less probable but also insufficient in that the essential facts have not been established.
18. Both parties based their argument on the principle enunciated in Paixão. Therefore the next issue to be determined is whether there was such an agreement express or to be tacitly inferred from the alleged surrounding circumstances and how the parties had conducted their relationship.
19. It is therefore necessary to briefly set out the facts in Paixão. The deceased who was married according to Portuguese law, involved with Mrs Paixão from 2002. During October 2013 he fell ill and was hospitalised. Upon his discharge from hospital Mrs Paixão offered to nurse and support him at her home until he was able to return to work. He accepted the offer and continued living with Mrs Paixão and her two daughters after his recovery. The court found their living together to have been in a mature, committed and loving family relationship accepted by relatives, community and friends as a family unit. The relationship was attested to not only by the deceased's mother and Mrs Paixão's daughters, but by a close family friend from the community who was also involved in the arrangements of the couple's wedding.
20. During their cohabitation the deceased paid for everything. When Mrs Paixão was retrenched, the deceased took care of her and her daughters. He took full responsibility for the family's food, holidays, university and school fees of Mrs Paixão's

daughters. He assured Mrs Paixão that he would marry her as soon as his divorce from his wife was finalised.

21. In June 2005 two significant events occurred. First, the deceased divorced his wife according to South African Law. He however felt constrained not to marry Mrs Paixão before his divorce was also concluded in Portugal. Second, he executed a joint will with Mrs Paixão in which they nominated each other 'as the sole and universal heirs of our entire estate and effects of the first dying of us'. The will provided that in the event of their simultaneous deaths their assets are to be consolidated and Mrs Paixão's daughters were to inherit in equal shares.

22. In June 2007 the deceased's divorce from his wife was concluded. The deceased and Mrs Paixão began making arrangements to marry. They travelled to Portugal where he introduced her to his family who approved of their relationship. The date for the wedding which was to be celebrated in Portugal was set and flights details arranged. Unfortunately, the deceased died before they could make their journey.
23. In casu, the only evidence to prove that there existed a contractual reciprocal duty to support each other, or put differently, that the deceased had a legal duty to support the plaintiff, is that: the couple stayed together in a flat and they intended to get married after the plaintiff obtain employment. Other issues like paying rent and buying groceries can be regarded as ordinary or normal support.
24. The plaintiff tried to establish that her cohabitation with the deceased was known to the deceased's family. To this end she called Dakalo to testify. Dakalo's evidence does not take the plaintiff's case any further. He testified and confirmed that the couple stayed together. I am not sure whether he knew of their plan to get married because he did not testify to that effect.
25. In my view, the facts in casu are distinguishable to the facts in Paixão's case in that:
 - (i) there is no evidence that the deceased ever introduced the plaintiff to his family;
 - (ii) no evidence that the parties' intention to marry each other was made known to any of their families. One would have expected the deceased to tell his parents and/or his brother of his intention to marry the plaintiff if it is was their intention to be permanent life partners;
 - (iii) no arrangements were made for the wedding or negotiations for lobola;
 - (iv) there is no evidence that the parties made financial provision for each other in case of death;
 - (v) although the plaintiff stated that she was not employed and therefore depended on the deceased's income, there is evidence that she was actually employed at Sanlam (her salary slip proves that her income during January 2016 had doubled from what she earned during July 2015. Therefore she was not and is not solely depended on the deceased's income, she has qualifications that can enable her to earn a decent salary.
26. It is common cause that there was no express agreement between the plaintiff and the deceased that created the reciprocal duty of support. The plaintiff relies on a tacit agreement. The conduct of the parties must be such that it justifies an inference that there was consensus between them. In my view, there are not enough facts to prove the existence of a permanent life partnership. I am not satisfied that the plaintiff discharged the onus in proving a legally enforceable duty of support on the part of the deceased.
27. In conclude this judgement I refer to another issue raised by the defendant during argument relating to the plaintiff's failure to allege her locus standi in both the particulars of claim and section 19 (f) affidavit.

28. Rule 17 4 (b)[8] provides that every summons shall set forth the full names, gender, occupation and residence or place of business of the plaintiff. In principle, a plaintiff must aver and prove that she has locus standi in iudicio. The object of the subrule is to require a plaintiff to furnish sufficient details to enable the court and the defendant to establish

whether or not the plaintiff has the requisite locus standi to sue.

29. In casu, the plaintiff stated her names, gender and residence without stating in details her relationship with the deceased. It is only in the affidavit where she described herself as a spouse of the deceased. During her testimony, the plaintiff denied residing

or having resided at the address stated in both her particulars of claim and affidavit. She further denied knowing any person residing

at that address. However it turned out that this address is actually the address of Dakalo. In my view, whether the plaintiff stayed at that address or not, is of no importance to the present proceedings. Of importance is that she failed to establish in her evidence that there existed relationship which was a kin to a marriage and which gave rise to a reciprocal duty to support

30. In the circumstances, the following order is made:

1. The plaintiff in her personal capacity has no locus standi to claim an amount for loss of support from the defendant.
2. The plaintiff is ordered to pay defendant's costs.

REPRESENTATIONS

1. For the Plaintiff : Mr Rameetse

Instructed by : Thobela Attorneys

2. Counsel for the defendant : Mr Mojamabu

Instructed by : Rachoene Inc Attorneys

3. Date of hearing : 30 March 2017
4. Date handed down : 29 June 2017

[1] Brook v Minister of Safety and Security 2009 (2) SA 94 (SCA) [6]

[2] 88 oF 1984

[3] 2012 (6) SA 377 (SCA)

[4] Ibid at para 29

[5] 2002 (6) SA 1 (CC)

[6] 2004 (1) SA 359 (SCA)

[7] 2000 (2) SA 1 (CC)

[8] Uniform Rules of Court

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