

SOUTH AFRICA / JUDGMENT

T.Z obo Minors v Road Accident Fund (29192/2017) [2021] ZAGPPHC 367 (22 June 2021) [2021] ZAGPPHC 367

COURT

North Gauteng High Court, Pretoria

BEFORE

Tsatsi

CASE / FILE NUMBER

29192/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

No: 29192/2017

In

the matter between:

T[...]
Z[...] obo Minors
PLAINTIFF
And
ROAD
ACCIDENT FUND
DEFENDANT

JUDGMENT

TSATSI AJ

INTRODUCTION

1. This application has been heard in a virtual hearing via Microsoft Teams.
2. The Plaintiff, a 35-year-old female, instituted a claim for loss of support in both her personal and representative capacities against the Road Accident Fund.
3. The Plaintiff claims support on behalf of four of her children named: D[...], H [...], A [...] and W [...].
4. The Plaintiff's husband SB [...] was killed in a motor vehicle accident that occurred on 24 May 2016 whilst he was driving his motor vehicle. The deceased was a mining operator earning R27 906.24 per month.
5. Both the issue of merits and quantum remain in dispute.

BACKGROUND

6. The Plaintiff deposed to an affidavit and stated that on or about 24 May 2016 at or near R555 (Old Orgies Road), Witbank the deceased was driving a motor vehicle with registration letters and numbers [...] when a motor vehicle with registration letters and numbers [...] when a motor vehicle with registration letters and numbers (herein referred as the first insured motor vehicle) there and then driven by one [...] herein after referred to as the first insured driver, and motor vehicle with unknown registration letters and numbers [herein after referred to as the second insured motor vehicle) there and then driven by unknown driver (herein after referred to as the second insured driver) caused a collision with the deceased's motor vehicle.
7. In its plea the Defendant submits that it bears no knowledge of the collision that caused the deceased's death. The Defendant also submits that it bears no knowledge of the loss of support by the Plaintiff and her children. The Defendant requested the Plaintiff to prove her allegations.
8. The Plaintiff stated that she was married to the deceased who was 43 years at the time of his death. The Plaintiff alleged that she was married to the deceased in accordance with customary law.
9. She further stated that the deceased's death deprived her and her three minor children one being an adult child, of maintenance and support which the deceased used to provide for them during his lifetime.

10. The Plaintiff did not plead the validity of her alleged customary marriage in her particulars of claim, except to mention that she and her children were financially dependent on the deceased. The first time the Plaintiff's customary marriage was mentioned was in the heads of argument. The Plaintiff ought to have pleaded her customary marriage in her particulars of claim. As a result, the Defendant did not comment on the issue of the Plaintiff's customary marriage.
 11. The Plaintiff attached the following documents to the reply in terms of Rule 36 (4): Lobola letter dated 6 December 2014 supporting the existence of the alleged customary marriage, her ID copy, an affidavit in terms of section 19
- (f) and Birth certificates of the children and the deceased's death certificate.

ISSUES

12. The issue in dispute is both merits and quantum and whether or not the Plaintiff is entitled to loss of support both in her personal capacity and on behalf of her children, one being an adult.
13. The other issue is whether a valid customary marriage existed between the Plaintiff and the deceased. In the event that the Court finds that there was a valid customary marriage between the Plaintiff and the deceased the Court has to determine whether the deceased had a legal duty to support the Plaintiff's children.
14. In section 1 (iv) of the Recognition of Customary Marriages Act: (Act No. 120 of 1998):, the following definition of "lobolo" is provided:

S 1(iv): "lobolo" means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma; lumalo, thaka, khazi, magadi; amabheka; or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage."

15. Although the Plaintiff alleges that she was married to the deceased according to customary marriage, the marriage was never registered. The lobola is signed by the representatives of both families. The letter from the tribal authority confirming the marriage of the Plaintiff to the deceased is also attached to the Court papers.
16. In addition to the above, in an effort to proof the Plaintiff's marriage to the deceased three affidavits were attached. One is from the neighbour, the second one is from the uncle of the deceased and third one is from the Plaintiff's mother all confirming that the Plaintiff was married to the deceased according to customary marriage.

17. Section 3 of the Recognition of Customary Marriages Act number 120 of 1998 provides that for a customary marriage entered into after this Act to be valid the following requirements had to be complied with:
- (a). The prospective spouses-
- (i) must both be above the age of 18 years; and
- (ii) must 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.”
18. It is not in dispute that both the Plaintiff and the deceased were over 18 years, they consented to be married to each other and the marriage was negotiated into by both families as demonstrated by the lobola letter.

THE LAW

Customary marriage

19. In terms of section 17 of the Road Accident Fund Act 56 of 1996 the Respondent is obliged to compensate any person for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle. The RAF Act does not therefore preclude the Plaintiff from bringing a claim for loss of support.
20. In the case of *Nhlapo v Mahlangu* 59900/14);
- [2015] ZAGPPHC 142,
- the court stated that the incorporation of the bride into the family of the groom is one of the requirements for valid customary marriage to come into existence. In casu the customary marriage between the Plaintiff and the Deceased was not ‘celebrated in accordance with custom’ as provided in Section 3 (1) (b) of the Recognition of Customary Marriages Act (see *Nhlapo* (supra).
21. The marriage between the Plaintiff and the Deceased was not celebrated in terms of Section 3 (b) of the Recognition of Customary Marriages Act.

22. In *Mbungela & Another v Mkabi & Others*, (820/2018) [2019] ZASCA 134 (30 September 2019) the Court was asked to decide whether the appellant and the deceased had complied with provisions of S 3(1) (b) of the Customary Marriages Act and concluded a valid customary marriage, despite the fact that the deceased's family did not hand her over to the Respondent's family in accordance to custom.
23. The SCA noted that this provision does not restrict itself to a specific list of requirements which must be complied with for a valid customary marriage to exist. In this case the court stated that this is so because "customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned...Thus, the legislature left it open for the various communities to give content to s 3(1) (b) in accordance with their lived experiences."
24. The Court find that customary marriage came into existence between the Appellant and the deceased. The above facts are similar to the facts in *casu*.
25. The recognition Act does not specifically prescribe the manner in which negotiations must be undertaken or how the marriage must be entered into or celebrated. What is clear is that for a customary marriage to be valid, it must be negotiated and entered into or celebrated. How this is to be done is not specifically set out in the Recognition Act but on the practices of each particular tribe. A Court in each specific case must consider the practices of the tribe of the parties. In fact, a factual determination must be made to reach a finding whether the requirement has been complied with (see *Msutu v Road Accident Fund* (18174/14)

[2011] ZAGPPHC 232 (10 July 2011: para: 31).

26. It is a fact that the customary marriage between the Plaintiff and the Deceased was not 'celebrated in accordance with custom' as provided in Section 3 (1) (b) of the Recognition of Customary Marriages Act (see *Nhlapo* (*supra*)).

Legal duty to support the Plaintiff and her minor children

27. The question that arises is whether or not the deceased had a legal duty to support the children of the Plaintiff including one adult child who are said to be also the children of the deceased.
28. In the test laid down in *Paixao v RAF* 2012
- (6) SA 377 (SCA), that 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 a duty of support could derive from a tacit agreement. At [29] Cachalia JA held: 'I appreciate that it is not always easy for defendants in the fund's position to refute evidence of a plaintiff dependant's assertion that the deceased had undertaken a

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

29. *Metiso v Padongeluxsfonds* 2001(3) SA 1142 T) at 1150G-H, Bertelsmann J found in favour of claimants who had lodged a claim for loss of support against RAF arising from the death of an uncle of certain children whom he had supported. The Court found that a binding offer to support the children were sufficient to ground a duty of support because to do so was consistent with the morality of society.
30. *Sutherland J in JT v RAF* 2015
 - (1) SA 609 (GJ) page 616 at para 26 held authoritatively as follows: "It seems to me that these cases demonstrate that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another. Moreover, a culturally imbedded notion of "family", constituted as being a network of relationships of reciprocal nature and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support, by persons who are in a relationship akin to that of a family. This norm is not parochial but rather is likely to be universal, it is certainly consonant both with the norms derived from the Roman-Dutch tradition, as alluded to by *Cachalia J in Paixao v RAF supra* and, no less, from the norms derived from African tradition, not least of all exemplified by the spirit of Ubuntu, as mentioned by *Dlodlo J in Fosi v RAF supra*".
31. In *M v Road Accident Fund* (28602/2017) [2020] ZAGPPHC 63 (18 February 2020), the Defendant was ordered to pay the Plaintiff an amount of R 700 000-00 being for past and future loss of support for the Plaintiff. In addition, the Defendant was ordered to pay the Plaintiff an amount of R 800 000-00, being for past and future loss of support for the Plaintiff's minor children.

32. In *Sizani v Road Accident Fund* (1895/2016) [2020] ZAECMHC 4 (13 February 2020), the Plaintiff was awarded an amount of R 206, 856.00 for loss of support arising from the untimely death of her son.

Duty to support an adult child

33. In terms of section 17 of the Children's Act 38 of 2005, a child whether male or female becomes a major upon reaching the age of 18 years.
34. In *Fosi v RAF* [2007] JOL 19399 (C) Dlodlo J at para [11] referred to "[11]The test as set out in *Smith v Mutual & Federal Insurance Co Ltd* 1998(4) SA 626 (C) at 6320-E as follows: "To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Accordingly, when the plaintiff pleads indigence, it is not sufficient to show that the plaintiff lives on very little or nothing (vide World Book dictionary). The plaintiff must prove something more. The plaintiff must prove that there is an extreme need or want for the basic necessities of life."
35. Section 23 (2) of the Road Accident Fund Act provides that " Prescription of a Claim for compensation referred to in subsection (1) shall not run against, a minor(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose".

Costs of funeral expenses

36. Section 17 of the Road Accident Fund Act provides that, the liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of the death of any person shall in respect of funeral expenses be limited to the necessary actual costs to cremate the deceased or to inter him or her in a grave.
37. It was held in *Young v Hutton* 1918 WLD 90 at 91, on the strength of Grotius' Introduction,²⁹ that a person improperly causing the death of another is liable to the heir of the latter for funeral expenses. In *Rondalia Assurance Corporation of SA Ltd v Britz* 1976
- (3) SA 243 (T) at 245H-246E Margo J, after surveying the authorities, came to the conclusion that where the heirs have laid out funeral expenses on their own account, an action to recover such expenses lies at their suit. This assertion was not attacked on appeal and this Court is in agreement with such assertion.
38. In *Keforilwe v RAF* 281/13)
- [2015] ZANWHC 74 (12 November 2015) the Plaintiff was awarded an amount of R17 510-00 for funeral expenses. Whereas in *Makangu and Another v Road Accident Fund* (30137/2003) [2007] ZAGPHC 31 (18 April 2007) the Plaintiff was paid R1 688,81 for funeral expenses.

39. Having considered section 17 of the Road Accident Fund and case law with regard to funeral expenses, I am of the view that an amount of R10 000.00 (ten thousand Rand) is reasonable in the circumstances.

APPLICATION OF THE LAW TO THE FACTS

40. In light of the preceding, it is my considered view that customary marriage between the Applicant and the Deceased came into existence.
41. It is trite that the contract of a marriage gives rise to a reciprocal duty of support and that a surviving spouse is entitled to bring a claim for loss of support arising out of the death of her spouse.
42. In addition, in casu, the children of the Plaintiff who are said to be the children of the deceased were also entitled to support from the deceased.
43. The claim for the adult child has not prescribed in terms of section 23
(2) and (3) of the Road Accident Fund.
44. The Defendant's liability with regard to funeral expenses is limited to the actual costs of placing the remains of the deceased human being into the ground, an earth burial. The Defendant is not liable for other funeral expenses except as provided in terms of Section 17 of the Road Accident Fund Act.
46. I accordingly mark the draft order "X" and it is made an order of Court.

E.K TSATSI

ACTING JUDGE OF THE HIGH COURT

For the Plaintiff: Adv. T.E. Tlhokwe

Instructed by: Motimele Inc.

For the Defendant: No appearance

Date of Hearing

9 June 2021

Date of

Judgment:

22 June 2021

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