

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES
Of Interest to other Judges:	YES
Circulate to Magistrates:	NO

Case number: 2718/2015

In the matter between:

ELSIE MALETHOLE MOHAJANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: LEKALE, J

HEARD ON: 12 AND 15 SEPTEMBER 2017

JUDGMENT BY: LEKALE, J

DELIVERED ON: 5 OCTOBER 2017

Summary: Delict- Loss of support- Extension of claim to survivor of heterosexual cohabitative relationship- As at date of death plaintiff and deceased staying with their minor child, who carries the latter's surname, at the residence of the deceased's aunt

with blessings of their elders who met agreeing deceased to pay lobola once in a financial position to do so – Deceased using monthly allowance to contribute towards maintenance of plaintiff and minor child who both remained at aunt's house in his absence- Claim allowed.

INTRODUCTION AND BACKGROUND

- [1] This is, in essence, a stated case in an action for loss of support instituted by the surviving partner of a cohabitative relationship following the death of her partner. Plaintiff is mother to **M T S**, a minor child of one **Hendry Matsheliso Sehloho** (the deceased), who sustained fatal injuries in a collision with a vehicle insured by defendant on 18 September 2012.
- [2] As at the date of his death the deceased had been cohabiting with the plaintiff at his aunt's house since August 2011 when the child, with whom they were staying, was born.
- [3] Pursuant to the fatal accident plaintiff instituted action for loss of support in the instant matter both in her personal capacity and on behalf of the minor child. The claim lodged on behalf of the minor child has since been settled by the parties and only the plaintiff's personal claim serves before the court for adjudication.
- [3] In the statement of facts filed the parties are in agreement that the deceased's aunt, who raised him, was responsible for his studies in Bloemfontein and, further, gave him a R2 000-00 monthly allowance which he, on his part, used to support himself at school and to contribute towards the maintenance of the plaintiff and the child back home.

- [4] It is, further, patent *ex facie* the statement of facts that the plaintiff and the deceased, as represented by their elders, intended to conclude a customary union, with the deceased paying lobola, upon completion of his studies and commencement, on his part, of employment.
- [5] On 12 September 2017, when the matter first served before me, the parties agreed to state a case for adjudication after it became clear that their dispute is limited to a question of law insofar as there exist no factual disputes between them. The parties have since obliged with the statement of facts, duly signed, being filed together with heads of arguments on 15 September 2017.

ISSUE FOR DETERMINATION

- [6] The parties are at variance on whether or not the deceased, as of law, owed the plaintiff duty of support as at the date of his death with the plaintiff contending that such duty was owed to her regard being had to case law and the peculiar as well as *sui generis* nature of the claim in question. Defendant, on its part, maintains that such duty did not exist on the part of the deceased insofar as he was not married to the plaintiff at all.
- [7] In the event of the above question being decided in the affirmative, I am required to award plaintiff damages as claimed insofar as the quantum of her damages, as reflected in the actuarial report filed, is not in dispute.

CONTENTIONS FOR THE PLAINTIFF

[8] Mr Berry for the plaintiff submits to, *inter alia*, the effect that the agreed facts are such that the instant matter is an appropriate case for the court to extend the relevant remedy to the plaintiff regard being had to *boni mores*, our constitutional values, recent legislation and case law, among others. He, further, reminds the court that plaintiff's expert reports are also not in dispute and it is clear from the same that plaintiff's quantum for loss of support amounts to R2 871 823 after contingencies have been applied. In his view the amount claimed is, however, less insofar as it amounts to R2 264 329.

CONTENTIONS FOR THE DEFENDANT

[9] On behalf of the defendant Mr Mopeli submits to, *inter alia*, the effect that no such duty existed and that the facts in the instant matter do not justify the extension of the relevant remedy to the plaintiff who only had the deceased's promise to marry her at a future undetermined date. He, further, reiterates that cohabitation cannot *per se* create a duty to maintain. The duty in question must have existed, as a matter of fact, during cohabitation and not as a mere possibility at some future date.

APPLICABLE LEGAL POSITION

[10] A dependant's claim for loss of support as a result of the unlawful killing of another is only valid if the deceased had a legally enforceable duty to support such dependant and if the right of the

dependant to such support was worthy of protection by way of an action. (See **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814(A)).

- [11] The law attaches a duty of support to various family relationships such as husband and wife and parent and child. Such a duty of support might be inferred as a matter of fact in certain cases such as persons involved in same-sex permanent life partnerships. Whether the duty of support existed or not depends on the circumstances of each case. (See **Du Plessis v Road Accident Fund** 2004 (1) SA 359 (SCA) paras [11], [12] and [13]).
- [12] The duty to support can arise *ex contractu* where the deceased had undertaken, expressly or tacitly, to support the plaintiff with the intention of being legally bound by such an undertaking. The question as to whether or not the plaintiff's right of support is worthy of protection depends on whether or not the killing of the deceased was a wrongful act as against the plaintiff. The answer to the relevant question depends on the prevailing *boni mores*. When the constitutional values of equality and human dignity dictate that such protection be extended to the plaintiff the court obliges. (See **Du Plessis v Road Accident Fund** (*supra*) paras [19] to and including [26])
- [13] Where the facts in a heterosexual life partnership establish a contractual reciprocal duty of support between partners and the nature of the relationship merits protection of the law, the court takes an incremental step towards development of the common law by extending the right of support to the surviving partner.

(See **Paixao and Ano. v Road Accident Fund** 2012(6) SA 377 (SCA)).

- [14] The statutory requirements for the validity of customary marriages are firstly that the prospective spouses must be above the age of majority and must consent to being married under customary law and secondly, that the marriage must be negotiated and entered into or celebrated in accordance with customary law. (See **Section 3(1) of Recognition of Customary Marriages Act** 120 of 1998)
- [15] At customary law the broad essentials of customary union or marriage in South Africa are the participation of the families or emissaries of the prospective partners in the lobola negotiations; the consent of the prospective partners; the payment of lobola and the handing over of the bride to the groom. (See in general **Seymour's Customary Law in Southern Africa** Fifth Edition-Juta by JC Bekker and **Southon v Moropane** [2012] ZAGPJHC 146)._
- [16] A promise to put in motion lobola negotiations is a significant factor pointing towards stability of a committed heterosexual relationship akin to marriage and entitling plaintiff's right of support to legal protection. (See **Mahapelo v Road Accident Fund** [2016] ZAGPJHC 317).

APPLICATION OF LEGAL POSITION AND FINDINGS

- [17] I am satisfied, from the agreed facts, that the plaintiff and the deceased lived together as husband and wife and their intention was clearly to marry at a future yet to be determined date. Their position was different from that of the betrothed in that they lived together and were not just engaged to each other. They already had a child together with whom they lived raising him as if born in wedlock.
- [18] The relationship between plaintiff and the deceased was blessed by their respective elders who were aware of both their intention to marry and plaintiff's commitment to pay lobola once in a financial position to do so. The respective families were fully aware and part of what was going on between the two of them having met and agreed on the way forward as in lobola negotiations when elders meet to agree on the terms of a customary union between their children. The deceased had assumed the role of husband as against the plaintiff and the father as against the minor child, contributing towards their maintenance and joining them at his aunt's residence over weekends and holidays. They simply lived together as a family eating from the same pot. The fact that the child carries the deceased's last name *viz.* Sehloho is, in my view, indicative of the permanency of the relationship and so does the fact that the child's birth certificate reflects the deceased as the father and the plaintiff as the mother. The most plausible inference to draw from the facts is that the deceased tacitly undertook to maintain the plaintiff and the child when he took them to stay with him at his aunt's home and continued to share his monthly allowance with them.

[19] It was obviously in the interests of the minor child for his parents to stay together with him in the same household. In my view the expectations of the society are that parents of a minor child would take care of such a child by, *inter alia*, staying with him in order to give him the necessary family support and warmth necessary for proper and beneficial development of a child. The society would, therefore, never frown upon the relevant relationship and would, in my judgment, most probably support and protect the same insofar as it is not a loose, unstructured and immoral relationship running parallel to accepted values. The couple lived together with their child as a family unit and was, most probably, regarded by all and sundry as a married couple. Theirs was, in my opinion, a *de facto* customary marriage with the only hurdle in the formalisation of the relationship being outstanding lobola agreement inclusive of payment of lobola itself. In the circumstances the facts in the instant matter are such that the legal convictions of society effectively require the law to protect plaintiff's right of support. In my view incremental extension of the relevant remedy to the plaintiff *in casu* is, thus, warranted.

ORDER

[20] Defendant shall pay R2 264 329 to the plaintiff in respect of past and future loss of support.

[21] Defendant shall, further, pay interest on the above sum at the prevailing legal rate of interest calculated from 14 days after date hereof to date of final payment.

[22] Defendant shall, furthermore, pay costs of suit inclusive of, but not limited to, qualifying expenses of all expert witnesses in respect of whom expert reports have been delivered.

[23] Interest on the aforesaid costs of suit at the prevailing legal rate of interest calculated from the date of taxing master's allocatur to date of final payment.

LJ LEKALE, J

On behalf of plaintiff: Adv. AP Berry
Instructed by: BL Kretzmann Inc
C/O McIntyre & Van der Post
Bloemfontein

On behalf of defendant: Adv. MF Mopeli
Instructed by: Maduba Attorneys
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