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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5054/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

In the matter between -

PAULINA MAHAPELOA

Appellant

And

ROAD ACCIDENT FUND

Respondent

JUDGMENT

Headnote

Appeal by plaintiff whose claim for loss of support had been dismissed a quo.

Plaintiff, the unmarried mother of the deceased's child claimed for loss of support in her own right

Whether in the circumstances such a right of support was established – Paixao v RAF 2012 (6) SA 377 (SCA) applied

On the facts, the plaintiff and the defendant had established a *de facto* family relationship – the short duration of the relationship not a conclusive factor – a promise to put in motion lobola negotiations a significant factor pointing towards stability of a committed relationship - social context of the persons involved important to assess and weigh in determining whether, in a given case, facts established the social conditions of a *de facto* family relationship

Sutherland J:

Introduction

[1] The question to be decided in this appeal is whether the plaintiff, now appellant, Paulina Mahapelo (Mahapelo) has a right in law to claim a duty of support from Simphiwe Titus Thetyana (Thetyana).

[2] Thetyana died as a result of a road accident on 19 December 2010. The Road Accident Fund (RAF) acknowledges liability to compensate persons to whom Thetyana had such a duty. Mahapelo and Thetyana had a child, O., born on [...] June 2010, about six months before Thetyana's death. The liability of the RAF to compensate the child is not controversial. Mahapelo and Thetyana were not married.

[3] Accordingly, upon what legal basis can Mahapelo claim a duty of support from Thetyana?

The Principles

[4] 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.'*

[5] On behalf of Mahapelo several contentions were advanced about what the norms of society expect or demand from a man who fathers a child towards the mother of such child, and considerable emphasis was given to the idea of Ubuntu. Such social values are indeed relevant to the establishment of principles or norms which inform the approach of the courts to the incidence of the duty of support.

[6] Upon the premises of such norms it was conceded that it cannot be expected, at the present time at least, that a woman who bears a child does has a personal claim for support from the father, without more. However, it was contended that whenever a firm relationship between the parties exists, intended by them to be indefinite, so that they may be described as a couple, a duty of support arises. It seems to me that there is no real controversy about principles or norms in this case that compels a re-evaluation of the law as it stands at present. In our view, the only real controversy is an evidential one: ie, is there evidence on record that, properly considered, ought to result in a *factual finding* that Mahapelo is a person whose circumstances are encapsulated within the expanded category or class of persons to whom a duty of support was owed in terms of the *Paixao* test?

The Facts

[7] It was urged upon us by counsel for Mahapelo that every morsel of evidence is pertinent to the evaluation of the issue. That approach is correct because it is upon a holistic appreciation and not a mechanical checklist approach that the enquiry must proceed. That approach involves nevertheless an assessment whether, in context, any particular aspect of the evidence is neutral, adverse or supportive of the proposition sought to be advanced.

[8] To satisfy the *Paixao* test, evidence is required of a conjugal relationship, and an existing life partnership with characteristics akin to a marriage as regards a reciprocal duty of support; such a relationship requires more than just cohabitation and sharing of household expenses, but rather of evidence of the partners actually supporting and maintaining each other. A tacit agreement of reciprocal support may be inferred from these attributes.

[9] The Court a quo, after considering the principles, concluded that Mahapelo had failed on the onus to establish sufficient evidence to justify the conclusion that Thetyana owed her, personally, a duty of support.

[10] In our view, the critical facts to assess, which could point towards such a duty of support, are as follows:

- 10.1. Both Thetyana and Mahapelo lived in female headed households. He with his mother; she with her grandmother and her siblings. Their fathers were absent and insignificant in their lives. Both families live in Freedom Park, which can be inferred to be a typical township, and the families live in, typical, small township houses. This aspect is a relevant contextual factor within which to assess other occurrences.
- 10.2. She was in High School and about 19 years old when he, then 26 years old, met her. He was then, and at all material times, employed by Chubb Security, in receipt of a steady income.
- 10.3. A conjugal relationship existed between them: they were initially friends which matured into a romantic relationship which existed for about two years. It was a monogamous relationship. The duration, although not a factor to be mechanically measured, was long enough to infer a serious commitment to one another.
- 10.4. Although, Thetyana had not introduced Mahapelo to his mother before she fell pregnant, he did so afterwards, and as things turned out, it was Thetyana's mother who took Mahapelo to hospital for the birth.

- 10.5. At the time of Thetyana's death, Mahapelo and he were cohabiting in his mother's home with their baby. This commenced a week after the birth. She initially went home to her grandmother. During that first week at home, the baby's crying disrupted the home to the extent that Mahapelo's grandmother complained. Upon being told this, Thetyana invited her to come home with him, an arrangement that had his mother's blessing. Their cohabitation was ended after six months, solely by reason his death. The duration, although brief, nevertheless, indicates a willingness to use the opportunity live as a family. For how long that might have endured is uncertain owing to several social factors, and the risk of the personal relationship breaking down.
- 10.6. Express evidence of the extent of financial support is absent, but when directly asked, Mahapelo said that '....he was always there for me. Every time I had problems, he was there for me and he was actually the one who was looking after me and the baby'. Mahapelo, albeit 21 years old at the time, was a schoolgirl, and had no source of personal income. In cross examination, she confirmed that Thetyana supported her and the baby from his earnings. She axiomatically, was never in a position to offer reciprocal financial support.
- 10.7. About three months after the birth of the child, Thetyana expressed a desire to marry her, the expression of desire being to say that he would ask a delegation from his family to open negotiations about lobola with Mahapelo's family. Although this remark cannot be construed as a marriage proposal, and even were it so, it could not be binding, it serves as evidence of a wish to make the connection between them permanent.¹ Thetyana did not apparently tell his mother. The absence of a report to his mother, in my view, is neutral.

¹ On the non-binding nature of a promise to marry, see: *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at [8].

10.8. Thetyana had no other civil or traditional marriage relationship, nor any other romantic partner.

10.9. After Thetyana's death, she continued to live with Thetyana's mother, and her informal acceptance into Thetyana's family circle has persisted for another 6 years, as at the time of the appeal hearing.

10.10. Thetyana was on all accounts an upright honourable, reliable man, conscious of his responsibilities. Although the evidence for such a character reference might be thought to be exaggerated in some respects, this impression is not rebutted and ought to be accepted.

[11] In the court *a quo*, these factors were assessed. Three factors were identified as militating against the satisfaction of the test for a tacit agreement of reciprocal support. First, the co-habitation was a fortuitous outcome owing to the disruption of the Mahapelo household, second, the cohabitation was brief and third, Thetyana failed to tell his mother about his lobola aspirations. Pursuant thereto, the court *a quo* held that it could not be found that the existence of a permanent life partnership could be inferred. In my view, these factors, although pertinent, are neutral, rather than contra-indications of a tacit agreement.

[12] It is critical to assess the significance of social circumstances within the context of South African social realities. Regrettably, very many people are inhibited from prolonged family cohabitation, and some may never experience at all. This stems from economic migrancy, inadequate accommodation for a man and woman to live with their offspring, and low rates of earnings, resulting in the reliance on the family circle, especially elders, to take on child-rearing duties often at great distance from the parents, who are themselves, sometimes separated in different places whilst working to support the family circle. Accordingly, whilst cohabitation *per se*

constitutes supportive evidence of a reciprocal commitment, absence of cohabitation or a brief period of cohabitation, may not afford any inference of the opposite, without other evidence.

[13] Because it may be reliably inferred, although no express evidence was adduced, that the homes in which the two families live are small, a baby in a space shared with a grandmother and siblings seems, indeed, a recipe for disruption. The appropriateness of diminishing the disruption is self-evident. The record is lean about the extent of what passed as the grandmother's 'complaint', thus, it cannot be implied that Mahapelo was placed under duress to leave. As regards Thetyana's home, the conclusion must be resisted to infer from the evidence which mentions only he and his mother living there, that they were the only inhabitants, because on the probabilities, it would be seldom that a township home would have so few inhabitants. But it can be inferred that the baby's disruptive presence would either be easier to tolerate or be more comfortably accommodated than at grandmother's house. The swiftness of the transfer suggests a welcoming tenor, rather than a reluctant acceptance of a new member of the household. In other words, it was at least as much pull as push. It seems to me that the move was not a mere pragmatic arrangement but a boon to the couple. Although of short duration, there is nothing to suggest a temporary character to her sojourn in his home.

[14] Owing to an absence of evidence about the protocols to be observed about the commencement of lobola negotiations, it cannot safely be supposed that it was within the bounds of propriety for Thetyana to raise the subject with his mother, at least initially, or at this early stage, or that a report of his intentions was overdue. There is no evidence on record regarding the process that should occur, or even which customary tradition would prevail. The assumption that lobola customs are uniform among all the bantu-speaking peoples of South Africa is unfounded. Moreover, it is appropriate to take judicial notice of the fact that it is commonplace for couples to conclude a formal marriage, after the conclusion of lobola negotiations, many years after their relationship has commenced, and long after children have

been born. The failure to initiate lobola negotiations during this period cannot give rise to any inferences that point towards the remark not being seriously made.

[15] In my view, the case for a committed relationship, contemplated by both of them, as long term and indefinite, is stronger than was thought to be the case by the court *a quo*. The example of *Paixao* is indeed stronger. In that matter, Mrs Paixao and Mr Gomes' relationship of cohabitation was longer. Both supported one another through retrenchment or illness. There was an express undertaking by Gomes to marry Paixao once he had secured a divorce from his wife. Gomes had treated Paixao's children as his own. In that case too, the actual cohabitation began after a relationship had existed for a while, and was precipitated by the fortuitous event of his illness and Paixao taking him to her home to nurse him back to health.

[16] It can be no bar to success that, in a given instance, there is less evidence than that supplied in *Paxiao*. In my view, the conduct of Mahapelo and Thetyana was indeed such that they behaved towards one another in a manner akin to spouses, they contemplate a life as married partners, and Thetyana supported her financially and personally. She had no means of reciprocal financial support, and at that stage of her motherhood, could not have been expected to do so. Her support, in its broadest sense, would, in my view, include her acceptance of his family home and integration into his family.

[17] The anxiety that such a finding may open floodgates of litigation is no reason to find otherwise. Each case turns on its own facts and the proper way to deal with all litigation is to proper interrogation of the assertions of an adversary and diligent investigation in preparation for a trial.

[18] Accordingly, the appeal must succeed. The parties are in agreement about the quantum of the claim and the terms of such order if that be the result. Costs should follow the result.

The order

[19]

19.1. The appeal is upheld.

19.2. The order of the court a quo is set aside and substituted as follows:

19.2.1. The defendant shall pay to the Appellant the amount of R684,109.00 together with interest on such amount at the applicable mora rate from 14 days of the date of the judgment of the court a quo to date of final payment.

19.3. The respondent shall pay the costs of the action in the court *a quo* and of the appeal.

Sutherland J (with whom Van Oosten and Makume JJ concur)

Van Oosten J

Makume J

Hearing: 26 July 2016

Judgment delivered: 4 August 2016

For Appellant:

Adv D. Goodenough,

Instructed by Van der Elst Inc

For Respondent:

Adv M. Makeleni,

Instructed by Nozuko Nxusani.