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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE N0181714/14

In the matter between:

BONGIWE MSUTU

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

KUBUSHI,J

INTRODUCTION

[1] Section 17 (1) of the Road Accident Fund Act 56 of 1996 ("the Act") enjoins the Road Accident Fund ("the Fund") to compensate any person for any loss or damage suffered as a result of any bodily injury or death caused by or arising from the negligent driving of a motor vehicle.

[2] Bongiwe Msutu, the plaintiff in this matter, is claiming damages against the Fund for loss of support for herself and her two minor children. The claim is pursuant to a motor vehicle collision in which her alleged husband and father to her two children, Rola Kholekile ("the deceased") perished.

[3] A claim for maintenance and loss of support suffered as a result of a breadwinner's death

is recognised at common law as a 'dependants' action'. The object of the remedy is to place the dependants of the deceased in the same position, as regards maintenance, as they would have been had the deceased not been killed. The remedy has been described as 'anomalous, peculiar and *sui generis*' because the dependants derive their right not through the deceased's estate but from the fact that the dependants suffered loss by the death of the deceased for which the Fund is liable. But, only a dependant to whom the deceased, whilst alive, owed a legally enforceable duty to maintain and support may sue in such action. Put differently, the dependant must have a right, which is worthy of the law's protection, to claim support. If a dependant institutes a claim under the Act, as is the case in this instance, she or he would be entitled to compensation from the Fund for her or his proven loss if she or he establishes this right.^[1]

[4] The Fund has conceded liability in full and is prepared to compensate Ms Msutu for any damages suffered on condition that Ms Msutu establishes her right and the children's right to be compensated by the Fund.

[5] It is not in dispute that the deceased and Ms Msutu have two minor children, twins. The Fund has as such conceded to the payment of damages in the amount of R515 085-96 in respect of the two children. What, however, the Fund puts in dispute is the marriage between the deceased and Ms Msutu, whether customary or otherwise.

[6] Ms Msutu, in her particulars of claim, is relying on the existence of a customary law marriage entered into between her and the deceased to establish the right to claim for maintenance and/or loss of support for herself.

[7] The burden of proof falls on Ms Msutu to prove the existence of the marriage on a balance of probabilities.

[8] Ms Msutu led evidence to prove the existence of the customary marriage between herself and the deceased. The Fund closed its case without tendering any evidence.

FACTUAL BACKGROUND

[9] The facts of the matter can be gleaned from the uncontested *viva voce* evidence of Ms Msutu.

[10] The evidence of the plaintiff as tendered by Ms Msutu is that she was married to the deceased by customary marriage. The marriage was concluded on 26 November 2006 when the deceased paid an amount of R15 000 for *lobolo* and handed over a bottle of brandy to Ms Msutu's family. The negotiations were conducted at her mother's place. The deceased also paid an amount of R4 000 as damages because at the time the deceased came to pay *lobolo*, Ms Msutu was pregnant with twins. These are the children for which Ms Msutu is claiming for loss of support.

[11] The *lobolo* negotiations were carried out by her family and the deceased's family. The deceased's family was represented by the deceased's friend and a cousin. Ms Msutu's family was represented by her mother and two of Ms Msutu's uncles. After the *lobolo* was paid there was a celebration.

[12] Ms Msutu stayed with the deceased in Soweto which is a municipality controlled area. At the time of the deceased's death they had been staying together for six years. They did not have a house of their own but rented out rooms.

[13] At the time Ms Msutu met the deceased, the deceased already had a customary law wife. According to Ms Msutu the deceased introduced her to his first wife when she fell pregnant and the first wife consented to the deceased marrying her (Ms Msutu). The deceased's first wife stayed in the Eastern Cape Province (the Eastern Cape) and also had two children with

the deceased. The deceased visited his first wife during holidays and would sometimes stay there for a week or two. The first wife would also sometimes visit them in Soweto. Ms Msutu and the deceased's first wife were friends. The deceased's first wife would always call Ms Msutu whenever she wanted to come and visit in Soweto. The first wife took care of the twins when they visited in the Eastern Cape.

[14] The relationship between Ms Msutu and the deceased's first wife changed after the death of the deceased. The deceased was buried in the Eastern Cape. The two wives arranged the funeral together. The first wife even gave Ms Msutu fare money when she returned from the Eastern Cape to Soweto, after the deceased's burial. They were both later called to the deceased work place where the issue of the deceased's pension benefits was discussed. When Ms Msutu arrived there, the first wife denied knowing her and refused to speak to her. She does not know why she was like that.

[15] According to Ms Msutu, all the deceased's family know her. She went to visit the family immediately after the payment of *lobolo*. She met the deceased father. One of the deceased's sisters was staying with her and the deceased.

[16] The deceased supported Ms Msutu and their children during his lifetime. He gave Ms Msutu R2 000 every month. She used the money to pay for household necessities. She paid for the children's school fees, transport and bought groceries for the household. Ms Msutu was not employed then and is still not employed. The deceased took care of her and provided for her. In return she took care of the children, the deceased and the household.

[17] The deceased also supported his first wife and her children. He gave an amount of R2500 every month to Ms Msutu to send to the first wife. When asked under cross examination, Ms Msutu stated that she does not know why the deceased's family or the first wife did not attend the *lobolo* negotiations.

[18] During cross examination she referred to a letter which was from the Khiwa Royal Family. The letter did not mention that she was married to the deceased but only that she has children with the deceased. The Fund's counsel asked her to produce the statement that was written during the negotiations that would show that the deceased paid an amount of R15 000 for *lobolo*. The statement which was discovered by Ms Msutu reflected an amount of R4 000 being for damages. The plaintiff could not explain why only R4 000 is mentioned. Although Ms Msutu was cross examined on the statement of R4 000, the statement together with the letter from the Royal Family, even though discovered, were not properly introduced into evidence and do not as such form part of the evidence before me. I shall as a result disregard any evidence adduced in respect thereof for purposes of this judgment.

ANALYSIS OF EVIDENCE

Life Partnership

[19] In his closing argument, Ms Msutu's counsel argued that Ms Msutu by her evidence has established on a balance of probabilities that she was married to the deceased by customary law. He contends further that even if the marriage was not properly consummated as the Fund's counsel is suggesting, I must find that because Ms Msutu and the deceased lived with each other and cared for each other, a tacit reciprocal duty of support had been created between them - which means that they were life partners. In this regard counsel referred me to the Supreme Court of Appeal judgment in *Paixao v Road Accident Fund* (640/2011) [2012] ZASCA 130 (26 September 2012).

[20] I must at this stage pause to indicate that I am not in agreement with the submission by Ms Msutu's counsel that I should, if I am not at one with the customary marriage entered into between Ms Msutu and the deceased, find in favour of Ms Msutu on the basis that there was a tacit reciprocal duty of support between her and the deceased because they were life

partners.

[21] I say so because, firstly, this is not Ms Msutu's case as set out in her particulars of claim. In the particulars of claim, Ms Msutu's claim for loss of support is premised on the existence of a customary marriage entered into between her and the deceased. It is trite that litigants are bound by the rules of court, specifically in regards to what should be averred and canvassed in pleadings. A party is, thus, bound by what is addressed in the pleadings. Conversely, a defendant is entitled to be informed of what the plaintiff's case is. It cannot be expected of a defendant to deal in a plea or in evidence with unsubstantiated averments without specific facts on which they are based being stated. This amounts to trial by ambush! Even though in her evidence in chief Ms Msutu gave evidence which tended to indicate such a relationship, that is, that the deceased and her were life partners, it was however, not her case and in my view that part of the evidence should be disregarded for purposes of determining this matter.

[22] Secondly, the facts in the Paixao-judgment do not support the submission by Ms Msutu's counsel that Ms Msutu and the deceased were life partners and as such the deceased owed Ms Msutu a reciprocal duty to maintain her. The *Paixao* judgment is different from the current matter because in that judgment the appellant had pertinently claimed on the basis of an express or tacit agreement between the appellant and the deceased which created a binding obligation upon the deceased to maintain and support the appellant and her children; and the nature of the relationship which was akin to a family and as such deserving of the law's protection. The Fund was found to be liable in that judgment because the court concluded that the deceased undertook a duty to maintain and support the appellant and her children out of profound, deep and loving sense of duty.

[23] What remains to be determined is whether at the time of the demise of the deceased, a

customary marriage existed between Ms Msutu and the deceased.

Customary Marriage

[24] The contention by the Fund's counsel during closing argument is that the marriage between Ms Msutu and the deceased was not valid because the formalities of a valid customary marriage were not followed. According to the Fund's counsel, the requirements of a valid customary marriage were not complied with in the following manner:

24.1 The first wife of the deceased did not give her consent that the deceased and Ms Msutu should marry;

24.2 The negotiations were not carried out properly since the deceased's family and his first wife were not part of the negotiations;

24.3 There is no proof that the *lobolo* was paid.

24.4 Ms Msutu could not indicate how the two families (Ms Msutu and the deceased's families) celebrated the marriage.

24.5 There was no handing over ceremony.

[25] It will be recalled that the Fund did not lead any evidence. The contention by the Fund's counsel was also not raised as a defence in the Fund's plea. The defence was raised with Ms Msutu's counsel shortly before the commencement of the trial and was raised specifically during the cross examination of Ms Msutu. As a result, the Fund's counsel is arguing on the basis of Ms Msutu's evidence in chief and on the evidence tendered during his cross examination of Ms Msutu. Without any real evidence tendered by the Fund, which can be subjected to testing through cross examination, I have to determine this matter on the unchallenged *ipse dixit* of Ms Msutu. The question being whether on a balance of probabilities Ms Msutu's oral evidence proves the existence of the customary marriage between her and

the deceased.

The Law

[26] A customary marriage is defined in the Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act") as a marriage concluded in accordance with customary law.

'Customary law' is described in the Recognition Act as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

[27] All customary marriages contracted after the Recognition Act came into force, in order to be recognized as valid, must comply with the provisions of the Recognition Act. And, any customary marriage contracted after the Recognition Act came into operation, which does not comply with the requirements imposed by it, shall not be recognized.

[28] The jurisdictional requirements for a valid customary marriage are stipulated in s 3 (1) of the Recognition Act, which provides as follows:

"(1) For a customary marriage entered into after the commencement of this Act to be valid -

(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."

[29] It has been held that the Recognition Act does not purport to be - and should not be seen

as - directly dealing with all the necessary aspects of customary marriages. Certain rules and requirements are left out in the Recognition Act and are to be determined by customary law such as the validity requirements referred to in s 3 (1) (b) thereof. This ensures that customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of the changing circumstances and the overarching values of the Constitution.[\[2\]](#)

[30] Section 3 (1) (b) of the Recognition Act prescribes that the marriage must be negotiated, entered into or celebrated in accordance with customary law. Therefore, in terms of s 3 (1) (b) of the Recognition Act a valid customary marriage is the one that is negotiated and entered into or celebrated according to any of the systems of indigenous African customs and usages that exist in South Africa.

[31] 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 depends 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.

[32] It is, however, common cause that the basic formalities relating to a customary marriage, like the meeting of the two families (the man's and woman's families) where *lobolo* is negotiated; the payment of the negotiated *lobolo* or part thereof to the woman's family and the agreement by the two families on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration, has become trite and find application in most of the practices.[\[3\]](#)

Application of the Law to Facts

Consent

[34] Section 3 (1) (a) of the Recognition Act even though contained in the section dealing with the validity requirements, does not directly prescribe that the first wife's consent is a requirement for the validity of her husband's subsequent customary marriages.^[4] It means, therefore, that a court faced with such a situation would have to look for answers in the customary practices of the tribe concerned.

[35] The Constitutional Court, in the *Mayelane v Ngwenyama-judgment* above, found that given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to the union without obtaining the consent of the other partner. It concluded, therefore, that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of s 3 (1) (b) of the Recognition Act. The court as a result ordered that from the time of the judgment, every further customary marriages irrespective of the practices of a particular tribe, must comply with that consent requirement. The court held further that a subsequent marriage will be invalid if consent from the first wife is not obtained.^[5]

[36] Since the customary marriage in this instance was entered in 2006, the order applies and for the customary marriage to be valid the deceased's first wife must have given her consent to the subsequent marriage of her husband and Ms Msutu. The underlying issue, in the current case, therefore, is whether such required consent was obtained before the deceased and Ms Msutu entered into the alleged customary marriage.

[37] The uncontested evidence before me is that the consent of the deceased's first wife was procured before the customary marriage in question was concluded. According to the

evidence, Ms Msutu was aware at all material times that the deceased had a first wife. And, when Ms Msutu became pregnant, that is, before the conclusion of the customary marriage, the deceased informed his first wife about Ms Msutu and informed her of his intention to marry Ms Msutu. The first wife gave her consent that the deceased should marry Ms Msutu.

[38] The Fund's counsel in closing argument suggested that it is doubtful that the required consent was granted because of the attitude the deceased's first wife displayed towards Ms Msutu when the two were called by the deceased's employer. There is no evidence before me which indicates why the deceased first wife acted in the manner she did. Ms Msutu, whose evidence it is which revealed this attitude of the deceased's first wife could not say why the deceased's first wife acted in that manner. The suggestion by the Fund's counsel can therefore not be admissible as it is based on speculations.

Negotiations

[39] It is indeed so that in the true African context, marriage is not a bond between the man and the woman but it is a bond between their families. Negotiations must therefore be between the two families. Ms Msutu's evidence is that the two families, that is, emissaries from the deceased's family and members of her family met to negotiate the marriage. The contention by the Fund's counsel is that the emissaries did not include the deceased's family members, in particular, the deceased's aunts and uncles and/or the deceased's first wife. This contention is fallacious to say the least. It is normal practice for the man's family to send as emissaries people who are not members of the family. In this instance, taking into account the distance between the Eastern Cape and Soweto, it is acceptable that the deceased's family would have sent emissaries which would not have included close relatives of the deceased. In any way, one of the emissaries was the deceased's cousin.

[40] It is also not repugnant to the customary law of marriage for Ms Msutu's mother to have

negotiated and received *lobolo* for her daughter's marriage.[\[6\]](#)

Lobolo

[41] Although the handing of *lobolo* is in terms of the Recognition Act not specifically listed as a requirement for the coming into existence of a customary marriage it is still one of the practices that is intrinsically linked with its existence. It is one of the important pillars in the process leading to the marriage. The payment or handing over of *lobolo* to the bride's family forms part of the evidentiary material to prove the conclusion of a customary marriage. However, the payment or handing over of *lobolo* is not conclusive proof of the existence of a customary marriage.[\[7\]](#)

[42] The argument by the Fund's counsel is that Ms Msutu was unable to prove that *Jobolo* was paid in that she could not produce documentary proof to that effect. Counsel cross examined Ms Msutu on the basis of a document which showed an amount of R4 000 contrary to the amount of R15 000 which is the amount which Ms Msutu alleges was paid as *lobolo*. According to Ms Msutu the amount of R4 000 was for payment of damages. I have already concluded that this document even though discovered, it was, however, not admitted into evidence as to the truth of its content and for this reason does not constitute admissible evidence as to the facts contained in it. Ms Msutu would be clearly prejudiced should this document be elevated beyond its limited status. I have as such not considered it as admissible for purposes of this judgment.

[43] It remains, therefore, that the *ipsi dixit* evidence of Ms Msutu that an amount of R15 000 was paid as *Jobo/o* for her should prevail mainly because there is no other evidence to jettison this evidence.

Celebrations and Handing Over

[44] One of the crucial elements of a customary marriage is the handing over of the bride to the family of her new family namely that of the groom. In terms of practised or living customary law the bride cannot hand herself over to the groom's family. She has to be accompanied by relatives. That such delivery need not necessarily be *de manu in manum* appears from the judgment in *Road Accident Fund v Mongalo; Nkabinde v RAF 2003 (3) SA 119 (SCA)*. It is trite that where a woman is living with the man with the knowledge of the family of the bride it is regarded as having been handed over.

[45] The court in the *Mayelane-judgment* above stated that certain rules and requirements are left out in the Recognition Act, so that, customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of the changing circumstances and the overarching values of the Constitution.[\[8\]](#)

[46] As is the case in this instance, it has become customary for couples to live together before marriage. It is not in dispute that the deceased and Ms Msutu were staying together from 2006 until the death of the deceased. It is also not in dispute that immediately after the alleged payment of *lobolo* the two continued to live together with the full knowledge of both the deceased's family and Ms Msutu's family. According to Ms Msutu's evidence after celebrating the *lobolo* payment she left together with the deceased returning to their common home. This, in my view, is the living law referred to in the *Mayelane-judgment* which should be applied by the courts.[\[9\]](#)

CONCLUSION

[47] The evidence before me does establish the existence of a customary marriage between Ms Msutu and the deceased. There is evidence that the deceased's family knew Ms Msutu. Ms Msutu say she was friends with and in constant contact with the deceased's first wife prior to the deceased's burial. She visited the deceased's family in the Eastern Cape where she

met with the deceased's father. The deceased's other sister stayed with Ms Msutu and the deceased in Soweto. The deceased's cousin was one of the people sent to negotiate with Ms Msuto's family.

[48] Ms Msuto came across as a satisfactory and reliable witness and her evidence, in the absence of any other evidence to gainsay it, should be accepted.

[49] I have therefore to conclude that Ms Msutu has succeeded on a balance of probabilities to prove that a customary marriage existed between her and the deceased and as such established her right to be compensated for her loss of support.

[50] Although Ms Msutu had in her papers claimed an amount of R711 501 as damages for her loss of support, the parties were agreed that the amount of compensation she should be awarded must equal that awarded the deceased's first wife, which is R848 060-74.

ORDER

[51] I accordingly, make the following order:

1. The defendant is held fully liable to the plaintiff.
2. The defendant is ordered to pay to the plaintiff the amount of R1 363 146-70 (One Million Three Hundred and Sixty Three Thousand One Hundred and Forty Six Rand Seventy Cent).
3. The defendant shall pay the plaintiff; agreed or taxed costs between party and party on the High Court scale on the appropriate tariff, which costs shall include the costs of the actuary for the actuarial calculations and revised calculations, if any.
4. Such agreed or taxed costs shall become payable 14 court days after such agreement or taxation.

5. The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record.

6. The payment referred to in paragraphs 2 and 3 above shall be made into the plaintiff's attorneys' trust banking account, the details of which are as follows:

ACCOUNT HOLDER : LUNDELL & HASSAN-LUNDELL (TRUST
ACCOUNT)

ACCOUNT NUMBER [.....]

BANK : ABSA

BRANCH : VON WEILLIGH STREET

BRANCH CODE : 51 47 05

ACCOUNT TYPE : CURRENT

EM KUBUSHI

JUDGE OP THE HIGH COURT

APPEARANCES

HEARD ON :10 JUNE 2011

JUDGMENT ON : 10 JULY 2011

PLAINTIFF' S COUNSEL : C DE AGRILLA

PLAINTIFF' S ATTORNEY :LUNDELL A HASSAN-LUNDELL

DEPENDANT' S COUNSEL : M L MAGAU

DEFENDANT' S AnORNEY : T M CHAUKI INCORPORATED

[\[1\]](#) See Kewana v SANTAM Insurance Co Ltd 1993 (4) SA 771 (TkAD) and Paixao v Road Accident Fund (640/2011) [2012] ZASCA 130 (26 September 2012) para 130.

[2] See *Mayelane v Ngwenyama & Others* 2013 (4) SA 415 (CC) para 32.

[3] See *Fanti V Boto and Others* 2008 (5) SA 405 (C).

[4] See *Meyelane v Ngwenyama & Others* above para 36.

[5] See *Meyelane v Ngwenyama & Others* above para 85 and 86.

[6] See *Mabena v Letsoalo* 1998 (2) SA 1068 at 1074 F-G.

[7] See *Motsoatsoa v Roro and Others* [2011] 2 ALL SA 324 (GSJ) para 18.

[8] See *Mayelane v Ngwenyama & Others* 2013 (8) BCLR 918 (CC) para 32.

[9] See also *Mabena v Letsoalo* above at 1074 H-J.