



IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO. 3149/2019

In the matter between:

**SISANDA BUJE**

**Plaintiff**

and

**ROAD ACCIDENT FUND**

**Defendant**

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### **JUDGMENT**

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**Bloem J.**

1. This is a claim for compensation against the Road Accident Fund (the Fund) for loss of support allegedly sustained as a result of the death of Tsepang Moleko (Mr Moleko or the deceased) in a motor vehicle collision. The plaintiff contended that she and Mr Moleko had been life partners. She accordingly sued in her personal capacity and her representative capacity, on behalf of her child who had, on 30 May 2010, been born of her relationship with Mr Moleko.
2. It is common cause that Mr Moleko was killed in a collision on 30 July 2016, on the N2 freeway, just outside Port Elizabeth, and that his death was caused by the negligent driving of the driver of the insured vehicle. The Fund admitted that the plaintiff has *locus standi* to claim damages from it in her representative capacity on behalf of her minor child, but disputed her claim in her personal capacity. By agreement between the parties, it was ordered, at the commencement of the trial, that the following issue be separated for determination from the remaining issues:

*“Whether, prior to the death of Mr Moleko (the deceased), the plaintiff and the deceased were permanent life-partners, in terms of which relationship the deceased had undertaken to maintain the plaintiff and*

*had in fact maintained her, and accordingly was under a legal duty to provide the plaintiff with maintenance and support, which would have continued in the future had the deceased not died in the collision herein”.*

3. The plaintiff testified that she met Mr Moleko during 2007 when they lived in Port Elizabeth. She had completed a security training course during 2007. However, she was unable to secure employment in Port Elizabeth and went to Cape Town at the end of January 2008 in search of employment. Mr Moleko followed her during February of that year. For the rest of that year the two of them lived together at her friend's house. At the end of 2008 Mr Moleko secured permanent employment at Alpha Pharm East Cape (Pty) Ltd and, during the following year, he purchased a dwelling, which was referred to in the evidence as a shack, and paid rental of R250.00 per month for the site on which the shack was located. They left her friend's house to live in the shack where she gave birth to Mr Moleko's son during May 2010.
4. During 2014 Mr Moleko's mother fell ill. Consequently, the plaintiff testified that he resigned from his employment and returned to Port Elizabeth. Shortly thereafter, during that same year, he was re-employed by the same employer, but in Port Elizabeth. It later emerged that her evidence in this regard was wrong insofar as it had been suggested that he resigned. The true state of affairs was that he had secured a transfer from Cape Town to Port Elizabeth at Alpha Pharm East Cape (Pty) Ltd. While he lived in Port Elizabeth he had sent R1 000.00 per month to her for rental, food and clothing. During November 2014 she secured employment as a security guard. Since then he only sent money to her when she made a request therefor. Shortly before he died Mr Moleko had resigned from his employment.
5. The plaintiff testified further that Mr Moleko had resigned because it had been his intention to return to Cape Town to live with her but, before he could do so, he first had to sign for receipt of his last Unemployment Insurance Fund benefits on 9 September 2016. He had told her that he would marry her during December 2016. She attended Mr Moleko's funeral on 13 August 2016. The plaintiff did not call other witnesses.

6. On behalf of the Fund Siphokazi Brown (Ms Brown) testified that she had met Mr Moleko during or about July 2014 at Greenbushes, Port Elizabeth and they had commenced a love affair. She used to go to the house which he shared with his family and stayed over, sometimes for a week. She knew his parents and sisters. Her parents also knew Mr Moleko. Her father was strict, but knew about her relationship with Mr Moleko, who did not enter their home.
7. Mr Moleko had told her that he was the father of a child in Queenstown, and another one in Port Elizabeth, and that he had terminated his relationship with the children's respective mothers. He told her that, while working in Cape Town, he had lived with the plaintiff, the mother of the boy who was then living with him in Port Elizabeth. He had resigned from his employment because, so he told her, he was going to work for the Nelson Mandela Bay Municipality. On receipt of the benefits due to him as a result of his resignation, she had accompanied him when he purchased items, for example kitchen furniture which were delivered at the house which he shared with his family. He had told her that he wanted to leave the home of his family to live with her.
8. When Mr Moleko's stepfather, the biological father of his sisters, died during January 2016, the family did not have sufficient money to bury him. Mr Moleko had asked her to assist, and she obliged. She was involved in the same collision which claimed Mr Moleko's life.
9. Lerato Rakaibe (Ms Rakaibe) is Mr Moleko's half-sister. She testified that Mr Moleko had requested his employer to be transferred to Port Elizabeth when their mother fell ill. He returned during February 2014, after his request had been granted. Two weeks thereafter the plaintiff brought their child to Port Elizabeth. She arrived on a Friday and left Port Elizabeth on the following Monday. While in Port Elizabeth, the plaintiff shared a bedroom with her and her sister.
10. She testified that, before the plaintiff had met Mr Moleko, he had been in a relationship with a woman who had given birth to his child during 2006. That child resides in Queenstown. After Mr Moleko's return to Port Elizabeth during 2014, he had started a love relationship with Ms Brown. Ms Rakaibe testified that the relationship between the plaintiff and Mr Moleko was over when she returned their child to him in February 2014. Mr Moleko, to whom she was close, had told her that

his relationship with the plaintiff was over. When it was put to her that they had had plans to marry, she said that she was unaware of those plans.

11. Insofar as it relates to this matter, section 17(1) of the Road Accident Fund Act<sup>1</sup> provides that the Fund shall compensate any person (the claimant) for any loss or damage that he or she has suffered as a result of the death of another person, caused by or arising from the driving of a motor vehicle by any person (the insured driver) if the death was due to the negligence or other wrongful act of the insured driver.
12. The plaintiff has instituted a dependant's claim against the Fund. That is a claim for damages for loss of support, instituted by the dependants of a breadwinner whose death was caused by the wrongful and culpable conduct of the wrongdoer. The remedy is available only to dependants to whom the deceased, while still alive, had owed a legally enforceable duty to maintain and support. The nature of the remedy was described as follows in *Evins v Shield Insurance Co Ltd*:<sup>2</sup>

*"An essential and unusual feature of the remedy is that, while the defendant incurs liability because he has acted wrongfully and negligently (or with dolus) towards the deceased and thereby caused the death of the deceased, the claimant (the dependant) derives his right of action not through the deceased or from his estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefor. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner."*

13. It appears that the remedy was initially only available to certain relatives of a deceased who were dependent on him or her for their support at the time of his or her death. The spouse, children and parents of the deceased fell into that category, provided that the deceased, while alive, owed them a legal duty of support. That remedy has subsequently been extended to, for instance, a divorced woman;<sup>3</sup> a

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<sup>1</sup> Road Accident Fund Act, 1996 (Act 56 of 1996).

<sup>2</sup> *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (AD) at 837H-838A.

<sup>3</sup> *Santam Bpk v Henry* 1999 (3) SA 421 (SCA).

partner in a same-sex life relationship;<sup>4</sup> a partner in a heterosexual relationship;<sup>5</sup> and the deceased's aunt.<sup>6</sup>

14. In terms of the common law a relationship between husband and wife, child and parent and grandchild and grandparent gives rise to a duty of support.<sup>7</sup> This court is required to determine whether a girlfriend, who does not fall within the categories of relationships recognised by the common law, was owed a duty of support by a deceased alleged boyfriend. Whether Mr Moleko owed the plaintiff a duty of support is determined by the *boni mores* of society, the norms and values contained in the Constitution. In this regard Cachalia JA had the following to say in *Paixão*:<sup>8</sup>

*“The existence of a dependant’s right to claim support which is worthy of the law’s protection, and the breadwinner’s correlative duty of support, is determined by the boni mores criterion or, as Rumpff CJ in another context put it in Minister van Polisie v Ewels, the legal convictions of the community. This is essentially a judicial determination that a court must make after considering the interplay of several factors: ‘the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas of where the loss should fall’. In this regard considerations of ‘equity and decency’ have always been important. Underpinning all of this are constitutional norms and values. So the court is required to make a policy decision based on the recognition that social changes must be accompanied by legal norms to encourage social responsibility. By making the boni mores the decisive factor in this determination, the dependants’ action has had the flexibility to adapt to social changes and to modern conditions.” (authorities omitted)*

15. The hand of history shows that our common law has not recognised that a relationship between boyfriend and girlfriend gives rise to a reciprocal duty to support by the one to the other. Recently, our law has recognised and protected

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<sup>4</sup> *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC).

<sup>5</sup> *Paixão and another v Road Accident Fund* 2012 (6) SA 377 (SCA) and *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP).

<sup>6</sup> *Road Accident Fund v Mohohlo* 2018 (2) SA 65 (SCA).

<sup>7</sup> n 6 at par 5.

<sup>8</sup> n 5 at par 13.

the right to claim loss of support of persons who are not married. To enjoy that protection of the law, the nature of the relationship must be akin to a marriage relationship.

16. The plaintiff's case was that there had been a tacit agreement between Mr Moleko and her in terms whereof he would support her and that that agreement had created a binding obligation upon him to support her. She also contended that the nature of their relationship had been akin to a marriage relationship and accordingly deserves the protection of the law. Mr Mthembu, counsel for the defendant, submitted that the plaintiff has failed to demonstrate that Mr Moleko had agreed to support her or that their relationship had been akin to a marriage.
17. In order to succeed in her claim against the Fund, the plaintiff was required to show on a balance of probabilities that before his death, Mr Moleko, as breadwinner, had owed her a legal duty of support; that the negligence of the insured driver had caused his death; that she has suffered, and will continue to suffer harm or loss as a consequence of Mr Moleko's death; and that the Fund is in law liable to compensate her for the loss or harm that she has suffered and will suffer. As pointed out above, the Fund admitted that the negligent driving of the insured driver caused Mr Moleko's death.
18. It must be determined firstly, whether, during his lifetime, Mr Moleko had been under a legally enforceable duty to support the plaintiff; and secondly, whether the nature of their relationship had been akin to a marriage relationship, deserving protection of the law.
19. The undisputed facts are that they had been in a love relationship since 2007. They had been living together in Cape Town since February 2008. Their son was born during May 2010. Since the end of 2008 when Mr Moleko secured employment, he had bought food and clothing, initially only for the two of them, but also for their son after his birth, and he had paid rental in respect of the site on which the shack was located. The plaintiff had been unemployed when Mr Moleko returned to Port Elizabeth during February 2014. Thereafter he had sent the sum of R1 000.00 per month to the plaintiff to support her. Their son had lived with Mr Moleko in Port Elizabeth at the time. The plaintiff testified that, since November 2014, when

she had secured employment, Mr Moleko sent money to her only upon request from her.

20. It was undisputed that, during February 2014, two weeks after Mr Moleko's return to Port Elizabeth, the plaintiff visited him to return their child to him. She visited again during September or October 2015 to collect their son. There was a dispute as to whether the plaintiff again visited towards the end of 2015 and the duration of those visits. The plaintiff's contention that Mr Moleko and his son had visited her during 2014, and again during or around April 2016, was in dispute. Ms Brown and Ms Rakaibe said that they had no knowledge of Mr Moleko's alleged visits to Cape Town during 2014 and 2016. They both testified about trips that Mr Moleko had undertaken to Queenstown to attend to "land claims business". He used to leave on a Saturday morning and return the following day. They could recall a trip to Queenstown during or about April 2016, because on his return from Queenstown he had been in an accident near Grahamstown. They also testified that they would have known about it if Mr Moleko had undertaken trips to Cape Town.
21. In my view, the probabilities do not support a finding that Mr Moleko visited the plaintiff in Cape Town during 2014 and 2016. Had he done so, Ms Rakaibe would have known about the 2014 trip and she and Ms Brown would have known about the 2016 trip. During 2016 he shared a home with Ms Rakaibe and had a love relationship with Ms Brown. He was accordingly in their company on a regular basis. It was unnecessary for Mr Moleko to have told them of a trip to the plaintiff. The parties agreed that Port Elizabeth is about 700 km from Cape Town which means that it takes at least eight hours to travel from the one city to the other, more if public transport is used. They would have known about Mr Moleko's extended absence from Port Elizabeth if he had visited the plaintiff in Cape Town. In my view, their version is more probable than the plaintiff's. Accordingly, the only visits that require attention are the plaintiff's visits to Port Elizabeth during 2014 and 2015.
22. Ms Rakaibe said that the plaintiff visited Port Elizabeth during 2014. Her evidence was that the purpose of that visit, which, as explained above, occurred two weeks after Mr Moleko's return to Port Elizabeth, was to bring their child to Mr Moleko. She said that the plaintiff had shared a bedroom with them while Mr Moleko had shared the other bedroom with his son. The plaintiff initially testified that Mr Moleko left Cape Town with their son when he returned to Port Elizabeth. It was only when

she was re-examined that she acknowledged that she was the one who had brought their son to Port Elizabeth during 2014.

23. The parties were agreed that the plaintiff had visited Port Elizabeth during September/October 2015 to fetch their child and to return with him to Cape Town. The plaintiff said that she had made another visit to Port Elizabeth towards the end of 2015, which visit was for three weeks. Throughout this time, she said, the two of them had shared a bedroom. It was common cause that Ms Brown had been in a relationship with him at this stage. When it was put to her that the plaintiff had been in Port Elizabeth for three weeks, she denied that. She testified, that she thought that the plaintiff had been in Port Elizabeth for a week. Ms Rakaibe was emphatic in her denial that the plaintiff had resided at her home for three weeks. Her evidence was that she had stayed with them for about one weekend when she fetched their child.
24. The probabilities favour a finding that the plaintiff had visited Port Elizabeth in 2014 and 2015 and that she had resided in the house with Mr Moleko and his family. The visit in 2014 was for no longer than a weekend while there was only one visit in 2015 around September/October, which was probably for a weekend, certainly not for more than a week. In 2015 Mr Moleko was involved in a love affair with Ms Brown who testified that she had no difficulty not visiting Mr Moleko's home while the plaintiff was there because the plaintiff was after all the mother of his son. Mr Moleko had advised her that the plaintiff had nowhere to reside while in Port Elizabeth. If the plaintiff had visited for three weeks, it would have meant that Ms Brown stayed away from Mr Moleko's home for about three weeks. That was not her or Ms Rakaibe's evidence. The plaintiff had reason to exaggerate her visit to three weeks, namely to create the impression that she spent an extended period with Mr Moleko. Ms Brown, on the other hand, had nothing to gain or lose by testifying that the plaintiff resided at his home for a much shorter period. In the result, it is found that, since Mr Moleko left Cape Town during February 2014, he and the plaintiff spent only one weekend in 2014 together, and not more than a week during September/October 2015.
25. In the light of that finding, can it be concluded that the relationship between the plaintiff and Mr Moleko was akin to a marriage? Mr Paterson, counsel for the plaintiff, submitted that the plaintiff has established that her relationship with

Mr Moleko was akin to a marriage relationship, especially if regard is had to what counsel termed “*the acceptance and agreement of the deceased to maintain and support the plaintiff pending the intended and planned marriage between them*”. The submission is based on the plaintiff’s evidence firstly, that Mr Moleko undertook to marry her in December 2016; and secondly, that he had agreed to support her. I will deal with the alleged agreement to support first.

26. The undisputed evidence was that, since the commencement of Mr Moleko’s employment at the end of 2008 until the plaintiff secured employment, during November 2014, he had supported her financially by buying food and clothing for them and their child. When he returned to Port Elizabeth during February 2014 he had sent R1 000.00 per month to her until November 2014. Thereafter he sent money to her only when she made a request therefor. Despite Ms Rakaipé’s scepticism about that evidence, there was no contrary evidence to cast doubt on its veracity. It was submitted that those facts demonstrated the existence of a tacit agreement that Mr Moleko would support the plaintiff. I have difficulty with that submission.
27. Firstly, the plaintiff’s own evidence was that, after she had secured employment, Mr Moleko had forwarded money to her only when she made a request therefor. The evidence did not show how often, during the twenty months between November 2014 and July 2016, she requested money, why she requested money or how much Mr Moleko paid to her when she made a request for money.
28. Secondly, her evidence shows only that he sent money to her. It did not show any support by her to him. Her evidence was accordingly insufficient to show that they jointly contributed to the upkeep of a common home. There was no evidence that they supported each other. The fact that Mr Moleko sent money to the plaintiff on a monthly basis between February and November 2014 and thereafter upon request is insufficient for a finding that Mr Moleko concluded an agreement with the plaintiff to support her or that he was under a legal duty to support her.
29. Regarding the nature of their relationship, apart from her two visits to Port Elizabeth, the parties have not been living together since February 2014, when Mr Moleko returned to Port Elizabeth. In *Paixão* the court indicated the minimum requirements

that a plaintiff has to prove to establish that a deceased had undertaken a duty to support him or her, when it held:<sup>9</sup>

*“A plaintiff’s assertion, without more, that he or she was in a 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 is 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.”* (authorities omitted)

30. Unlike in *Paixão*, the defendant denied that, at the time of Mr Moleko’s death, there had been a love relationship between him and the plaintiff or that such a relationship, if it was found to have existed, was a life partnership. At the very least, there should be evidence of cohabitation and that Mr Moleko and the plaintiff supported each other. No such evidence was adduced. Their relationship, since Mr Moleko returned to Port Elizabeth during February 2014, can by no stretch of the imagination be equated with a marriage. The only family members to which the plaintiff made reference in her evidence were her mother and her sister. Her evidence was that Mr Moleko requested her mother whether the two of them could live together until they got married. Her sister was only mentioned in relation to their accommodation in 2008. There was no evidence of whether or not the plaintiff’s mother, sister or any other family member or friend had seen their relationship as a marriage. The evidence given by Ms Brown and Ms Rakaipe was clear – there was no relationship, let alone one akin to a marriage, between the plaintiff and Mr Moleko at the time of his death.

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<sup>9</sup> n 5 at par 29.

31. The objective facts render the existence of a life partnership improbable. To summarise, those facts are that since February 2014 until Mr Moleko's death, he had lived in Port Elizabeth while the plaintiff lived in Cape Town, where she had been employed since November 2014. Mr Moleko had sent R1 000.00 per month to her between February and November 2014. Thereafter he had sent undisclosed sums of money to her only when she requested him to. They had had contact in Port Elizabeth in February 2014 and in September/ October 2015. Those visits cannot amount to cohabitation.
32. The plaintiff seemed to know very little about Mr Moleko's employment. For example, her initial evidence was that he had resigned in 2014, whereas, in fact, he had requested a transfer. When she was asked what Mr Moleko's income was when he was employed in Port Elizabeth she had no idea.
33. Furthermore, Mr Moleko resigned from his employment before his death, without having secured alternative employment. He was accordingly unemployed at the time of his death. The plaintiff testified that Mr Moleko intended to marry her during December 2016 in terms of Xhosa customary law. As at the time of his death only she, her mother and Mr Moleko knew of that intention. At that stage no lobolo negotiations had commenced and there was no evidence to indicate that preparations were being made for the wedding, which was about five months away. Mr Moleko's resignation from employment shortly before the alleged intended wedding and the absence of any wedding preparations as at the date of his death, indicate, on the probabilities, that there were no wedding plans, as suggested by the plaintiff.
34. Ms Brown's evidence, that she had been in a love relationship with Mr Moleko since 2014, cannot be ignored, especially since it was corroborated by Ms Rakaibe. That long term relationship is inconsistent with the conduct of a person who was betrothed to marry the plaintiff in December 2016.
35. The only fact that militates in favour of the plaintiff's contention is that, while Mr Moleko lived with her in Cape Town, he supported her by buying food and clothing for her. That support continued after his relocation to Port Elizabeth until November 2014 when she secured employment. That, on its own, is insufficient to conclude that a life partnership existed at the time of his death. As explained

above, more is required. The objective facts do not support a finding that they lived like a family.

36. In the light of all the evidence, I am of the view that the plaintiff has failed to show that there was an agreement, tacit or express, that Mr Moleko would support her or that he was under a legal duty to do so. She has also failed to show that her relationship with Mr Moleko was akin to a marriage at the time of his demise. In the circumstances, her claim against the Fund must be dismissed. The Fund was justified in its defence of the plaintiff's claim against it and is accordingly entitled to its costs.

37. In the result, it is ordered that:

37.1. The plaintiff's claim, in her personal capacity, be and is hereby dismissed.

37.2. The plaintiff shall pay the defendant's costs relevant to her claim referred to in paragraph 1 above.

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G H BLOEM

Judge of the High Court

For the plaintiff:

Mr N M Paterson, instructed by Lawrence Masiza Vorster Inc, Port Elizabeth.

For the defendant:

Mr A M Mthembu, instructed by the State Attorney, Port Elizabeth.

Dates heard:

24, 25 and 26 March and 20 and 22 July 2021.

Date of delivery of the judgment:

17 August 2021.