

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 28602/2017

18/2/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 2020/2/18
SIGNATURE

In the matter between:

L[....] M[....] M[.....]

Plaintiff

And

Road Accident Fund

Defendant

JUDGMENT

Maumela J.

1. This matter came before court in the opposed motion roll. The plaintiff, L[....] M[....] M[....], a 36-year-old female instituted action against the Road Accident Fund. She advanced a claim based on loss of support. The claim is based on two legs. The First claim she lodged is in her personal capacity and the second is on behalf of her minor children. The claims are constituted as follows:
The claim in her personal capacity:
1.1. Past Loss of support at R 200 000-00.
1.2. Future loss of support at R 500 000-00.
The total claim in respect of the Plaintiff is: R 700 000-00.
2. The Second Claim Plaintiff lodged is on behalf of her minor children K[....] D[....] M[....], a male who was born on the 2nd of June 2001, and T[....] F[....] M[....], a male who was born on the 16th of May 2006. It comprises of:
2.1. Past Loss of support at R 300 000-00 and
2.2. Future loss of support at R 500 000-00.
The total claim in respect of Plaintiff's minor children is: R 800 000-00. This action is defended.
- 2.3. The Plaintiff prays for the Defendant to pay the cost of the suit.

BACKGROUND.

3. On the 23rd of March 2016 Plaintiff's husband, D[....] K[....] T[....], (the deceased), was a passenger in a white Nissan Hardbody with registration numbers [....]. This vehicle collided with a white Golf with registration numbers [....], (the insured vehicle). The collision took place at the intersection of the Old Johannesburg Road (R101), and Escourt Road Hennospark.
4. The Defendant does not dispute that this accident took place and that it involved the vehicles mentioned above. Neither

does it dispute that the Deceased was a passenger in the insured vehicle, and that he succumbed to injuries he sustained in the collision. The plaintiff alleges that the collision was solely as a result of negligence on the part of the driver of the insured vehicle.

5. Plaintiff, who is 36 years of age, contends that she was married to D[....] K[....] T[....], who was 30 years of age at the time he died. She stated that her marriage to the deceased was in accordance with Customary Law. She submits that she and her two children were dependent on the deceased. She alleges that as a direct result of the collision, the deceased sustained bodily injuries and he succumbed to the said injuries. She submits that the deceased's demise deprived her and her minor children of maintenance and support which the deceased used to provide for them during his lifetime.
6. While the Defendant concedes that the accident was a result of negligence on the part of the 'insured driver' it disputes liability to the plaintiff. It is not disputed that the accident happened at the place and time indicated by the plaintiff. Neither is it disputed that the deceased succumbed to injuries sustained in that accident. It is not disputed that the insured driver was negligent. What is disputed is the defendant's liability. The Defendant disputes the claim for loss of support for the Plaintiff and her children.
7. The Defendant disputes the validity of the customary marriage alleged by the plaintiff. It contends that there was no valid marriage between the plaintiff and the deceased. The Defendant contends that the Plaintiff and the Deceased did not fulfil all the requirements for a valid customary marriage as determined by the provisions of the Recognition of Customary Marriages Act.¹

¹. Act No. 120 of 1998.

8. The Plaintiff submitted that the deceased is not the biological father of her children. However, she submits that during the deceased's lifetime, the children stayed with her and the deceased in the same house. She contends that the deceased would support her and the children. She contends that the deceased would have been legally obligated to maintain her two minor children and for that reason, the children are entitled to support from the estate of the deceased.

9. The Defendant disputes that a valid customary marriage came into existence as between the Deceased and the Plaintiff. The Plaintiff substantiates her contention that she was married to the deceased in accordance with Customary Law. To that end, she submitted the following:
 - 11.1. *Lobola* letters supporting the existence of the marriage,
 - 11.2. An ID copy,
 - 11.3. An affidavit in terms of section 19 (f).
 - 11.4. Birth certificates of the children.

10. The plaintiff attached Exhibits "A", "B" and "C". These are documents that depict '*lobola* negotiations. In them, the dates, the place and that attendants at the occasion of the *lobola* negotiations are reflected. The Exhibits attached are numbered "A", "B" and "C. The Plaintiff contends that these exhibits constitute proof of the fact that members of her family, together with those of the family of the Deceased met on the 6th of February 2015, the 7th of March 2015 and the 17th of September 2015. She contends that the exhibits constitute proof of the fact that discussions and negotiations concerning *lobola* were held by individuals whose names stand listed in the exhibits.

THE ISSUES.

11. The court has to determine whether a valid customary marriage came into existence as between the Deceased and

the Plaintiff or not. In the event where the court finds that a valid customary marriage came into existence as between the Deceased and the Plaintiff, it has to determine whether a legal duty to maintain the Plaintiff's minor children came to exist as against the deceased and indeed, his deceased estate.

12. In making that determination, the court has to determine the following issues:

14.1. The validity of the customary marriage between the plaintiff and the deceased.

14.2. Whether the deceased was under a legal and an enforceable duty to support the plaintiff and her children or not and

14.3. Whether the plaintiff has *locus standi* to institute a claim for loss of support against the defendant as a result of the death of the deceased.

13. 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; amabhaka; 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."

14. The Plaintiff proved that *lobola* negotiations were held between members of her family and those of the Deceased. She advanced exhibits "A", "B" and "C" to substantiate her contention that *lobola* negotiations were successfully held. The question arises whether the requirements of a valid customary marriage were fulfilled. In section 3 of the Recognition of Customary Marriages Act²

². Supra.

requirements for a valid customary marriage to come into existence stand prescribed. In that regard, this section provides the following:

“Requirements for validity of customary marriages:

3. (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.”*

15. It is not in dispute that the Plaintiff and the deceased were both above the age of 18. The gathering where negotiations were conducted concerning *lobola* was in accordance with custom. The defendant disputes that a marriage in accordance with custom was entered into between the Plaintiff and the Deceased. This is in direct contradiction to the contention by the Plaintiff. It begs the question as to which version between that of the Plaintiff and that of the Defendant is true.

16. The Defendant contends that it contacted J[....] M[....] and P[....] M[....], both of whom are cousins to the deceased. It stated that both of the deceased's cousins confirmed that the, deceased, and the plaintiff were once in a love relationship between the 2007 and 2000. However, they are adamant that the two were not married to one another. The deceased's two cousins also denied that the deceased had any children with anyone. They stated that recently, the deceased got into another love relationship with one T[....]. D[....] D[....], a brother to the deceased, also stated that the deceased and the plaintiff were not married to one another. He stated that after the Plaintiff and the Deceased ended their love relationship, the two of them were not even in speaking terms.

17. Daniel denied that the deceased fathered any child with the plaintiff. The Defendant raised the point that there is proof of the fact that the Plaintiff received child grants through the Department of social development for her minor children, T[....] M[....] and D[....] M[....]. It was found that SASSA pays each of the children an amount of R 360-00 per month. The Defendant also states that he made enquiries at the office of the Master of the High Court where it was found out that the Plaintiff and her children do not feature in the estate file of the deceased.

EVALUATION.

18. The Plaintiff claims that she was married to the deceased in accordance with custom. She produced Exhibits “A”, “B” and “C” to substantiate her contention. The Defendant disputes that the Plaintiff and the Deceased entered into a marriage in accordance with custom. The Defendant is corroborated by two cousins and a brother of the deceased. In that way, the versions of the plaintiff and the defendant are diametrically opposed to one another. They are mutually destructive against one another.

19. In the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others*³, the court had to deal with versions by the opposing parties which were mutually exclusive to one another. The court stipulated an approach that should find application in such instances. In that regard the court stated the following: *“To come to a conclusion on a disputed issue a court must make findings on:*
 (a). *The credibility of the various factual witnesses;*
 (b). *Their reliability; and*
 (c). *The probabilities.*
Where it concerns (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness.

³. 2003 (1) SA 11 (SCA).

That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance such as:

- (i). The witness's candour and demeanour in the witness box;
- (ii). His bias, latent or blatant;
- (iii). Internal contradictions in his evidence;
- (iv). External contradictions with what was pleaded or put on his behalf, or with established facts or with his own extra curial statement or actions;
- (v). The probability and/or improbability of particular aspects of his version; and
- (vi). The calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), witness' reliability depending, apart from factors mentioned under (a)(ii), (iv) and (v), on (i) opportunities he had to experience and observe event in question and (ii) quality, integrity and independence of his recall thereof -

As to (c), this necessitating analysis and evaluation of probability or improbability of each party's version on each of disputed issues - In light of its assessment of (a), (b) and (c) court will, as final step, determine whether party burdened with onus of proof succeeded in discharging it - Hard case occurring where credibility findings compel court in one direction and its evaluation of general probabilities in another - Latter becoming less convincing where former more so - Probabilities prevailing where all factors equipoised.

20. The plaintiff produced exhibits, Annexure "A", "B" and "C", which entail *lobola* negotiations. The Defendant advanced no evidence to disprove the authenticity of Exhibits "A", "B" and "C". On the other hand, Jeanette Mashilo, a cousin to the deceased contends that the deceased never got married to the plaintiff. She is corroborated by one other cousin of the Deceased and one brother.
21. In this case, the Exhibits advanced purport to prove that meetings were held between members of the family of the deceased and those of the family of the applicant. This

culminated in a meeting which *lobola* was paid to the full on 19 September 2015. Be that as it may, the payment of *lobola* is not a requirement for a valid customary marriage to come into existence. In some of the cases, a mere agreement on *lobola* suffices. See *Matsoaso v Roro*⁴

22. There is no evidence proving that celebrations were held or that the bride was accepted or received within the family of the deceased. Although an annexure purporting to contain the *lobola* agreement was produced, consent by the guardian of the applicant was not proven. However, the applicant was already a major and therefore, proof of consent by the guardian was not a requirement. Neither was incorporation of the bride into the groom's family proven. In the case of *Nhlapo v Mahlangu*⁵ 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.
23. It is 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 Act⁶. The question arises whether a customary marriage can be said to have come into existence between the Plaintiff and the Deceased despite the fact that this marriage was not celebrated in terms of *Section 3 (b)* of the Recognition of Customary Marriages Act⁷.
24. In the SCA judgment of *Mbungela & Another v Mkabi & Others*,⁸ 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

⁴. [2011] 2 All SA 324 (GSJ), at paragraph 18.

⁵. (59900/14); [2015] ZAGPPHC 142.

⁶. Supra.

⁷. Supra.

⁸ *Mbungela & another v Mkabi & others* (820/2018) [2019] ZASCA 134 (30 September 2019)

family did not hand her over to the Respondent's family in accordance to custom. 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."*⁹

25. It is clear that there are individuals within the family of the Deceased who do not recognize the customary marriage he entered into together with the Plaintiff. Some of them go as far as to vouch that the Deceased never entered into a customary marriage with the Deceased while there are Exhibits that reflect a picture clearly different from their contention.
26. The Recognition of Customary Marriages Act was promulgated with the objective of the recognizing customary marriages. This is in line with according all humans, especially women the human dignity provided to them in the constitution. The court finds that a customary marriage came into existence between the Plaintiff and the Deceased.

OBLIGATION TO MAINTAIN.

27. It is trite that in South Africa, parents owe a duty to maintain their children. That duty arises by operation of the law.¹⁰ The minor children in this case had no blood relationship with the Deceased. In the case of *Maneli v Maneli*¹¹, the magistrate

⁹ *Mbungela & another v Mkabi & others* at para 17.

¹⁰. See *Vermaak v Vermaak* 1945 CPD 89 and *In Re Estate Visser* 1948 (3) SA 1129 (C).

¹¹. [2010] JOL 25353 (GSJ).

referred the case to the constitutional for that court to determine the correctness of her conclusion that the respondent had a legal duty to maintain the minor child he and the applicant had adopted in terms of Xhosa customary law; and her finding that in that matter, she was entitled to develop the Common Law in terms of section 39(3) of the Constitution of the Republic of South Africa, 1996.

28. The Defendant also raises the point it made enquiries at the office of the Master of the High Court where it was found out that the Plaintiff and her children do not feature in the estate file of the deceased. Estate files are often opened at the instance of the next of kin of deceased persons. It is not unheard of that relatives of a deceased person ignore, shun, exclude scare away individuals they consider undesired while they pursue the devolution the estate. Failure by a woman to feature in the file pertaining to a deceased estate does not necessarily imply that the woman who is so excluded had no relationship with the deceased.
29. It is trite that children in a customary marriage can benefit from the estate of an adoptive parent. Section 242 (3) of the Children's Act outlines the effects of an adoption order. In that regard this section provides the following:
242 (3). *"An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child."*
30. The late Professor Maithufi, a widely acknowledged expert in African law outlined customary adoption. He outlined the process of adoption as follows: *"The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area or his or her representative. The formalities relating to the agreement between the families of the adopted child and the adoptive parent(s), as well as the report to the traditional leader or his or her representative are aimed at indicating that the adopted child has been formally transferred from one*

family to anotherEven in cases where adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and the adoptive parent(s). The validity of an act of adoption in terms of customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption.”

31. Initially, South African Case Law dictated that where no biological relationship existed, no legal duty to maintain arose unless a formal adoption was done. It is undisputed that the minor children in this case were not formally adopted by the Deceased. That raises the question whether a legal duty could have arisen for the Deceased to maintain the minor children in this case. In her article¹². Associate Professor Anne S Louw¹³, stated that the South African courts have in recent times shown an increased willingness to grant *de facto* adopted children some, if not all, the rights reserved for formally adopted children. She contended that based on the trends apparent from judgments, she concludes in her article that a doctrine of *de facto* adoption has evidently been created in the context of founding a duty of support.
32. Besides; in the case of *Thibela v Minister van Wet en Orde*, the court considered an agreement in terms of which a husband paid *lobola* for his wife and her “illegitimate” son sufficient to create a duty of support between the husband and the “illegitimate” son in terms of Pedi custom. Expert evidence attested to the fact that such payment would result in the child becoming a “child” of the husband. The court consequently held that the damages suffered by the child arising from the death of his deceased “father”, who could no longer fulfil his duty of supporting him, must be included in the mother’s claim for damages. As in the *Kewana*-case, the

¹². A de facto Adoption Doctrine for South Africa

¹³. Department of Private Law University of Pretoria BA Bluris LLB LLD.

court in *Metiso v Padongelukkefonds* was, called upon to decide whether a customary law adoption was valid and thus created a legally recognizable duty of support for purposes of a claim against the Road Accident Fund. The court held that the customary law adoption should in the interest of the children be considered valid despite its possible lack of publication as prescribed by custom.

33. The court concluded that the deceased's promise to care for the children, even if not a completed adoption in terms of customary law, was sufficient to create a legally recognizable duty of support towards the children – if not in terms of the common law then a logical extension thereof. Bertelsmann J argued that to deny the legality of such an undertaking would be contrary to – “the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993”.
34. In the case of *Taljaard, Johanna Marinda N.O. v Road Accident Fund*¹⁴, Sutherland J cited the case of *Metiso v Padongeluksfonds*¹⁵ where Bertelsmann J addressed a claim against the RAF arising from the death an uncle of certain children who he had supported. After their father died and their mother had deserted them. A formal adoption according to the custom of the community had not occurred because the consent of the absent mother was a prerequisite and she was unreachable. It was contended on behalf the children that the uncle had agreed to maintain them. The court resolved the problem by two finding. First, that a *de facto* adoption should be acknowledged and that the formal defects be overlooked and, secondly, that a binding offer to support the children was sufficient to ground a duty of support because to do so was consistent with the morality of

¹⁴. Case No: 2013/22829.

¹⁵. 2001(3) SA 1142 (T)

society¹⁶. In *MB v NB*¹⁷, Brassey AJ dealt with whether or not after a divorce an ex-husband had a duty of support towards the children of his former wife, who had been widowed. During the marriage the ex-husband had related to the children as a father. At issue was whether he was obliged to continue to contribute to the payment of the school fees of the children. At [22] Brassy AJ took the view that it was unnecessary to construe a quasi-adoption because it was sufficient that by making the promise to pay the husband was bound.

35. The court finds that where the deceased maintained the Plaintiff and her minor children during his life-time, a legal duty to maintain the minor children came into existence against the deceased. Now that the Deceased perished as a result of a wrong committed by the driver of the 'insured vehicle' the provisions of Section 17 (1) (b) of the Road Accident Fund Act 1996¹⁸ kicks into operation. This section imposes a duty on the Road Accident Fund to compensate persons adversely affected as a result of an accident caused by an act of omission on the part of an 'insured driver'.
36. The plaintiff in this case indicated the amounts of the claims she brings against the Defendant. The Defendant did not bring evidence to oppose the amounts indicated by the Plaintiff in the claims. All that the Defendant did was to dispute liability. In the event where the Plaintiff proves its case against the Defendant, the claims shall be granted in the amounts indicated by the Plaintiff.
37. Considering the evidence in this case, the court finds as follows:
 - 36.1. That a customary marriage came into existence between the Plaintiff and the Deceased.
 - 36.2. That a legal duty came into existence for the Deceased

¹⁶. At page 1150G- H.

¹⁷. 2010 (3) SA 220 (GSJ)

¹⁸. Act No 56 of 1996.

- to maintain the Plaintiff and her minor children.
- 37.3. That there is a legal duty upon the Defendant to compensate the Plaintiff and her minor children for the loss they suffered as a result of the collision.

In the result, the court makes the following order:

ORDER.

- 39.1. The Defendant is ordered to pay to the Plaintiff an amount of R 700 000-00 being for past and future loss of support for the Plaintiff.
- 39.2. The Defendant is ordered to pay to the Plaintiff an amount of R 800 000-00, being for past and future loss of support for the Plaintiff's minor children; T[....] M[....] and D[....] M[....].
- 39.3. The Defendant is ordered to pay the costs of the suit.

Maumela J.
Judge of the High Court of South Africa.

REFERENCEE

For the Plaintiff: Adv. C Mosala

Instructed by: Mokgatle Lesole Attorneys

For the Defendant: Adv. J Themane

Instructed by: Ningiza Horner Inc.