



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

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

Case number: 3996/2013

In the matter between:

D. M. K.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 11 OCTOBER 2016

JUDGMENT BY: GELA, AJ

DELIVERED ON: 27 OCTOBER 2016

- [1] This is an action in which the plaintiff, D. M. K. sues the defendant, the Road Accident Fund under section 17(1) of the Road Accident Fund Act 56 of 1996, for loss of maintenance and

support arising from the death of M. D. S. in a motor vehicle accident on the 29th November 2009. The victim was a pedestrian in Khumalo Street, Parys, in the Free State Province when he was hit by a vehicle driven by L.B Motha (the insured driver) with registration number [D...]. At the time of the accident the victim had been living with the plaintiff and their two minor children and was supporting them financially.

- [2] It is important to give an account of the background facts of this matter, most of which are common cause. The victim and the plaintiff met in 1995, while they were still primary school learners. They fell in love and when the plaintiff was a teenager aged 17 years old and in secondary school, the victim deflowered her. Consequently, the couple's first child, M. C. K. was born on the [...] 2001. At the time the child was born the victim was gainfully employed and was also involved in the upbringing of the child.
- [3] In 2005 they started living together as husband and wife and the couple's second child, R. A. K. was born on the [...] 2006. After the birth of their second child, the parties agreed that the plaintiff should stop doing part-time jobs and take care of the baby, while the victim was hustling to support them, (plaintiff and the 2 children). Between June and July 2008 there were lobola negotiations between the two families and a sum of R10 000-00 (then thousand) was agreed upon as lobola for the plaintiff. They continued staying together as husband and wife even after the lobola negotiations were concluded. Their relationship was with the blessings of both families. At the time of his death the victim was still raising the lobola agreed upon during the negotiations

between the two families. No handing over of the bride and traditional ceremony was as yet performed and no part payment of lobola was done.

- [4] The victim was on 29 November 2009 around 08H10 a pedestrian in Khumalo Street, Parys, Free State Province when he was hit by a motor vehicle with registration number [D...]. The said vehicle was driven by LB Motha, the insured driver. The victim died immediately as a result of the injuries sustained.
- [5] The essential facts pertaining to the nature of the relationship between the plaintiff and the deceased are not in dispute. They emerge from the testimony adduced by three witnesses who testified on behalf of the plaintiff, Ms D. S. herself, P. S. M., (deceased's brother in-law) and N. K. (the plaintiff's brother). The Road Accident Fund (defendant) adduced no rebuttal evidence. The defendant's cross examination of the three witnesses was aimed at impugning the plaintiff's assertion that she entered into a customary marriage with the deceased.
- [6] When the matter served before this court, the defendant had conceded the merits and had accepted full liability for the plaintiff's proven damages, but of course, depending on the finding of this court. In addition, the parties also confirmed that the calculation of the quantum was not in dispute.
- [7] The defendant having agreed that the victim at the time of his death owed a legal duty of support to the couple's two minor children, the issue to be determined is whether or not the

deceased, owed the plaintiff such duty of support at the time of his death on 29 November 2009. Put differently, was the plaintiff legally married to the deceased, alternatively, does the legal principle founded in **Paixão and Another v Road Accident Fund** 2012 (6) SA 377 (SCA) find application in this matter?

- [8] The defendant has contended that the evidence adduced did not support any conclusion of a customary marriage in that lobola was not yet paid and there were no ceremonies held for the handing over of the plaintiff to her husband's family. See Lawsa, Volume 32: Indigenous Law, Para 95 where the essential requirements for a legally binding customary marriage are listed. The defendant submitted that the deceased and the plaintiff were desiring to be married but due to financial constraints the deceased did not pay lobola and the marriage ceremony was not concluded. Nothing significant was submitted by the defendant pertaining to the alternative claim of the plaintiff, based on the question whether the deceased owed the plaintiff a duty of support at the time of his death, which called for the court to decide whether the principle in **Paixão and Another v Road Accident Fund** (*supra*), which extended the dependant's action to permanent heterosexual relationships applied.
- [9] The Paixão principle also found application in the case of **Engela v Road Accident Fund** 2016 (1) SA 214 (GJ), where the plaintiff sued the defendant for loss of support sustained by her two sons, T and O, as a result of the death of her deceased ex-husband, in a motor vehicle collision. T was the illegitimate son of the plaintiff and brought into the marriage with the deceased. Subsequent to

their divorce and a brief separation, the plaintiff and deceased reconciled, and commenced living together again as family of four. There existed no express agreement between the deceased and the plaintiff that the deceased would support T. At para [12] the court held that, underlying the agreements in both cases (i.e. Paixão and Engela (*supra*)) is a mutual commitment of the parties to live together as a family. It is irrelevant whether the one agreement is governed by a marriage certificate while the other is not. It was held, further, that the duty of support would not only arise in circumstances where the deceased had during his lifetime expressly undertaken to support an illegitimate child beyond the dissolution of a marriage but also when he had tacitly undertaken to do so. The court found that there existed, on a balance of probabilities, a tacit agreement that the deceased would support T as his own child, and that accordingly the deceased owed T a legal duty of support at the time of his death.

[10] The development of the common law to extend to dependant's action to cover permanent heterosexual relationships was found to be applicable to the Engela case (*supra*).

[11] I revert to the circumstances of this case. The facts show that the plaintiff and the victim were in a love relationship since their school days. The plaintiff became pregnant with their first child while she was still attending school. From then the deceased accepted the duty to support the child. In 2005 they moved in together. They were combining their earnings until the victim promised the plaintiff that he would support her and the children. The plaintiff stopped working, stayed at home for the sake of the

victim's children and looked after the children for the victim's benefit. The length of the relationship, the blessing of such relationship by families on both sides, the victim's conduct and the plaintiff's conduct demonstrated that there existed a mutual commitment to permanently live together as husband and wife in order to raise a family, Paixao, *supra* and Engela, *supra*. All these were material considerations. They substantially compel the conclusion that the victim was under a legal duty to support the plaintiff notwithstanding the apparent lack of recognised requisites of a customary marriage.

[12] Crucially, they had already undertaken duties of support and agreed to formalise their relationship through marriage. The deceased in this case undertook a duty to maintain and support the plaintiff and the children. I have found that the plaintiff tacitly established the existence of legally enforceable duty of support and I can see no reason in principle or policy not to extend the protection of the common law to the plaintiff.

[13] In my view, the facts presented warrant a conclusion that there existed a tacit agreement that the victim would support the plaintiff. Accordingly, the plaintiff has, on a balance of probabilities established that the deceased owed her (plaintiff) a legal duty of support as at the date of his death. The development of the common law to extend the dependant's action to cover permanent heterosexual relationships is therefore applicable to this case.

[14] In the circumstances, I am of the view that the victim owed a legal duty of support to the plaintiff. Accordingly, I would determine the issue in favour of the plaintiff.

[15] The following order is made:

15.1 The defendant is ordered to pay to the plaintiff in her personal capacity, compensation in an amount of R365,201.00.

15.2 The defendant is also ordered to pay interest on the aforesaid capital amount at the rate of 9% per annum from the 15th day of this order.

15.3 The defendant is further directed to pay the costs of the action which shall include the costs relative to the preparation of the court file as well as the actuary's fees.

N. GELA, AJ

On behalf of the plaintiff:
Instructed by: Adv. PJJ Zietsman
Honey Attorneys
Northridge Mall
Bloemfontein

On behalf of the defendant:
Instructed by: Adv. CJ Hendricks
Maduba Attorneys
77 Kellner Street
Westdene
Bloemfontein