

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

CASE NUMBER:71221/2011

DATE:30/05/2013

In the matter between:

WINNIE DINEO MODISANE

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

STRIJDOM AJ

(A) INTRODUCTION:

1. The Plaintiff is Winnie Dineo Modisane, an unemployed major female, who acts in her personal capacity as well as her representative capacity as mother and natural guardian on behalf of K M and OR M.

2. She instituted a claim against the Defendant in terms of the Road Accident Fund Act 56

of 1996 (the “Act”) in her personal capacity as well as her representative capacity as mother and natural guardian on behalf of the two minor children for the loss of support suffered by herself as a result of the death of her late husband May Stephen Mphephu in a motor vehicle accident which occurred on 31 August 2008.

### 3. COMMON CAUSE FACTS:

3.1. The customary marriage between the Plaintiff and the deceased was entered into on 11 November 2006 and concluded on 16 December 2006.

3.2. The deceased was the natural father of ORM (with Identity number ...).

3.3. The deceased, at the time of the accident, maintained the Plaintiff and the two minor children.

3.4. The deceased passed away at the accident scene as a result of injuries he suffered in the motor vehicle accident.

4. The merits have already been finalised in favour of the Plaintiff on the basis of 100% liability on Defendant’s part.

5. The only issue that remain for determination is whether the Defendant is liable to compensate the Plaintiff for loss of support in respect of the minor child KM (with Identity Number ..).

6. Counsel for the Defendant submits that K M was not legally adopted by the deceased and subsequently was not liable to support him.

7. Counsel for the Plaintiff submits that the deceased clearly expressed his intention to adopt the child during negotiations and the entering into customary marriage and was

therefore liable to maintain the child.

#### THE PLAINTIFF'S CASE:

8. Winnie Dineo Modisane testified that she is the biological mother of the two minor children and she is a Tswana. She agrees to marry the deceased in a customary marriage. The parents of the families met and negotiate a customary marriage.

9. During the discussions and negotiations to enter into a customary marriage, the deceased was aware of the fact that the Plaintiff gave birth to K M and that he is not the biological father.

10. She testified that the deceased took her and the child K M into the customary marriage. They stay together as a family and the deceased support the two minor children.

11. The Plaintiffs evidence was not seriously contested in cross-examination and no evidence was led by the Defendant.

#### CUSTOMARY LAW:

12. Section 2 (2) of the recognition of Customary Marriages Act, No 120 of 1998 provides that a customary marriage entered into after the commencement date, which is 15 November 2000, which complies with the requirements of that Act, is for all purposes recognised as a marriage.

13. Plaintiff relies on the concept "O e gapa le namane" as the basis for liability of the Defendant.

14. Reliance on the concept of “O e gapa le namane”, applies to children in the context of indigenous customs, practises and traditions. In that sense, it means “Go nyala mosadi ka ngwana yo o sa mo tsaleng ka madi.” Loosely translated, it says ‘To take a child born of another man into your marriage with its mother.’ For all intents and purposes, it is equal to the customary adoption of a child.

15. A man who does not intend to take a child who is under the age of 14, born of another man into his marriage with the mother of that child, must express such intention during the negotiations and the entering into a customary marriage.

16. The Plaintiff testified that:

16.1. The child K M was disclosed to the deceased and he accepted the child.

16.2. Deceased assumed responsibility for providing the child with shelter and maintenance.

17. Nothing precludes a man from expressly manifesting a desire, during the negotiations and the entering into a customary marriage, to take the children into his marriage with their mother, and to assume the role of fatherhood for these children. Once there is such agreement, such children become the children of the spouse concerned, and the spouse concerned becomes the father of the children in full. This fatherhood amongst others attracts the duty to maintain each other.

See: Schapera I: A Handbook of Tswana Law and Custom p 172-3

18. I am satisfied that the Plaintiff has set out sufficient facts before me to conclude that the deceased took the child K M into his alleged customary marriage with the Plaintiff which is equal to the customary adoption of a child.

19. I am called upon to not only interpret, but also to be equal to the task of developing customary law.

20. Section 39 (3) of the Bill of Rights states as follows:

“The Bill of Rights does not deny the existence of any other rights of freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

21. When interpreting the Bill of Rights, a Court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

22. In the result judgment is granted in favour of the Plaintiff.

23. It follows that the Defendant is liable to compensate the Plaintiff and the two minor children for the loss of support suffered by herself as a result of the death of her late husband.

24. The Draft Order annexed hereto marked “X” is made an order of Court.

SIGNED AT PRETORIA ON THIS THE 30<sup>th</sup> DAY OF MAY 2013

JJ STRIJDOM

ACTING JUDGE: NORTH GAUTENG HIGH COURT