

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

Not reportable

Case no: 4264/2021

In the matter between

P[...] P[...] M[...]

FIRST PLAINTIFF

Identity number: 9[...]

P[...] P[...] M[...]

SECOND PLAINTIFF

on behalf of her minor son R[...] P[...] M[...]

and

ROAD ACCIDENT FUND

RESPONDENT

Coram: Majosi AJ

Heard: 7 June 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 13h00 On 13 December 2024.

Summary: Loss of support – *Locus standi* of mother of minor child – Minor child – Loss of support - Quantum thereof.

JUDGMENT

Majosi AJ

[1] On 7 September 2019, Mr. R[...] was involved in a motor vehicle accident along the R57 road between Kestell and Reitz which claimed his life. Upon his death, he left behind a minor son which he shares with the first plaintiff, Ms. M[...], his alleged life partner.

[2] Ms. M[...] instituted action proceedings against the defendant for loss of support in her personal capacity and on behalf of her minor child. Negligence was conceded and the plaintiff's *locus standi* and loss of support claims were separated in terms of rule 33(4) of the Uniform Rules of Court as the plaintiff's claim in her personal capacity remained in dispute.

[3] Merits on the loss of support of the minor child was conceded by the defendant on the trial date and only the quantum thereof remained in dispute. My adjudication is three-fold: firstly, the first plaintiff's *locus standi* and her claim for loss of support; secondly, the quantum thereof; and lastly the quantum of the second plaintiff's claim for the loss of support in respect of the minor child.

[4] Ms. M[...] testified that the deceased was her life partner who she met in the year 2010 and who resided with for at least four years prior to his death, together with their now 11-year-old son in Reitz, Free State. She indicated that due to her being unemployed for the duration of the relationship, the deceased supported her and their son without a formal maintenance order by paying for their rental, household amenities, food and clothing, as he was sole breadwinner earning a salary of R 4 952.00 per month¹ at a construction company.

[5] Upon his death, she and the minor child suffered a total loss of support. She and her son could not afford to stay in the rental property which they had shared with the deceased and moved out shortly after his death. She currently survives on a social grant of R550.00 which is in favour of the minor child but she indicates that this is insufficient for her needs as well as that of the child.

[6] Though she was not legally married to the deceased, she indicated that she

¹ Discovery bundle, p 48, Salary advice of NR R[...], Gert Tack Staalkonstruksie BK dated 30 August 2017.

considered him her husband and her life partner as the eventual plan was to get married as soon as their finances allowed and that this intention was conveyed to her mother and the mother of the deceased and all concerned referred to her as his wife.

[7] Ms. Khumalo, the mother of the plaintiff, indicated that she was aware that her daughter and the deceased had been in a relationship since the year 2010. This then culminated in a minor child being born and the three of them had been staying together as a family from the year 2016. This occurred after the deceased requested her permission that he resides with her daughter and their minor child. She gave her blessing to this arrangement as she considered him to be her son-in-law.

[8] Ms. R[...], the mother of the deceased, testified to the effect that she was aware that her son and the defendant became involved in a romantic relationship and he had expressed to her that he will marry the plaintiff once he is financially stable. She was also aware that they resided together in Rietz prior to her son's death and that they indeed shared a minor child.

[9] She was specific to mention that upon her son's death, the plaintiff moved out of the home that she shared with him and stayed with her until the funeral. Thereafter, she (first plaintiff) went to stay at her parental place located in Petrus Steyn, together with her minor son. She also indicated that her son died without a will and without any policies; he only left furniture items which she later donated to the plaintiff as a gesture of goodwill.

[10] The defendant closed its case without the calling of witnesses

[11] Counsel for the defendant argued that the plaintiff and the deceased were involved in a heterosexual relationship and she was totally reliant and dependent on financial support that she received from the deceased as they lived together and she is unemployed. Since his death, she was deprived of maintenance for herself and her minor child and he had a legal duty to support her during his lifetime as she was his life partner.²

[12] It was further submitted that the first plaintiff also has the right to the maintenance she received from the deceased as he was the sole breadwinner and had an obligation

² Plaintiff's Heads of Argument, paras 6-16.

to maintain her as his life partner – she was unemployed and reliant on his income for herself and the minor child.³

[13] To that end I was referred to *Paixao v Road Accident Fund*⁴ (*Paixao*) wherein the court found in favour of an unmarried partner and her biological daughters for their claim for loss of support on the basis that she had established that the deceased had a legal duty to support the plaintiff and her daughters; the rights of unmarried partners ought to be protected.⁵

[14] Transversely thereto, the attorney for the defendant argued that the plaintiff in her personal capacity did not discharge the onus in proving the existence of a legally enforceable duty of support on the part of the deceased.⁶ This assertion was based on the fact that they were not legally married, did not have a joint will, did not share any policies nor was she nominated as a beneficiary at any stage. Moreover, it was contended that her financial difficulties cannot be construed as a legally enforceable duty to maintenance and that her claim for loss of support in her personal capacity ought to be dismissed.⁷

[15] The evidence of the plaintiff inadvertently confirms two facts. Firstly, that she and the deceased were not legally married and secondly, although she was cohabiting with the deceased, no legal expression asserting her rights as a life partner was contained in the form of a will. The furniture in their rental property had not been acquired in her name and it had not been stated otherwise that they jointly owned the furniture or whether he intended for her to be a beneficiary to a single item in his estate.

[16] In *Paixao*, the deceased had a joint will wherein they nominated each other as universal heirs to their entire estates and they were each beneficiaries of their respective estates. It was also blatantly stated by the deceased that upon their simultaneous deaths, their entire estate would go to her three daughters in equal shares, the three not being biological children of the deceased. The Supreme Court of Appeal thus formally found that, though the two were not married, the only plausible inference from the facts was that

³ Ibid paras 18 – 22.

⁴ *Paixao v Road Accident Fund* [2012] ZASCA 130; 2012 (6) SA 377 (SCA) (*Paixao*).

⁵ Ibid, para 17.

⁶ Defendant's Heads of Argument, para 4.2

⁷ Ibid, paras 4.3 –4.5 and 8

the deceased undertook to support and maintain the Paixao family before formally entering into a marriage contract.⁸

[17] The facts *in casu* are distinguishable from *Paixao* for several reasons. Firstly, although the plaintiff and the deceased lived together, no express or tacit provision was made for her financial benefit in a will, or otherwise, as he died intestate. It can thus not be said that he had intended to support her beyond his death or that he had a legal obligation to maintain her.

[18] The evidence of the deceased mother was also that she and her family had to attend to the funeral arrangements of the deceased and used their own funds for that purpose. This entails that no estate planning was done by the deceased for the plaintiff, nor she was made aware of the fact that the deceased had a funeral policy.

[19] In my view, living together does not automatically imply that the individuals concerned intended to be permanent life partners. However, by not formalizing it as per societal standards of commitment, which entails marriage, they could also have intended not to attract any legal consequences which would be accompanied by such formalities.⁹

[20] Secondly, the money that she would have received from the deceased whilst he was still alive, was received for the benefit of the household in the form of groceries and utilities and not solely for her benefit or exclusive use. It was intended for the needs of the child and the house that they shared with the deceased.

[21] In my view, although the plaintiff wants this Court to believe that she was the life partner of the deceased, this allegation cannot be sustained in light of the evidence that has been presented, despite the sincere testimony. Although the defendant did not call any witnesses, it still does detract from the fact that this is a deficiency in the case for the plaintiff wherein she seeks to enforce a legal duty of support. I am not persuaded that that she has the necessary *locus standi* to support her claim or that she has made out a case for loss of support in her personal capacity. I will therefore dismiss her claim for loss of support in her personal capacity.

⁸ *Paixao* fn 4 para 31.

⁹ *Volks NO v Robinson* 2005 (5) BCLR 466 BC (CC) para 120.

[22] Merits for the loss of support in respect of the minor child have been conceded by the defendant as it was not disputed that the deceased, as the biological father had a legal duty to support the minor child. The only issue that remains is that of quantum. The plaintiff indicated that the deceased was indeed maintaining their minor child without a maintenance order with the salary he received from his employer and that the amount was sufficient to sustain his family. He would have continued to do so had it not been for his untimely death.

[23] The actuarial report as compiled by Mr. Waisberg on 4 May 2022 was admitted as an exhibit in terms of rule 38(2). The actuary referred to two scenarios where the minor child is concerned. Firstly, minors supported until the age of 18 years with a contingency of 5% / 10%. Secondly, minors supported until the age of 21 with contingencies at 5% / 7%, considering that the deceased normal retirement age would have been 65 years:

Scenario 1: Children 18 years		
Past loss of support	27 762	27 762
Minus contingencies deductions of (5%) (5%)	- 1 388	- 1 388
Nett past loss	26 374	26 374
Future loss of support	94 423	94 423
Total loss of earnings (10%) ;(7.5%)	9 442	7 082
Nett future loss	84 980	87 341
Total loss support	111 354	113 714

Scenario 2: Children 21 years		
Past loss of support	27 762.00	27 762.
Minus contingencies deductions of (5%)	- 1 388.00	- 1 388.
Nett past loss	26 374.00	26 374
Future loss of support	120 039.00	120 039
Total loss of support (10%) ;(7.5%)	12 004.00	9003
Nett future loss	108 035	111 036
Total loss support	134 409	137 410

[24] Counsel for the plaintiff argued that loss of support for the minor child should extend to the age of dependence of 22 with contingencies of 5% / 15% with the total loss being an amount of R 230 960.15. Though an updated report was provided by the actuary, this calculation is not in line with the earlier report of Mr. Waisberg wherein his calculations used the contingencies ratio of 5% / 10% and 5% / 7.5% but, rather in tandem with the

report of an Industrial Psychologist, whose report does not form part of the evidence presented for adjudication.

[25] The legal representative for the respondent indicated that the appropriate age where support will be needed is the age of 18 and that the contingencies with a ratio of 5% / 30% should be applied with the total loss being an amount of R92 470.00. It was further contended that the report of the industrial psychologist is new evidence and cannot now form part of the trial proceedings as the plaintiff closed its case without presenting this evidence.

[26] I agree with this assertion as same cannot form part of evidence after the case for the plaintiff had already been closed on 7 June 2024. I will thus disregard the contents of the said report as parties, at the start of proceedings, indicated that they are willing and able to proceed with both claims and the quantum thereof. The costs relating to this report will thus be disallowed and will be for the plaintiff's own costs.

[27] In *Goodall v President Insurance Co Ltd*,¹⁰ the court said:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'¹¹

[28] This abovementioned case aptly illustrates the guesswork that judicial officers need to embark on when determining contingencies, having regard to relevant factors such as the appropriate age of majority and the life expectancy of the deceased, his projected retirement age being 65, but for the accident. I am of the view that it would be just and equitable to apply contingencies 5% / 10% with the minor's age of majority being the age of 18 years. This brings the total loss of support to an amount of R111 354.00.

[29] It is trite that costs follow the result and I am not persuaded to make a different order. Counsel for the defendant submitted that costs ought to be granted on scale C due to extensive preparation and the amount of labour involved being relatively high. The legal

¹⁰ *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W).

¹¹ *Ibid* at 392H-393A.

representative for the plaintiff requested that costs be awarded on scale A as the matter was not complicated and they should not be burdened with the costs of the industrial psychologist. In light of the submissions made and the elementary nature of the matter, costs will be awarded on a party and party scale A.

[30] In the result, the following order is made:

1. The first plaintiff's personal claim for loss of support is dismissed;
2. The defendant is liable 100% for the proven damages sustained by the second plaintiff in her representative capacity as biological mother and natural guardian of her minor son, R[...] P[...] M[...], arising from motor vehicle accident which occurred on 7 September 2019, which caused the death of one, N[...] T[...] R[...] in respect of the minor child's claim for loss of support
3. The defendant shall, in full and final settlement of the claim for loss of support, pay the second plaintiff a total of R111 354.00 (the capital amount) in relation to and in favour of R[...] P[...] M[...], the second plaintiff representing past and future loss of support;
4. Payment of the capital amount must be made into the plaintiffs' attorneys' trust account, the details of which are indicated in para 9 of this order. This payment shall be made within 180 (the due date) days from the date of this Order.
5. Interest on the capital amount shall be calculated at the prescribed statutory rate on the capital amount after 180 days have elapsed from the date of this Order.
6. The defendant shall pay the plaintiffs' taxed or agreed costs to date on the high court scale as between party and party, which costs shall include:
 - 6.1 The reasonable qualifying fees of Namir Waisberg of Actuary Consulting (report dated 4 May 2022); and
 - 6.2 Cost of counsel of the plaintiff on Scale A.
7. Defendant shall not be liable for the costs set out hereunder, including any costs associated with obtaining said reports:

7.1 Liesolette Badenhorst – Industrial Psychologist

8. Payments of the taxed or agreed costs reflected above shall be affected within 180 calendar days of agreement or taxation and shall likewise be affected by electronic transfer to the plaintiffs' attorneys' trust account, the details of which are indicated in para 8 of this Order. Should the said costs not be paid by the due date, the defendant will be liable for interest thereon at the prescribed statutory rate, as provided for in s 17(3)(a) of Act 56 of 1996.

9. The plaintiffs' attorneys' trust banking account details are as follows:

ACCOUNT HOLDER:	MGCOTYELWA KREWU INC
BRANCH:	FIRST NATIONAL BANK
BRANCH CODE:	250655
TYPE OF ACCOUNT:	CHEQUE ACCOUNT
ACCOUNT NUMBER:	6[...]
REFERENCE:	M[...]

MAJOSI AJ

Appearances:

For the Plaintiffs:	Adv. S. S. Khumalo
Instructed by:	Mgcotyelwa Krewu Inc c/o Seobe Attorneys Bloemfontein
For the Defendant:	Ms. J. Gouws
Instructed by:	State Attorney Bloemfontein