

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1553/2021P

In the matter between:

LULAMA FELICITY PRIMROSE KETH KUNENE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Nako AJ

Heard: 4 and 5 November 2024

Delivered: 6 December 2024

ORDER

The following order is granted:

The plaintiff's claim for loss of support is dismissed with costs.

JUDGMENT

NAKO AJ:

Introduction

[1] This is a claim for loss of support resulting from the death of Mphumeleli Edmund Nkosi ('the deceased'), who died in a motor vehicle collision on 27 August 2017. The plaintiff claims in her personal capacity as the life partner and/or customary law wife of the deceased.

[2] The deceased was married to someone else when he met the plaintiff, and that marriage was extant at the time of his passing.

[3] At the trial, the plaintiff testified in support of her claim and called two witnesses. Her first witness was Mr Siyabonga Simphiwe Kunene, the plaintiff's cousin, who is a practising attorney at Potgieter Kunene Xaba Attorneys ('the cousin'). Her second witness was Ms Maritha Patricia Thato Kunene, her mother ('the mother'). The defendant, while disputing that a relationship giving rise to a legal duty of support existed between the plaintiff and the deceased, did not call any witnesses.

The plaintiff's evidence

[4] The deceased and the plaintiff started a romantic relationship while she was a teacher at Tambolini School, Eskhawini in 1998.

[5] The deceased was married when this relationship started, and he worked as a magistrate at Nqutu and also had business interests.

[6] The plaintiff is a qualified teacher with a primary teacher's diploma and a Bachelor of Arts in Communication, obtained in 1996 from the University of Zululand.

[7] The deceased sent a lobolo delegation to the plaintiff's home on 4 November 2004 and after negotiations ensued, a sum of R20 000 was paid.

[8] The plaintiff had her first child with the deceased on 2[...] M[...] 2005. When this child was born, the plaintiff lived in her own flat that she had purchased in 2002.

[9] After the birth of their first child, the deceased bought a flat in which he 'lived' with the plaintiff, while the plaintiff's flat was leased out. The plaintiff's flat was eventually transferred to the deceased on the basis that the plaintiff was part of the

Nkosi family after the payment of lobolo. The evidence is not clear about when this transaction occurred, and no documentary evidence was provided at trial.

[10] The plaintiff had her second son on [...] J[...] 2007, and after his birth, the deceased thought that the flat that he had purchased for them was too small and he consequently bought a bigger house for the family to reside in. The plaintiff's mother was invited to come and live with the family so that the minor children could have a relationship with their grandmother.

[11] During the period that the plaintiff and the deceased lived together in the house purchased by the deceased, the plaintiff paid for rates, security services, and municipal services, as her contribution to the household.

[12] The plaintiff resigned from her employment as a teacher in 2010, after being instructed to do so by the deceased, to look after the children. She paid over her pension pay-out to the deceased for him to invest it. The plaintiff and the minor children were moved to Pietermaritzburg by the deceased in 2013, in search of good education for the minor children. They were both registered at St Charles College thereafter.

[13] The deceased paid for all the educational, medical, transport, and accommodation expenses of the plaintiff and the minor children. The deceased also gave the plaintiff a cash allowance of R6 000 per month, which he increased to R8 000 per month in 2014.

[14] In cross-examination, it was suggested to the plaintiff that the payment of R20 000 was not lobolo but a seduction fine, as the plaintiff was already pregnant with her first child when this payment was made. This was disputed by the plaintiff.

[15] It was suggested further that even if the payment was in fact lobolo, this did not make the plaintiff a customary law wife but rather constituted a promise to marry, as the other customary law requirements were not met. The plaintiff accepted that the other requirements were not met but persisted with the fact that they lived as husband and wife, even without those other requirements being met.

[16] It was also put to the plaintiff that the deceased actually lived with his wife and only visited the plaintiff and minor children during the weekends to keep contact with the minor children. The plaintiff insisted that the deceased intended to take her as his second wife and promised to marry her when he asked her to marry him in front of their friends and gave her an engagement ring.

[17] The plaintiff conceded that the deceased did not marry her, and that the marriage remained an unfulfilled promise in the 13 years after the lobolo was paid.

[18] It also emerged in cross-examination that the plaintiff was not aware if the first wife knew about the relationship she had with the deceased and that she was never introduced to the first wife's family.

[19] When challenged in cross-examination about being an outsider to the deceased's family, the plaintiff testified that she was known to the deceased's cousin who lived in Eswatini; the deceased's oldest son, not born of the first wife; and to the deceased's friends.

[20] The plaintiff was also challenged on the financial support that she stated that she received from the deceased, and it was contended that the support was intended for the minor children and her leaving her work was intended to ensure the security of the minor children. The plaintiff insisted that the support was also for her as a life partner and future second wife. The plaintiff added that the deceased did not want her returning to work, and even offered to pay her an amount equivalent to a teacher's salary so that she could continue to be a fulltime mother to the children.

The cousin's evidence

[21] The cousin testified that he was requested to take notes at the lobolo negotiations. He did not participate in the negotiations, as he was young. After counting the money paid, he handed it over to his aunt, together with the notes. He claimed that the lobolo paid was the total amount requested by the plaintiff's representatives. However, this was contradicted by the plaintiff's mother, as will be seen from a consideration of her evidence later.

[22] He learnt for the first time at the lobolo negotiations that the deceased was married and intended to make the plaintiff his second wife.

[23] He stated that he met the deceased at the plaintiff's house in Richards Bay on occasions and would also see him visit his cousin in Pietermaritzburg after she moved there.

[24] He referred to the deceased as his brother-in-law after the payment of lobolo because the acceptance of the lobolo made the deceased his brother-in-law. There was no celebration of a traditional ceremony after the lobolo payment.

[25] The deceased came to the plaintiff's residence on weekends and the cousin would interact with him during those visits. The deceased was the man of the house, buying groceries and being a father to his children and a man to his wife.

[26] During cross-examination, he testified that there were no discussions about whether the first wife had consented to the deceased having a second wife. The issue of the plaintiff's pregnancy also did not arise during the lobolo negotiations, and it would have been the first thing to be discussed if it was known.

[27] The cousin also conceded that there are other customs to be performed after lobolo negotiations to complete a customary marriage, which were not performed in the plaintiff's case. He, however, insisted that lobolo constitutes more than just an intention to marry.

The mother's evidence

[28] The mother testified that she knew the deceased as the plaintiff's husband, who had paid lobolo to have the plaintiff as his second wife.

[29] She was not aware that the deceased had a wife until he informed her that he intended to take the plaintiff as his second wife to build him his retirement home. The deceased gave this assurance because he had children from women other than his wife and he provided for them and ensured that they had a good education.

[30] During cross-examination, she testified that she was not aware of the plaintiff's pregnancy during the lobolo negotiations or that the deceased was married to someone else. When informed of the cousin's assertions that the deceased's delegation disclosed that he was married, she claimed that such things do not get disclosed to the mother of the woman for whom lobolo is being paid.

[31] The mother also conceded that lobolo indicates an intention to marry and does not, without more, complete a customary marriage. She conceded further that there were no other traditional celebrations held to conclude a customary marriage.

[32] The mother explained that the marriage did not take place because the deceased had other financial commitments and did not send his delegation back to complete the lobolo negotiations and pay the outstanding amount. This is the aspect of her evidence that contradicts the cousin's evidence, as according to her, the lobolo negotiations were not finalised as there were still outstanding amounts to be negotiated. The mother even ventured an explanation that the deceased was waiting to retire so that he could use his pension to pay the rest of the lobolo that was still to be negotiated but stressed that the deceased still intended to marry the plaintiff.

[33] The mother also testified that the plaintiff has been trying to obtain employment but has not been successful. This corroborated the plaintiff's evidence, who had also indicated that her age has become a challenge in securing employment.

[34] The plaintiff then closed her case, whereafter the defendant closed its case without calling any witnesses.

The law and analysis

[35] The plaintiff is entitled to bring a loss of support claim if she can prove all the elements of such claim. Corbett JA held in *Evins v Shield Insurance Co Ltd* that:¹
 '... in the case of an action for damages for loss of support, the basic ingredients of the plaintiff's cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant *culpa* (or *dolus*) on the part of the defendant, (c) a legal right

¹ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839A-C.

to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) *damnum*, in the sense of a real deprivation of anticipated support. The *facta probanda* would relate to these matters and no cause of action would arise until they had all occurred.'

[36] The defendant conceded 100% liability for the death of the deceased, thereby dispensing with the need to prove elements (a) and (b) listed in the paragraph above.

[37] The issue in dispute is element (c), namely, a legal right to support. In relation to a legal right to be supported by the deceased, the plaintiff relied on the existence of a customary marriage and/or her common law wife status, which she avers vested in her before the death of the deceased.

[38] The plaintiff had to prove that the marriage met the requirements set out in section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 ('the Act') and that the deceased was in fact also competent to enter into such a marriage.

[39] The Supreme Court of Appeal in *Mbungela and another v Mkabi and others* held that:²

'... the ritual of handing-over of a bride is simply a means of introducing a bride to her new family and signifies the start of the marital consortium.'

It was further held that it need not be a formal ceremony and that:

'... proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection or showed disapproval...'.³

[40] The SCA concluded that:

'The purpose of the ceremony of the handing-over of a bride is to mark the beginning of a couple's customary marriage and to introduce the bride to the groom's family. It is an important but not necessarily a key determinant of a valid customary marriage.'⁴

² *Mbungela and another v Mkabi and others* [2019] ZASCA 134; 2020 (1) SA 41 (SCA) (*Mbungela*) para 25.

³ *Ibid*.

⁴ *Ibid* para 30.

[41] Similarly, in *Mankayi v Minister of Home Affairs and others*,⁵ Mngadi J held that: 'An agreement on lobolo and staying together of the bride and bridegroom as husband and wife with knowledge of her people means the existence of a customary marriage. In those circumstances, the failure to formally hand over the bride or to celebrate the union are of no consequence. Lobolo signifies the transfer to and acceptance of the bride by the family she is marrying to ... Some traditional community (sic), after an agreement on lobolo and part payment thereof, slaughter a beast celebrating the event, which effectively recognises the bride and the bridegroom as husband and wife. The other customs and rituals relating to the customary marriage including its celebration may remain outstanding.'

[42] *Mankayi* was quoted with approval by E Bezuidenhout J in *Nduli v Minister of Home Affairs and others*.⁶ E Bezuidenhout J concluded that:⁷

'...the fact that a bride was not formally handed over to the bridegroom's family or to the bridegroom himself for that matter, is not an impediment to a valid customary marriage *and* further that by living together as husband and wife, the applicant and deceased had clearly concluded their customary marriage. This also takes into account the evolving nature of customary law and how certain elements are influenced by changing social and economic conditions.' (Footnotes omitted.)

[43] It is accepted that the elements listed in section 3(1) of the Act must all be present for a customary marriage to exist. In *MM v MN and another*,⁸ the Constitutional Court added that the first wife's rights to equality and human dignity are not compatible with allowing her husband to marry another woman without her consent.⁹ The court held further that:¹⁰

'...a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage.'

[44] The Constitutional Court then concluded that:¹¹

⁵ *Mankayi v Minister of Home Affairs and others* [2021] ZAKZPHC 43 para 28 (*Mankayi*).

⁶ *Nduli v Minister of Home Affairs and others* [2023] ZAKZPHC 24 para 45, 46 and 60.

⁷ *Ibid* para 60.

⁸ *MM v MN and another* [2013] ZACC 14; 2013 (4) SA 415 (CC) (*MM v MN*).

⁹ *Ibid* para 71.

¹⁰ *Ibid* para 73.

¹¹ *Ibid* para 76.

‘When s 3(1)(b) thus speaks of customary-law marriages, it necessarily speaks of marriages in accordance with human dignity and fundamental equality rights upon which our Constitution is based. It is no answer to state that the definitions of customary law and customary marriages in the Recognition Act do not expressly state this. Those definitions must be read together with the Constitution and this Court’s jurisprudence.’

[45] While *MM v MN* involved Tsonga customary law, it is clear that the pronouncement that section 3(1) of the Act speaks to marriages being concluded in accordance with human dignity, refers to all marriages under this section. The reference to section 6 of the Act affording full status and capacity to a wife in a customary union¹² applies to all the women in customary marriages, and as such, the principles enunciated in this case apply to all customary marriages. This is especially so if regard is had to the finding by the Constitutional Court that¹³

‘...that the consent of the first wife is a necessary dignity-and-equality component of a further customary marriage in terms of s 3(1)(b) of the Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained...’.

This is to be read with paragraph 7 of the Constitutional Court’s order, which directed the registrar to ensure that the judgment and the summary of the judgment was sent to Houses of Traditional Leaders and the Minister of Home Affairs for distribution.

[46] Lastly, section 10(4) of the Act provides that:

‘No spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage’.

[47] Applying the law to the facts of this case, it is clear that the deceased was, in fact, married to someone else. In the opening address by the plaintiff’s legal representative, it was alleged that the deceased’s first marriage was also by customary law and as such, he was competent to enter into a further customary marriage. This point, however, was not pursued in evidence. To the contrary, it emerged that the plaintiff knows very little, if anything, about the first wife for someone who was to be taken as a second wife and who was to form part of the larger family of the deceased.

¹² Ibid para 78.

¹³ Ibid para 85.

[48] Furthermore, while the plaintiff was able to demonstrate that there was payment of lobolo, it is clear that no other ceremony was performed. There was no celebration of the union. The plaintiff and the deceased did not live as husband and wife: the plaintiff lived with the children and the deceased would be with them during weekends and some planned holidays. Unlike in the various cases referred to above, while there was no formal handover, there was also no waiver of other traditional ceremonies. The plaintiff was waiting on the promised marriage, while the deceased continued to live with his wife.

[49] A further demonstration that there was no waiver of other traditional ceremonies was the fact that the plaintiff's mother was expecting the deceased's delegation to return to conclude lobolo negotiations so that the plaintiff could become the second wife. Absent the existence of the first marriage and if the plaintiff and the deceased had in fact lived together as husband and wife, perhaps a customary marriage would have existed.

[50] It is unavoidable to conclude that, on the facts of this case, there was no customary marriage in existence at the time of the passing of the deceased. The deceased was, in fact, not competent to enter into a further customary law marriage as he did not seek the permission of his first wife, if they were in a customary law marriage, or because he was already in a civil marriage, if his first marriage was in terms of the Marriage Act 25 of 1961.

[51] Perhaps realising that the compulsory requirements for a customary marriage were not met in her case, the plaintiff also argued that the relationship she had with the deceased was a life partnership, or alternatively that she was the deceased's common law wife because they lived together as husband and wife while the deceased provided all the financial support.

[52] The plaintiff, relying on *Paixão and another v Road Accident Fund*¹⁴ and *Jacobs v Road Accident Fund*,¹⁵ claimed that her relationship falls to be recognised and that the deceased had a legally enforceable duty to support her as they were in a relationship akin to a marriage.

[53] The question to be answered then, failing a customary law marriage, is whether the plaintiff was in a legally recognised relationship with the deceased, resulting in the defendant being obliged to assume that duty after conceding liability for the death of the deceased. Put differently: do the facts of this case establish a legally enforceable duty of support arising out of a relationship akin to a marriage, as contended by the plaintiff?

[54] With regard to the cases relied upon by the plaintiff, the first case, *Paixão*, is distinguishable in that the parties in that case lived together, the surviving partner was known to the family of the deceased, the deceased had divorced his first wife both in South African law and in Portuguese law, and finally, the parties had, in fact, set a wedding date. Moreover, the surviving spouse was able to demonstrate the reciprocal support that she shared with the deceased, including executing a joint will in which the parties nominated each other as sole and universal heirs of their estates. Based on these facts, the Supreme Court of Appeal found that their relationship was akin to a marriage, giving rise to a legal duty of support.

[55] The plaintiff, realising that the fact that the deceased was in fact married posed an obstacle, then sought to rely on *Jacobs* for the proposition that the duty of support was extended to a partner of a married deceased person. In *Jacobs*, the deceased person was responsible for all the plaintiff's needs and those of her children: she did not contribute financially to their relationship, and they were together for a period of six years. The court ultimately found that the plaintiff in that case was owed a duty of support by the Road Accident Fund.

¹⁴ *Paixão and another v Road Accident Fund* [2012] ZASCA 130; 2012 (6) SA 377 (SCA) (*Paixão*).

¹⁵ *Jacobs v Road Accident Fund* 2019 (2) SA 275 (GP) (*Jacobs*).

[56] Again, *Jacobs* is distinguishable from the current matter. The deceased in that case had left his wife and resided exclusively with the plaintiff, had filed for divorce, and a wedding date was agreed to, conditional upon the divorce being finalised before that date. The intention to enter into a formal marriage relationship was clear in both *Paixão* and *Jacobs*.

[57] The plaintiff in the current matter and the deceased never entered into an express agreement to constitute a universal partnership. The deceased was a married man, and this fact was known to the plaintiff before he purported to pay lobolo for her. The plaintiff was aware that they were not in an exclusive relationship, as the deceased maintained the relationship with his wife and resided with her during the week. The plaintiff was also aware that the deceased had fathered other children outside the marriage before she had children with him. The deceased had no intention of leaving his wife for the plaintiff but allegedly intended to take her as his second wife.

[58] With the knowledge of these facts, the plaintiff invites the court to find that the relationship she shared with the deceased is not *contra boni mores* and ought to give rise to a legal duty of support on the premise that the deceased supported her. The plaintiff contends that the recognition of her claim does not in any manner demean the institution of marriage but rather recognises cohabitation outside a formal marriage.

[59] The defendant also relied heavily on the principles set out in *Paixão* in defending the plaintiff's claim. The defendant argued that the plaintiff failed to prove a life partnership and that the reliance on the payment of lobolo is misplaced, as it is no more than an intention to marry, which would not have been realised in any event.

[60] The defendant argued that proving the existence of a life partnership entails more than showing that the parties cohabited jointly and contributed to the upkeep of the common home, as set out in *Paixão*. In this regard, Cachalia JA held that:¹⁶
 'It entails, in my view, demonstrating that the partnership was 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

¹⁶ *Paixão* para 29.

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.’ (Footnote omitted.)

[61] The plaintiff demonstrated that there was indeed a relationship between herself and the deceased, which entailed partial cohabitation and a contribution from the deceased to the upkeep of the plaintiff’s home. These types of contributions between the deceased and the plaintiff were characterised by Mokgohloa DJP in *T obo Minor v Road Accident Fund*¹⁷ as normal and ordinary support in love relationships.

[62] Mossop AJ (as he then was) concluded in *Magwaza v Ndoora and others*¹⁸ that the essence of the concept of ‘universal partnership is an agreement about joint effort and the pooling of risk and reward’. The characteristics of a relationship, which did no more than indicate a level of intimacy between a plaintiff and her deceased partner, were differentiated from those that proved the existence of a life partnership.¹⁹

[63] In examining the question of whether the plaintiff’s right to claim support from the defendant, on the facts of this case, is *contra boni mores* or not, I can do no better than quote the following from Cachalia JA:²⁰

‘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

¹⁷ *T obo Minor v Road Accident Fund* [2017] ZALMPPHC 13 para 23.

¹⁸ *Magwaza v Ndoora and others* [2021] ZAKZPHC 96 para 16.

¹⁹ *Ibid* para 29.

²⁰ *Paixão* para 13.

and to modern conditions.’ (Footnotes omitted.)

[64] Clearly the plaintiff was in an intimate relationship with the deceased but the unfulfilled promise of marriage over a period of 13 years, coupled with the clear separation in asset ownership and the extant marriage of the deceased to his first wife, are indicative that this relationship was no more than a love relationship, encompassing financial support from the deceased to the plaintiff to ensure that she was available to look after the minor children.

[65] It is difficult in the circumstances of the plaintiff’s relationship with the deceased to conclude that had the deceased terminated the voluntary support to the plaintiff, she would have been able to claim same from him. The law, as it stands, entitles a person to claim from the Road Accident Fund what they are legally entitled to. This relationship was not akin to a marriage, and as such, the duty of support does not arise.

[66] The flexibility of the norms of society would be bent a notch too far if the plaintiff’s and the deceased’s social irresponsibility were to be acknowledged as a category of relationship that could give rise to a duty of support. This is so because the route of customary law marriage was open to them and yet not fully explored, given the failure to include the plaintiff in the larger family unit, including that of the first wife.

Costs

[67] The general principle is that costs follow the result. While the court retains a discretion in relation to costs, such discretion is to be exercised judiciously. The plaintiff claimed maintenance from the estate and her claim failed on the grounds that she was not married to the deceased or in a relationship that entitled her to maintenance. Similarly, the plaintiff did not inherit from the deceased’s estate on the same basis and yet, she approached this court knowing that her claim to be the customary law wife and/or life partner of the deceased was baseless.

[68] The defendant should not have been put to the expense of defending this claim and as such should be recompensed.

Order

[69] In the circumstances, I make the following order:

The plaintiff's claim for loss of support is dismissed with costs.

NAKO AJ

Appearances

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