

9098/07-C SLATER

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JUDGMENT

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WITWATERSRAND LOCAL DIVISION)**  
**JOHANNESBURG**

CASE NO: 9098/07

DATE: 2008-10-10

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	
DATE <u>3/2/2009</u>	SIGNATURE <u>[Signature]</u>

10 In the matter between

**RITA SIBANDA**

Plaintiff

And

**THE ROAD ACCIDENT FUND**

Defendant

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**J U D G M E N T**

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HORN, J: The plaintiff and the deceased, Ndidi Mangweni, lived together prior to the motor vehicle collision which occurred on 20 September 2003 in which collision the deceased died as a result of injuries sustained.

At the time of the collision, the plaintiff was expecting a child fathered by the deceased which child was born on 6 May 2004. They had never married. When the matter came before me, I was advised that the merits had been conceded by the defendant and the

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defendant's liability to compensate the plaintiff for loss of support in respect of the minor child was not in issue.

The issues which I was asked to adjudicate upon were the following:

1. Had the accident not occurred, would the plaintiff and the deceased have married?
2. If they would have married when, on the probabilities, would the marriage have taken place?
3. If it was found that the plaintiff and deceased would have married, would such a marriage have given rise to a legal duty of support by the deceased of the plaintiff?
4. If the questions posed in one and three above were in the affirmative, would the defendant be obliged to compensate the plaintiff for loss of the deceased's support?

What it in essence amounts to is whether the defendant would be

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obliged to compensate a woman whose live-in partner had been killed in a motor vehicle collision. Mr Saner, who appeared on behalf of the plaintiff argued that in law, the plaintiff had a claim against the defendant for loss of support by virtue of the fact that the plaintiff and the deceased were engaged to be married in December 2003/January 2004. By virtue of the negligence of the insured driver, which caused the death of the deceased on 20 September 2003, the parties could not marry and the plaintiff was therefore entitled in accordance with aquilian principles to be placed in a position where she would have been, had the deceased not died in the collision. Had the collision not occurred,

so Mr Sadar argued, the parties would have married in December 2003/January 2004 and the plaintiff would have been entitled to claim loss of support as the wife of the deceased. This right the plaintiff has been deprived of by reason of the negligent conduct of the defendant.

It has long been an accepted principle in our law that, a wife whose husband is killed by reason of the negligent act of another has a claim against the wrong doer for the loss of support she would have been entitled to receive from her husband. The claim of the spouse arises from the duty of support that was owed her by her husband  
10 by virtue of the marriage. See *Milns v Protea Assurance Co Ltd*, 1978 (3) SA 1006 (C) 1011H. It is therefore generally speaking the existence of a marriage which entitles the spouse to claim loss of support from the fund. One will have to look at the purpose of the legislature in enacting the Road Accident Fund, Act 56 of 1956 (the Act) and whether it was intended to extent such claims for loss of support to the situation where the man and woman were not married at the time of the man's death.

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The Act was created to compensate people who sustained damages by virtue of injuries sustained in motor vehicle collisions. It  
20 serves therefore as a kind of third party insurance against the risk of injury in the case of a motor vehicle collision in respect whereof a plaintiff has suffered damages. Consequently from a common law point of view, the compensation extended to a plaintiff who was entitled to receive support from the person who had been killed in a motor vehicle collision. The entitlement of such a person to receive compensation

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due to loss of support was based on a duty to provide such support by the person who was killed. Such a duty would have arisen by virtue of a marriage. Without the parties being legally married at the time of the death of the deceased, no such duty arises. Such a duty to support has been extended to traditional Muslim marriages. See *Amod v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality)*, 1999 (4) SA 1319 (SCA).

The fact of the matter is that a claimant for loss of support resulting from the unlawful killing of a deceased must establish that the  
10 deceased had a duty to support the claimant during his lifetime. So for example, a woman who was divorced from her husband prior to the death of the former husband and who was entitled to support by virtue of a maintenance order against the deceased, i.e. the former husband, could be accommodated within the parameters of a claim for loss of support in accordance with the common law because the deceased had a duty in terms of a court order to pay maintenance to his former wife.  
~~*Santam Beperk v Henery*, 1999 (3) SA 421 (SCA) 425H.~~ In other words, the duty of support continued after the termination of the marriage by virtue of a legal duty imposed on the former husband in terms of an  
20 existing maintenance order. Therefore, for the purpose of a claim for loss of support in terms of the Act, a prerequisite is the existence, at the time of the death of the person who provided the support of a duty to support. A mere spes that such a duty may arise in the future when the parties were expected to be married, is in my view not sufficient to found a claim for loss of support in terms of the Act.

The test is therefore not so much whether the plaintiff and the deceased in the present matter would or would not have married but whether at the time of his death there was a legal duty on the deceased to support the plaintiff. The answer to this question is clearly in the negative. Marriage is not the only criterion to establish such a duty. In *Du Plessis v Road Accident Fund*, 2004 (1) SA 359, such a duty was found to exist in a permanent same sex relationship where it was proved that a contractual obligation rested on the deceased to support the plaintiff. The permanency of the relationship did not create the legal  
10 duty of support but the undertaking by the deceased during his lifetime to continue to support the plaintiff after the latter was medically boarded.

Cloete JA at page 375 paragraph 16 found as a fact,:

*"The plaintiff proved that the deceased undertook to support him with the intention of being legally bound by such an undertaking. The deceased therefore owed the plaintiff a contractual duty of support."*

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~~Cloete JA expressly left open the question whether the dependence~~  
action should be extended to unmarried couples in a heterosexual relationship.

20 The plaintiff in the present matter proved no such undertaking on the part of the deceased. Indeed, in my view, she failed to prove that there was any duty on the deceased to support her. The mere fact that the plaintiff and deceased were engaged to be married in December 2003/January 2004, does not assist the plaintiff. An agreement to be married sometime in the future, notwithstanding the permanency of the

relationship, in my view, does not equate with a duty of support. If that was the case, it could literally open the floodgates, so to speak, of plaintiffs claiming from the fund large sums of money under the guise of loss of support claims. As an institution which has been created for the public benefit and which is financed by means of public funds, the proliferation of such claims would become uncontrollable, could decimate the fund financially and give rise to unnecessary litigation. In my view it would be detrimental to the fund and would not be in the public interest to allow claims for loss of support based on such tenuous

10 grounds. The situation is exacerbated by the fact that the evidence of the prospective plaintiff's in such cases would almost, without exception, stand alone and it would be difficult if not impossible for the defendant to refute a plaintiff's evidence regarding the relationship and its status. The system would be open to abuse.

In any event, from the evidence, it is clear that the plaintiff was well able to support herself. On her own evidence she earned

~~substantially more than the deceased. She holds a good position and~~

earns a reasonable income. The plaintiff simply has not proved that she was either in need of support or that there was a legal duty on the

20 deceased to support her. It is apparent that the plaintiff and deceased commenced living together during mid-2002 and continued living together until the deceased's death on 20 September 2003. A child was conceived during this period and the plaintiff gave birth to the child on 6 May 2004. The duty to support the minor child is not disputed and the

defendant has indicated that it has no objection in having to pay for loss of support in respect of the child.

What is in issue is the question whether the defendant should be ordered to pay loss of support which the plaintiff claims for herself. The plaintiff stated in evidence that it was her and the deceased's intention to get married. When they decided to live together, the deceased moved in with the plaintiff. This situation is no different to possibly thousands of similar relationships where young people decide to live together in similar circumstances. It is inconceivable, and in my view, 10 irrational for these relationships to be elevated to quasi-marriages so as to enable an unmarried woman in those circumstances to claim loss of support where her live-in partner had been killed in a motor vehicle collision. Perhaps there may be exceptional circumstances which may give rise to such a duty. Whether there are such exceptional circumstances will depend on the facts of each particular case. There are, in my view, no exceptional circumstances in the present matter.

It is so that where a man and a woman become engaged to be married, certain reciprocal duties arise one of which is that where one of the parties breach the agreement to marry without good cause, it can 20 give rise to an action in contract. But that alone cannot create a duty of support for the purpose of a claim for loss of support in terms of the Act. The agreement to marry and the rights and obligations stemming from it, may form the bases of reciprocal rights and duties based on contract, that is, based on the agreement to marry, but it can have no bearing on a claim against the fund in terms of the Act. Therefore, although on the

evidence of the plaintiff it must be accepted that the parties would in all probability have married had the deceased not been killed in the collision, that alone did not give rise to a legal duty to support the plaintiff for the purposes of a claim for loss of support in terms of the Act.

Consequently I conclude that the plaintiff cannot succeed with her claim for loss of support by virtue of the death of the deceased in the motor vehicle collision and that that claim must be excluded from the total amount claimed.

10        Insofar as the costs of the trial are concerned, I am satisfied that the plaintiff will be entitled to the costs of the first day of trial and the defendant will be entitled to the costs of the second day of trial. I am not prepared to order that counsel for the plaintiff be reimbursed for his travelling expenses.

In the result, I make the following order:

1. The defendant having conceded the merits, the plaintiff shall  
be entitled to recover 100% of such loss of support on behalf  
of the minor child, Ndita Mangweni, as the plaintiff is able to  
prove at a hearing in due course.
- 20        2. The question of the quantum of such support referred to in  
paragraph 1 above is postponed *sine die*.
3. The defendant shall pay the costs of suit save that the  
defendant shall be entitled to the cost of the second day of  
trial on 8 October 2008.



4. The plaintiff's costs shall include the qualifying fees of  
Mr Francois Wilders and Dr Dan Steyn.
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