

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION

CASE NO: 2013/03860

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
_____ DATE	_____ SIGNATURE

In the matter between:

ZENOBIJA NATASHA ENGELA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE J:

[1] This is an action in which the Plaintiff sues the Defendant for damages for loss of support sustained by her two sons, Tiago Barreiro De Villiers (hereinafter “Tiago”)

and Orson Jason Engela (hereinafter “Orson”), as a result of the death of Gerald James Engela (hereinafter “the deceased”) who was involved in a motor vehicle collision on 18 March 2011 and later died because of injuries suffered during the crash on 30 March 2011.

- [2] It having been agreed that the deceased at the time of his death owed a legal duty of support to Orson, the only issue for determination is to decide whether or not the deceased who was not the biological father of Tiago owed him such duty of support at the time of his death on 30 March 2011. Put differently, does the legal principle founded in **Piaxão and Another v Road Accident Fund** 2012 (6) SA 377 (SCA) find application in this matter?
- [3] When the matter served before this court, the Defendant had conceded merits and had agreed to be 100% liable for the Plaintiff’s proven damages. In addition to that arrangement, the parties also confirmed that calculation of the figures was not in dispute. Thus, depending on the finding of this court, the award will either be in respect of both minor children or for the one minor child alone.
- [4] To put the matter in its proper perspective, it is important to give an account of the background facts, which are largely common cause. The deceased and the Plaintiff met in 2004 and married two years later on 11 March 2006. In or around March 2010, they divorced and the deceased moved out for a month to live with his mother. The divorce decree provided for a maintenance order of Orson in the amount of R1 500.00 per month to the exclusion of the Plaintiff and Tiago.

- [5] The Plaintiff came into the marriage with an illegitimate child, Tiago, who was born on 24 October 2001. The Plaintiff and Tiago lived together with the deceased until their short-lived separation after divorce in 2010. On 12 February 2008, Orson was born of the parties' marriage.
- [6] After their monthlong separation, the Plaintiff and the deceased reconciled. They, together with both minor children, resumed their stay under the same roof until the deceased's death on 30 March 2011. During their second stay together, there existed no express arrangement between the deceased and the Plaintiff that the former would support the plaintiff and Tiago.
- [7] The deceased and the Plaintiff nonetheless arranged to live as a family without entering into another marriage relationship. While they were living together as husband and wife, no thought was ever given to what would transpire in the event of a recurrence of problems in their future relationship.
- [8] The evidence of the Plaintiff did not depart much from the above common cause facts. Her cross-examination did not accomplish or achieve anything of significance that can sway the outcome hereof one way or the other. That said, it is indubitable that The **Paixão** case *supra* has advanced the common law such that the dependants' action now encompasses permanent heterosexual relationships.

[9] The Defendant has contended that while the legal principle established by the **Paixão** case *supra* is clear, the facts in this instant case are distinguishable. Accordingly, Counsel for the Defendant implored this court not to extend the principle to apply here. The Defendant sought to make a distinction between this case and the **Paixão** case *supra* on the following basis:

9.1 In the four years during which the plaintiff and the deceased were married, they did not expressly or tacitly agree that the deceased would support Tiago beyond dissolution of their marriage, whether by death or otherwise. If there was such an agreement, so argued the Defendant, it would be anomalous why this was not assimilated into the Divorce Order;

9.2 The Plaintiff's claim that she and the Plaintiff together with the minor children lived as a family is not supported by other independent facts as was the case in the Piaxao case. In this regard the Defendant pointed out to the fact that there was no joint will drawn up as was the case in **Paixão**;

9.3 It should be inferred from the divorce of the Plaintiff and the deceased that they intentionally chose not to be bound by the thrills and frills of the marriage relationship, including the reciprocal duty of support;

9.4 There is no evidence that the deceased tacitly accepted that he and / or his estate would continue to support Tiago beyond any possible

termination of their marriage. As a matter of fact, there is no evidence that they ever gave this eventuality any thought. However, if anything, the contrary is true as it is known that on a previous occasion when the deceased was getting divorced from the plaintiff, he did not offer to continue to support Tiago.

[10] The Plaintiff has fervently asserted that the agreed facts and the totality of the evidence tendered demonstrate that she has successfully discharged the onus of proving on a balance of probabilities that there existed a tacit agreement to support Tiago. Such an agreement, maintains the Plaintiff, can be inferred from the surrounding circumstances and the conduct of the parties creating a binding contractual obligation upon the deceased to support and maintain Tiago, which he in fact did during his lifetime.

[11] There are apparent differences between the facts of the **Paixão** case and the case in *casu*. For example, the parties specifically agreed not to conclude another marriage relationship when they reconciled but nonetheless committed to live together as the deceased thought a marriage certificate was worthless anyway. In the **Paixão** case, the converse is true in that the deceased promised to enter into a marriage relationship as soon as he had divorced from his wife. The parties in **Paixão** case drew a joint will whereas those in the current case did not.

[12] Underlying the agreements in both these cases 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. From the deceased and the Plaintiff's marriage in 2006 emerged the latter's commitment to support and treat Tiago as his own child. That commitment, in my opinion, is not different to his promise to look after the family, Tiago included, post the divorce.

[13] By agreeing to reconcile with the deceased and to resume the life that they led prior to their separation, the Plaintiff also committed to be bound by the terms and conditions that governed their relationship before the divorce being that of the support of house wife to her husband. The relationship that ensued was unquestionably akin to marriage. There existed therefore reciprocal undertakings to support each other between the parties. Contrary to the Defendant's belief, it can be inferred that the plaintiff and the defendant opted to be bound by the 'thrills and frills' of the marriage relationship albeit without a marriage certificate.

[14] I agree that the **Paixão** case is no precedent of the assertion that the duty of support will only arise under circumstances where the deceased has during his lifetime made an undertaking to support an illegitimate child beyond the dissolution of a marriage. Thus, the non-existence of such an agreement should not affect the deceased's legal duty to financially support Tiago.

[15] In the result, the facts presented warrant a conclusion that there existed a tacit agreement that the deceased would support Tiago as his own child. Accordingly, the Plaintiff has, on a balance of probabilities demonstrated that the deceased owed Tiago a legal duty of support as at the date of his demise. The development

of the common law to extend the dependants' action to cover permanent, heterosexual relationships is therefore applicable to this case.

[16] Against that background, I make the following order:

1. The Defendant is to pay to the Plaintiff, in her representative capacity as mother and natural guardian of Tiago and Orson, an amount of R1 258 293.00 made up as follows:

- 1.1 R799 894.00 for Orson; and

- 1.2 R458 399.00 for Tiago.

- 1.3 Defendant to pay the costs of the Plaintiff including those of senior counsel.

B. A. MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Adv Chaitowitz SC
Instructed by: De Broglia Inc

Counsel for the Defendant: Mr L. Adams (Attorney)
Instructed by: Lindsay Keller Attorneys

Trial proceedings took place on 15 June 2015
Date of delivery of Judgment: