

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

Case Number: **2014/40055**

23 April 2025

DATE

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SIGNATURE

In the matter between:

CATHERINE MARIA LETAOANA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

FLYNOTE / SLEUTELWOORDE

Claim for loss of support – customary marriage – conclusion of customary marriage in accordance with section 3 of the Recognition of Customary Marriages Act proven, not disputed by the RAF, and duty to support established.

Customary marriage – alleged invalidity to be specifically raised in plea – issue of validity of customary marriage to be raised in plea by way of a confession and avoidance – impermissible for RAF to generally deny existence of customary marriage in plea and then rely on alleged invalidity of marriage during trial – RAF in any event failing to lead evidence in support of alleged invalidity.

Agreement to support as alternative basis for duty to support – on the assumption that the customary marriage was invalid due to the existence of a prior civil marriage, plaintiff's alternative argument that the facts demonstrate a binding agreement to support as basis for a duty to support upheld.

HEADNOTE / KOPSTUK

In this action the plaintiff is claiming compensation from the RAF for loss of support, as a result of the death of her husband, who died as a result of injuries sustained in a motor vehicle collision. The plaintiff's case was that she was married to the deceased by way of customary marriage. The RAF generally denied the existence of the customary marriage, and the alleged duty of support.

The plaintiff testified that she met the deceased in 2007 and that they started to cohabitate in August 2007. The deceased, who was to be ordained as a priest in the church, informed the plaintiff that he was divorced from the mother of his children, a fact which she accepted. In terms of custom, they could not be introduced to their respective parents before lobolo had been negotiated and paid by the deceased. In 2010, after lobolo had been negotiated and paid, the customary marriage between them was celebrated at the plaintiff's parent's home and thereafter the plaintiff was also welcomed into the deceased's family home.

The deceased passed away in 2011 after the motor vehicle accident. At the funeral, the plaintiff was allowed to sit on the traditional widows' mattress, which signified the deceased's acceptance of the plaintiff as the deceased's widow. The deceased's previous wife also attended the funeral but was not allowed to sit on the mattress.

During the trial the RAF did not dispute the fact that a customary marriage was concluded but put to the plaintiff that at the time of the customary marriage a civil marriage between the deceased and his previous wife was extant, without putting to

the plaintiff that any specific defence was raised on that basis. Subsequently the RAF sought to argue that the customary marriage was invalid in terms of the Civil Union Act, 2006 due to the alleged existence of a prior civil marriage. However, the RAF led no evidence in support of its allegation that a civil marriage was in existence at the time of the conclusion of the customary marriage.

Held, that on the plaintiff's undisputed evidence a customary marriage was entered into between the plaintiff and the deceased in accordance with section 3 of the Recognition of Customary Marriages Act, 1998.

Held, that if the RAF wished to raise the invalidity of the customary marriage as a defence, it was obliged to plead a confession and avoidance and plead the facts on which the alleged invalidity was based. The RAF's approach during the cross-examination of the plaintiff to allege the existence of a prior civil marriage without having pleaded it, and without expressly putting to the plaintiff what the nature of the defence was, was impermissible. The relationship between the deceased and his previous wife commenced, and was potentially terminated, prior to the Recognition of Customary Marriages Act, 1998 and the Civil Union Act, 2006, and the continued existence of such marriage is a complicated issue that cannot be dealt with in the haphazard manner the RAF attempted to do.

Held, that the RAF in any event failed to adduce any evidence of the existence of a prior civil marriage at the time the customary marriage was entered into between the plaintiff and the deceased.

Held, on the assumption that the customary marriage was invalid due to the existence of a prior civil marriage, plaintiff's alternative argument that the facts demonstrate a binding agreement to support as basis for a duty to support must be upheld. The plaintiff's undisputed evidence supports the contention that even if the customary marriage was invalid, the deceased in any event undertook to support the plaintiff by purporting to enter into a customary marriage with her (after informing the plaintiff that he was divorced), and in fact supporting her until his death.

Held, as to the question whether the *boni mores* dictate that the agreement to support was invalid, evidence elicited during cross-examination revealed that the deceased's family was under the impression that the previous marriage was dissolved by divorce,

that there was no relationship between the deceased and his previous wife for about 20 years and the deceased's sister in raised the two children born from the previous marriage. Assuming the marriage to be invalid, the plaintiff was entirely *bona fide* in entering into what she evidently believed to be a valid customary marriage. The respective families regarded the parties as married. There was no moral turpitude on the part of the plaintiff and the *boni mores* do not require the support agreement to be invalid.

ORDER

- (1) It is declared that the defendant is liable to the plaintiff for the loss of support caused by the death of Samuel Mbhazima Chauke as a result of a motor vehicle accident that occurred on 5 February 2011;
- (2) The defendant is ordered to pay the plaintiff's costs in respect of the trial relating to the issue of loss of support, with the cost of counsel to be on Scale B; and
- (3) The matter is postponed *sine die* in respect of the quantum of the plaintiff's claim for loss of support.

JUDGMENT

D MARAIS AJ

The plaintiff's claim for loss of support

- [1] The plaintiff, Ms Catherine Maria Letaoana, instituted action against the defendant, the Road Accident Fund, for compensation in terms of the Road Accident Fund Act, Act 55 of 1996, in respect of past and future loss of support, and funeral expenses.
- [2] The claim arises from the death of Samuel Mbhazima Chauke ("the deceased") as a result of a motor vehicle collision that occurred on 5 February 2011. The plaintiff's claim for loss of support is based on the allegation that she was married to the deceased by customary law, and that she suffered loss of support, and incurred funeral expenses, as a result of his death.
- [3] By the time this matter was heard during October 2024, it had been agreed between the parties that the defendant was in principle liable as a result of the motor vehicle in question, but it remained in dispute whether the plaintiff was entitled to claim for loss of support.

The defendant's plea in relation to the claim for loss of support

- [4] In its plea, the defendant raised a "special plea" in relation to the plaintiff's allegation that she was the surviving spouse of the deceased, by alleging that the plaintiff failed to provide the defendant with documentary proof, proving that the plaintiff was indeed married to the deceased. The defendant also alleged that the plaintiff failed to provide the defendant with proof of the existence of a legal duty resting on the deceased to support the plaintiff and/or that a relationship existed between the plaintiff and the deceased which gave rise to a claim for loss

of support. The defendant proceeded to state that in the absence of such proof, the plaintiff lacked capacity to institute legal proceedings in her personal capacity. This purported defence ostensibly related to the validity of the claim that was submitted by the plaintiff prior to the institution of the action, but the basis of this special defence was not revealed. However, the defendant did not persist with this special plea.

- [5] In the defendant's main plea, the defendant generally denied the plaintiff's allegation in respect of her relationship with the deceased and put the plaintiff to the proof thereof.
- [6] At the commencement of the trial, the parties also agreed to separate the question whether the defendant is liable to the plaintiff in respect of loss of support from the question regarding the quantum of such claim. As a result, the court granted an order separating these issues.
- [7] Consequently, on the pleadings the dispute between the parties hinged solely on the question whether a customary marriage existed between the plaintiff and the deceased. At the commencement of the trial, the parties indeed informed the court that the existence of the marriage was the issue in dispute.

The plaintiff's evidence in support of the claim for loss of support

- [8] The only witness who testified in this trial was the plaintiff.
- [9] The plaintiff, a dignified and well-spoken lady was, at the time of the trial, 60 years of age, and gave evidence in a credible manner. She finished matric in 1984 and thereafter completed diplomas both in business management and human resources management. She was employed from 1985 to 2004 by a well-known firm of attorneys in Johannesburg as a Human Resources Consultant. She resigned to start a restaurant business with two other persons, which was eventually sold. Thereafter, she was not employed again as she found it difficult to find employment under circumstances where employers preferred to appoint younger persons in positions she applied for. The issue was that she was regarded as too experienced/qualified for the relevant positions.

- [10] The plaintiff testified that she met the deceased in 2007 at church. In August 2007 they decided to cohabitate. After the plaintiff and the deceased met, the deceased introduced the plaintiff to his sisters and cousins but, in accordance with Tsonga tradition, the deceased could only introduce the plaintiff to his mother after the deceased had paid lobola. Similarly, the deceased could not enter the plaintiff's parental residence in accordance with Tswana custom. He could only enter after the lobola negotiations were concluded and after payment of lobolo.
- [11] The plaintiff testified that on 27 March 2010 they celebrated the marriage at her parents' house. She went to the deceased's family's household in Malamulele during May 2010, and was welcomed into his family by his family members. At the deceased's funeral after the accident in 2011, the plaintiff was requested and allowed by the deceased's family to "sit on the mattress". This is in the context of the Tsonga tradition in terms of which the widow(s) of a deceased sits on a grass mat (or in modern times a mattress) until and / or at his funeral.
- [12] The deceased was employed, and earned a net amount of R11,000 per month, which he used to support himself and the plaintiff, and provided some cash to his mother. The deceased was maintaining the common home. Although the plaintiff through a side hustle erratically made a little bit of money, she was constrained by a lack of money to properly conduct a business. The deceased was the breadwinner in the house. She had nobody else but the deceased to support her.
- [13] The plaintiff met the deceased's children, two sons, in December 2010. At that time, they were approximately 19 and 22 years of age. She testified that there was no relationship between the deceased and his two sons and that they did not communicate with each other. The deceased was apparently strict and did not like the way his sons were behaving. On Boxing Day in 2010 they communicated through the plaintiff to the deceased that they needed some money, as they were scared of him. The eldest son, Thembani, was present during the wedding celebrations on 27 March 2010.
- [14] During cross-examination, defendant asked the plaintiff whether the deceased mentioned his son's mother. In response, the plaintiff testified that she asked the

deceased about his sons' mother and that the deceased informed her that he was divorced from her. The plaintiff trusted the deceased as he was a pastor in the Miracle Gospel Church in Rustenburg. He was ordained as such during 2008. Under cross-examination she testified that she did not ask when they were divorced.

[15] When the deceased was in hospital after the accident, the plaintiff received a telephone call from the hospital. She was informed by the hospital that one Mmaseporo Flora Manganyi telephoned the hospital. A hospital clerk put the plaintiff on a speaker, and she was able to speak to Ms Manganyi. Ms Manganyi turned out to be the deceased's former wife. The gist of this conversation was that Ms Manganyi was only interested in money. The inference can be drawn that Ms Manganyi was informed or assumed at that time that the deceased was going to die due to his injuries. Earlier Ms Manganyi allegedly made a comment to the hospital clerk that the plaintiff was there just for the money.

[16] Ms Manganyi was at the graveyard during the deceased's funeral, but the plaintiff did not meet her personally at that point in time. Evidently not being recognised as the deceased's widow, she did not sit on the mattress in accordance with the tradition.

[17] The defendant elicited during cross-examination that the plaintiff was informed by her sister-in-law that the deceased and Ms Manganyi were married a long time ago and that Ms Manganyi had been gone for 19 years. She also said that she (the sister-in-law) raised the deceased's sons. The deceased's uncle similarly said that they all (the deceased's family) thought the deceased was divorced.

[18] Subsequently, the deceased's employer telephoned the plaintiff and informed her that she was a beneficiary of certain policies held by the deceased. The plaintiff met Ms Manganyi at the employer's premises. The deceased's employer made a decision to pay 60% of the policy to the plaintiff and 40% to Ms Manganyi. The plaintiff requested that 5% be paid to the deceased's mother.

[19] The plaintiff testified that she remarried on 11 March 2024 by way of a civil union and that she and her elderly husband are now surviving on government grants.

Did the plaintiff's evidence support the conclusion of a customary marriage and a duty to support?

[20] The plaintiff's evidence that she and deceased decided to cohabit, that there were lobolo negotiations, that the deceased had paid lobolo, that the deceased was accepted into the plaintiff's parental home after payment of lobolo, that the marriage was celebrated at the plaintiff's parental home, that the plaintiff was also accepted into the deceased's family and that the plaintiff sat on the traditional widows' mattress before and during the deceased's funeral (to the exclusion of Ms Manganyi) was uncontroverted.

[21] During the trial the defendant did not dispute the fact that a customary marriage had been concluded between the plaintiff and the deceased.

[22] Consequently, I have no hesitation in finding that a customary marriage complying with the requirements of section 3 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) had been concluded.

[23] Non-registration of a customary marriage does not invalidate such marriage in terms of the RCMA.

[24] That should be the end of the matter and a finding in favour of the plaintiff should be made.

The impermissible line of defence adopted by the defendant during cross-examination.

[25] During cross-examination the defendant put it to the plaintiff that the deceased was previously married by way of a civil marriage. To this the plaintiff responded by testifying that in the deceased's death certificate (evidently issued by the Department of Home Affairs) it was stated that the deceased was "married".

[26] It was also put to the plaintiff that the deceased was still married, to which the plaintiff responded that she did not know. She only saw the word "married" on the death certificate.

- [27] The plaintiff was also asked also during cross-examination whether she had asked the deceased uncle about the previous marriage, to which she responded that the one uncle said that they thought that the deceased was divorced, and that the deceased's sister-in-law also said that she thought that the marriage was dissolved as the deceased previous wife had not been around for many years (according to previous evidence 19 years).
- [28] It was also put to the plaintiff that was Ms Manganyi was entitled to claim for loss of support, and not the plaintiff. To this the plaintiff responded that the defendant's investigators informed her that she was entitled to claim as they were having regard at who was staying with deceased at the time of his death.
- [29] During re-examination the plaintiff testified that she had no personal knowledge regarding any previous civil marriage between the deceased and anybody else and that she was informed that the deceased was divorced.
- [30] As indicated above, in respect of the alleged customary marriage the defendant raised a general denial. The purported special plea that the plaintiff failed to provide proof of the customary marriage to the defendant (prior to action being instituted), was not pursued.
- [31] Consequently, the only question to be decided in this matter on the pleadings is whether a customary marriage was concluded or not.
- [32] During cross-examination the defendant, whilst putting it to the plaintiff that the deceased was allegedly still married to by way of a civil marriage at the time of the customary marriage, the actual defence relied upon by the defendant was never revealed or put to the plaintiff.
- [33] If the defendant wished to raise the invalidity of the customary marriage as a defence, it should have done so by way of a confession and avoidance and should have pleaded the facts on which the defence was based. This is particularly so where on the undisputed evidence the deceased and Ms Manganyi were in a relationship since at least 1989 (their son was 22 in 2011). Where the RCMA only came in operation in November 2000 and the Civil Union Act 2006 in November 2006, the date and nature of the alleged previous

marriage is crucial to the inquiry into the status of the alleged previous marriage and the manner in which such marriage could have been dissolved, as well as the impact thereon on the customary marriage between the plaintiff and the deceased.

[34] Having regard to the complicated nature of the inquiry, if the defendant intended to attack the *validity* of the customary marriage, as opposed to its mere conclusion, it was not permissible for the defendant to resort to a general denial. It was imperative to plead the facts supporting the defence, and to the extent that the defendant wished to rely on certain statutory provisions, to plead reliance thereon.

[35] In written argument filed subsequently, the defendant sought to argue that the customary marriage was invalidated by the provisions of the Civil Union Act, which prohibits the conclusion of a customary marriage where there was a pre-existing civil marriage or civil union. This defence was never pleaded, nor put to the plaintiff in cross-examination.

[36] The defendant is simply not entitled to rely on such defence. The defence was not pleaded, nor was it fully ventilated during the trial.

[37] Furthermore, the defendant presented no evidence whatsoever in support of the defence raised in argument.

[38] The defendant argued that certain documentation was discovered by the defendant in terms of rule 35 which supports the defence. These alleged documents were never put to the plaintiff during cross-examination, nor did the defendant introduce the documents into evidence. These alleged documents are simply not before the court.

[39] Regarding the information contained in the death certificate, the purpose of a death certificate is not to certify a deceased's marital status at the time of death. The indication that the deceased was "married" is meaningless. All it does is to state that the deceased was married at some point in history, according to the records of the Department of Home Affairs. It does not reflect on the entire history of such marriage, for instance whether the marriage was dissolved by divorce,

or by the death of a spouse. It also does not indicate whether the marriage was by way of civil union or by customary law. In the premises, the content of the death certificate does not assist the defendant in this matter.

[40] The correctness of the records of the Department of Home Affairs depends on whether the parties ensured that a marriage or divorce is recorded in the records. On the available evidence the deceased divorced Ms Manganyi a long time ago. Having regard to the fact that the plaintiff and the deceased met each other in 2007, the alleged marriage between the deceased and Ms Manganyi may well have been concluded and dissolved before the RCMA and / or the Civil Union Act came into operation. If such marriage was a customary marriage, the dissolution thereof would be a matter of great complexity, which cannot be dealt with in a haphazard manner.

[41] Consequently, the Civil Union Act defence cannot succeed, even if it could be entertained.

The plaintiff's alternative argument

[42] As the defendant strayed beyond the scope of the pleadings, the plaintiff's attorneys, clearly out of abundance of caution, argued that on the facts of the matter the deceased agreed to support, and in fact supported, the plaintiff from the time they started to live together until his death. As such, it was argued that a duty of support was created by agreement.

[43] It is indeed beyond any doubt that the deceased had undertaken to support the plaintiff. The deceased concluded a customary marriage with the plaintiff, thereby undoubtedly undertaking to support her. If the customary marriage was technically invalid, for whatever reason, this does not detract from the fact that the deceased had undertaken to support the plaintiff.

[44] In *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), prior to the Civil Union Act 2006 coming into operation, the Supreme Court of Appeal held that where same-sex partners have established a reciprocal legal duty of support by way of a tacit agreement, that duty was worthy of protection and could form the basis of a claim for loss of support, but left open the question whether the

dependants' action should be extended generally to unmarried parties in heterosexual relationships or to any other relationships.

[45] In *Paixão and Another v Road Accident Fund* 2012 (6) SA 377 (SCA) the Supreme Court of Appeal indeed extended the common law duty to support to heterosexual persons who contractually undertook reciprocal duties of support to each other.

[46] In *Engela v Road Accident Fund* 2016 (1) SA 214 (GJ) the parties in heterosexual relationship reconciled after a divorce and again co-habitated. The deceased had undertaken a duty of support towards the “illegitimate” son of the female partner. They had not agreed to marry again. The court held that underlying the agreement entered into between the parties regulating the resumption of their relationship, was a mutual commitment to live together as a family. It was irrelevant whether or not such agreement was governed by a marriage certificate.

[47] On the assumption that the deceased was still married by way of a civil marriage by the time the customary marriage was concluded, which would have invalidated the customary marriage, both in terms of the Civil Union Act and section 10(4) of the RCMA, the facts of the present matter are somewhat different from the cases mentioned above. On the aforementioned assumption, the deceased was still married at the time of the undertaking to support the plaintiff and remained married.

[48] However, by parity of reasoning the principle remains the same; if the deceased had undertaken contractually to support the plaintiff, with whom he purportedly entered into a customary marriage, this clearly created a duty of support which the plaintiff is entitled to assert.

[49] In *Jacobs v Road Accident Fund* 2019 (2) SA 275 (GP) the facts were, however, similar to the present matter, in that the deceased was still married to another person at the time when he undertook to support the plaintiff. Collis J held that the plaintiff established an agreement to support and rejected the defendant's contention that the *boni mores* requires the rejection of a duty to support under circumstances where the deceased was married to another person.

[50] Collis J, whilst recognising the value of marriage in our society, held (*op.cit.* par [20]) as follows:

“In the present matter the evidence presented showed that the respective families of both the plaintiff and the deceased did not regard their cohabitation as opprobrious. Cohabitation outside a formal marriage, and dare I say, even where one of the parties is still married, is now widely practised and accepted by many communities, including our South African community. In the present matter, as already alluded to, the plaintiff and the deceased had taken the decision to get married and, shortly prior to his death, were even making plans for the actual wedding. Both parties for a period of six years prior thereto had undertaken reciprocal duties of support, with the deceased providing financially for the household.”

[51] I respectfully agree with the learned Judge in this regard that the *boni mores* do not dictate that a duty of support undertaken by a married person to another life-partner should necessarily be visited by invalidity. This does not mean that there may not be circumstances where the conduct of a plaintiff who claims the benefit of a duty of support was so opprobrious and harmful to other legitimate dependents of the deceased (for example exploiting a vulnerable person to the detriment of other legitimate dependants) that it justifies a finding that the arrangement was *contra bonos mores*.

[52] In the present matter there was no moral turpitude on the part of the plaintiff whatsoever. She met a man who was to be ordained as a pastor in the church. He assured her that he had been divorced. The evidence is that the deceased's family was under the impression that the deceased and his previous wife were divorced a long time ago, and that the deceased's previous wife had not been seen for about 19 years. The deceased's children with his previous wife were raised by his sister. The parties complied with traditional custom by refraining from introducing themselves to their respective families before lobola was paid, and thereafter the marriage was celebrated, and they were welcomed into each other's respective families. The plaintiff *bona fide* entered into the customary marriage with the deceased while having no reason to doubt their capacity to do so validly. Such was the plaintiff's acceptance into the family of the deceased that she was requested to sit exclusively on the traditional funeral mattress.

Clearly, the *boni mores* would not require the deceased's undertaking to support the plaintiff as part of a putative marriage (assuming the marriage to be invalid) to be invalidated. To the contrary, a finding of invalidity *in casu* would be a grave injustice.

[53] Consequently, to the extent necessary I agree with the plaintiff's alternative argument.

Costs

[54] The plaintiff was successful in establishing liability on the part of the defendant for loss of support. Although the quantum of such claim must be determined, on the evidence it is clear that the plaintiff has suffered damages and will succeed with her claim, whatever the amount.

[55] There is obviously the possibility that the quantum of the claim may be settled between the parties and that the matter will never go on trial on the issue of the quantum of the claim.

[56] Under the circumstances it would be preferable not to reserve the costs on the separated issue and it will be appropriate to order the defendant to pay the costs occasioned by the hearing on the issue of loss of support.

[57] The costs of the plaintiff's counsel shall be on scale B.

Order

In the circumstances the following order is granted:

- (1) It is declared that the defendant is liable to the plaintiff for the loss of support caused by the death of Samuel Mbhazima Chauke as a result of a motor vehicle accident that occurred on 5 February 2011;
- (2) The defendant is ordered to pay the plaintiff's costs in respect of the trial relating to the issue of loss of support, with the cost of counsel to be on Scale B; and

- (3) The matter is postponed *sine die* in respect of the quantum of the plaintiff's claim for loss of support.



DAWID MARAIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff

Adv RL Mashabathakga instructed by
Pitsi Lamola Inc Attorneys

For the Defendant

Adv J Mhlanga instructed by State
Attorney

Date of Hearing

11 October 2025

Date of Judgment

23 April 2025 ((after written arguments
were filed and the court having
requested further argument

