

REPUBLIC OF SOUTH AFRICA

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REPUBLIC OF SOUTH AFRICA
OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)
CASE NO: 72837/2014
DATE: 15 SEPTEMBER 2016
In the matter between

MOKULUPI SIMON SEOLESENG

First Plaintiff

MOGOLOSI OESLEY KASEBEDILE

Second Plaintiff

And

THE ROAD ACCIDENT FUND
JUDGMENT
Fourie AJ

Defendant

1. This is a claim for damages resulting from the death of Motlogomang Martha Kasebedile, who died in a motor vehicle collision that occurred on 22

December 2013. The first plaintiff claims in his personal capacity as well as in his capacity as father and guardian of G A K, a girl born on 27 May 2005. The second plaintiff is the son of the deceased only, but his claim did not serve before me.

2. I was informed by counsel that the issue of liability had been disposed of and that the defendant had agreed to compensate the first plaintiff for 100% of his proven or agreed damages in his personal and representative capacities. The parties had also agreed that the defendant pay an amount of R 24 100.00 in respect of funeral expenses.
3. The issues before me were whether the plaintiff has a claim for loss of support in his personal capacity, and the contingencies to be applied to the respective claims for loss of support.
4. The first plaintiff relied on the evidence of Mr G Whittaker of Algorithm Consultants and Actuaries, and the parties agreed to use this actuarial report as the basis for computing the first plaintiffs claims for loss of support. The parties further agreed that:
 - 4.1. The first plaintiffs claim in his personal capacity, should he be found to have a claim, be calculated on the basis that the first plaintiff received R 500.00 per month from the deceased and would have done so to age 60, (from when he will receive a State pension); and
 - 4.2. That the minor child would have been dependant until the age of 21.
5. The first plaintiff testified that he lived with the deceased as lovers from 2000 until her death in December 2013. They were not married and had one child together. The first plaintiff testified that the deceased commenced working as a domestic worker in 2005. The first plaintiff had piece-jobs until 2013 when he worked at a construction site for six months. He was laid off during September 2013. While employed, he contributed to the house-hold expenses. When the first plaintiff was not earning, the deceased gave him R

500.00 per month, and at the time of her death, the first plaintiff was again receiving R 500.00 per month from the deceased. He was unable to state whether the deceased would have continued to support him had she not passed away in December 2013. This aforesaid evidence was not disputed by the defendant. Presently his brothers and sisters give him money when they can afford to do so. He is 59 years old and had not been able to find any work since. This evidence was disputed and it was contended that the first plaintiff is not indigent. That was the case for the plaintiff.

6. Before considering the contingencies proposed by the parties' respective counsel, it is necessary to consider whether the first plaintiff has a claim in his personal capacity whatsoever. Curiously, neither counsel referred me to any authority in this regard.
7. The underlying principle was stated thus in *Paixao & Another v Road Accident Fund, 2012 (6) SA 377 (SCA)* at paragraph 12: *"A claim for maintenance and loss of support suffered as a result of a breadwinner's death is recognised at common law as a 'dependants' action. The object of the remedy is to place the dependants of the deceased in the same position, as regards maintenance, as they would have been had the deceased not been killed. ... However, only a dependant to whom the deceased, whilst alive, owed a legally enforceable duty to maintain and support may sue in such an action. Put differently, the dependant must have a right which is worthy of the law's protection to claim such support."* (My emphasis).
8. Having considered the development of the common law, the Supreme Court of Appeal extended the dependant's common law action for loss of support to unmarried persons in heterosexual relationships, who have established a contractual reciprocal duty of support (my emphasis). The court further found that on the evidence before it, the appellants had

tacitly established the existence of a legally enforceable duty of support. See also **Engela v Road Accident Fund**, 2016 (1) SA 214 (GJ); **Verheem v Road Accident Fund**, 2012 (2) SA409 (GNP).

9. As the first plaintiff and the deceased were not married to one another, the deceased did not owe any duty of support to the first plaintiff in terms of the common law. The question is accordingly whether the first plaintiff has established that he and the deceased had established a contractual duty of support and that he is accordingly entitled to rely on the principle established in **Paixdo**.
10. As I have already mentioned, the evidence led by the first plaintiff was not seriously disputed by the defendant's counsel. This is hardly surprising. It is not easy, and may even be impossible, for a defendant such as this to place evidence before court to refute the plaintiff's assertion that the deceased had undertaken a duty of support towards him or her.
11. But as was stated in *Paixao*, *"(a) plaintiff's assertion, without more, that he or she was in a life partnership, cannot be taken as sufficient proof of this fact ... Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. 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 supported and maintained each other. The implied inference to be drawn from these proven facts must be parties, in absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments - i.e. a duty to support - to each other."* (See paragraph 29).
12. The evidence led on behalf of the first plaintiff was unsatisfactory insofar as it was lacking

in facts. While it may well be so that the first plaintiff received financial support from the deceased, in my view the evidence was insufficient to establish not only that they had an enforceable agreement, but that the obligations created by the nature of their relationship were worthy of the law's protection. It follows that the first plaintiff has failed to demonstrate that he has a claim as against the defendant in his personal capacity.

13. The amount calculated by the actuary, Mr Whittaker, as being the past loss of support suffered by the minor child should the first plaintiff have no claim in his personal capacity, amounts to R 63,074.00. In respect of this claim, the parties were in agreement that a contingency of 5% should be deducted. The amount is accordingly reduced to R 59,920.30.
14. The amount calculated as the future loss of support, is R 215,225.00. The first plaintiffs counsel, Ms Schreuder, argued that a 10% contingency in respect of future loss of support would be reasonable, while counsel for the defendant, Mr Shitlhelana, submitted that a 12.5% contingency should be applied. He was unable to provide any authority to support such a submission. The minor child lived with the deceased who was employed from about the time of her birth and who was the primary bread-winner. There is no reason to apply any contingency other than the normal 10%. This claim is accordingly reduced to R 213,072.75.
15. Accordingly, the following order is made:
 - 15.1. The defendant is ordered to pay to the first plaintiff, in his capacity as father and guardian of G A K, an amount of R 272,993.05, such amount to consist of the following:
 - 15.1.1. R 59,920.30 in respect of past loss of support;
 - 15.1.2. R 213,072.75 in respect of future loss of support.
 - 17.2 The defendant is ordered to pay interest on the amounts set out in paragraph

17.1 at 10.5% *per annum*, from 14 days after the date of this judgment to date of payment.

17.3 It is recorded that the parties have agreed that the defendant will pay to the first plaintiff an amount of R 24,100.00 in respect of funeral expenses.

17.4 The defendant is ordered to pay the first plaintiffs costs of suit, including the qualifying expenses of the expert, Mr G Whittaker of Algorithm Consultants and Actuaries.

17.5 No order is made in respect of the second plaintiffs claim.

H R FOURIE

ACTING JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF ADVOCATE: L SCHREUDER ATTORNEYS: AK MIA INC,

JOHANNESBURG

FOR THE DEFENDANT ADVOCATE: R SHITLHELANA

ATTORNEYS: DIALE MOGASHOA ATTORNEYS, PRETORIA