

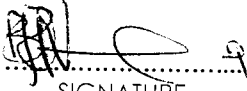
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

30/9/16

CASE NO: 48435/2013

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
	30/09/2016.....
	DATE
	
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In the matter between:

SHEILA SIBONGILE MTHETHWA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

NONYANE, AJ:

- [1] The plaintiff sues the defendant for loss of support arising from the death of Joseph Radebe (the deceased) who died in a motor collision on 1 March 2009. The plaintiff claims in her personal capacity and in

her representative capacity on behalf of her minor child who was born on 15 April 2000.

- [2] In her particulars of claim the plaintiff pleaded that the deceased had a legal duty to maintain her and the minor child and fulfilled that duty. The defendant raised a special plea in respect of the plaintiff's claim. The special plea is that the plaintiff has no *locus standi in judicio* in that there was no legal relationship between the plaintiff and the deceased.
- [3] The plaintiff's claim as pleaded can be defined as a claim for loss of maintenance or loss of support. It does not confine itself to a claim for loss of support founded on a duty of support arising from a marriage relationship. This is the case that the defendant was required to meet on the pleadings. As pleaded, the special plea is broadly worded and simply states that the plaintiff lacks standing in that there was no legal relationship between the plaintiff and the deceased. The wording of the special plea suggests that the defendant understood the basis of the case it had to meet not to be confined to a legal duty arising out of a marriage relationship.
- [4] The parties had a pre-trial conference on 20 March 2014. At the pre-trial conference the defendant was required to admit the plaintiff's *locus standi*. The defendant put the issue of *locus standi* in dispute and requested the plaintiff to provide a marriage certificate. It is not clear from the minutes whether the marriage certificate was required in order

to prove *locus standi* as pleaded by the plaintiff or merely to confirm the existence of a marriage relationship between the plaintiff and the deceased, which would only be a factor in consolidating the plaintiff's standing as pleaded and not necessarily to validate it. The purpose of a pre-trial conference is to limit the issues between the parties. It follows that any issue that is not resolved at the pre-trial will stand as defined in the pleadings. Accordingly the pre-trial minute does not detract from the issues as pleaded or the case the defendant had to meet as regards the question of standing.

- [5] At the onset of the trial the issues were separated and the court was required to determine one issue, namely, whether a valid customary marriage was concluded between the plaintiff and the deceased. In the context of the evidence and the applicable law, as it will appear in this judgment, the real issue to be determined in respect of the plaintiff's standing is whether the deceased was liable to support the plaintiff.
- [6] The following evidence was adduced on behalf of the plaintiff. Testifying in her personal capacity, the plaintiff stated that the deceased and the plaintiff had agreed to get married. Following the agreement the deceased's family sent a delegation to her family on 2 July 2000 to negotiate her lobola. During the negotiations she was called upon to confirm that she knew the deceased and his family, which she did. She took no further part in the negotiations although she was aware that the negotiations were about her lobola. She testified

that on 2 July 2000, as part of the negotiations, the delegation representing her family in the lobola negotiations intermittently consulted with her parents concerning the lobola negotiations and that such consultations took place in her presence within earshot. She stated that the deceased passed away before all the arrangement concerning the customary marriage could be finalized although there had always been an intention to do so.

- [7] She testified that before and after the lobola negotiations the deceased supported her and her child financially. The deceased provided them with financial support on a monthly basis without fail. The plaintiff did not work during the lifetime of the deceased. She testified that she was known to the deceased's family and the deceased's father called her "daughter in law". She did not stay with the deceased as the deceased worked very far from home and only came home over the weekends. She stayed away from the deceased's family during the week as the deceased's father allowed her to stay with them only when the deceased was around. The plaintiff normally performed household chores and cooked for the family of the deceased whenever she stayed with them.

- [8] Mrs Mthethwa who is the plaintiff's mother testified and corroborated the plaintiff's testimony regarding the lobola in material respects. She added that the payment that was received during the lobola negotiations included a payment of damages for impregnating her

daughter outside wedlock as well as “imvimba” which was equivalent to an engagement. A bottle of alcohol was then handed over to the deceased’s family as a token of acceptance of their proposal to marry the plaintiff. Mr Mthethwa, the plaintiff’s father, testified and corroborated his wife’s evidence in all material respects.

- [9] Mr Nyembe testified on behalf of the defendant. He confirmed the meeting of the 02 July 2000 and the amount paid. As for the rest of his evidence he contradicted himself to such an extent that no value can be placed on it.
- [10] Mr Radebe, the deceased’s father, testified and corroborated the plaintiff’s version regarding his refusal to allow her to stay with their family when the deceased was not around.
- [11] It is common cause between the parties that the plaintiff’s daughter was born on 15 April 2000; that imvimba and damages were paid on 2 July 2000. It is was also not placed in dispute that the plaintiff continued to visit the deceased and his family over the weekends whenever the deceased was back from work until his death in March 2009. That is a period of 9 years since the imvimba was paid despite Mr Radebe’s evidence that the deceased had told him that he did not intend to marry the plaintiff. It was also not disputed that imvimba was equivalent to an engagement. Significantly, Mr Radebe’s evidence was

not to the effect that the deceased did not consider the plaintiff to be his life partner.

[12] In support of the special plea the defendant adduced evidence to the effect that not all the requirements of a valid customary marriage in terms of section 3(1) of The Recognition of Customary Marriages Act 120 of 1988 (the Act) had been fulfilled. The requirements are: capacity to enter into a customary marriage; consent of the bridegroom and the bride; consent of the father (or guardian of the bride; payment of lobolo; and the handing over of the bride. It was further alleged that the customary union had not been registered. It was not alleged on behalf of the plaintiff that there was a handing over of the bride or that the marriage had been registered in compliance with the Act.

[13] Having considered the evidence regarding the alleged customary marriage, I am satisfied that no customary marriage was concluded between the plaintiff and the deceased. Our courts have on previous occasions pronounced on what constitute a valid customary marriage. See, *Singanga Welsh Mxiki v Victoria Nompumelelo Mbata* High Court of South Africa Gauteng Division, Pretoria (A844/2012) judgment delivered on 23 October 2014, at para 10.

[14] I now return to the special plea. The special plea makes no reference to non-compliance with the Act. The special plea is founded on the broad issue that the plaintiff lacks standing in that there is no legal

relationship between the plaintiff and the deceased. A legal relationship does not only arise out of marriage or contract. It is a relationship that arises from circumstances that give rise to consequences that are recognized and enforceable by law. Consequently, the special plea as pleaded does not preclude a claim that falls outside the confines of the Act.

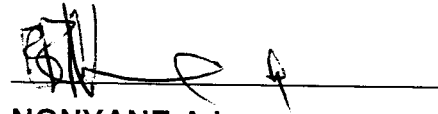
- [15] In *Paixao v Road Accident Fund* 2012 (6) SA 377 SCA, the Supreme Court of Appeal stated the following at para [26] “The object of the remedy in a dependants’ action, on the other hand, is to place the dependants of the deceased, to whom the deceased owed a legally enforceable duty to support and maintain, in the same position as they would have been, as regards support and maintenance, had the deceased not been unlawfully killed by a wrongdoer. The right of a dependant to sue for this loss arises because the wrongdoer unlawfully caused the termination of a legally enforceable duty of support – it is not a spousal benefit that accrues to a dependant only by virtue of a formally recognised marriage.” At para [39] the court stated that “The proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage. Evidence that the parties intended to marry may be relevant to determining whether a duty of support exists, as in this case. But does not mean that there must be an agreement to marry before the duty is established. And once a dependant establishes the duty, the law ought to protect it.”

[16] In my view, the deceased's duty of support, though not elaborately pleaded, was sufficiently pleaded to alert the defendant of the case it had to meet. The evidence led by the parties regarding the alleged customary marriage adequately ventilated the relationship that existed between the plaintiff and the deceased to enable the court to determine the real issue before it. In my view, it is proper to determine the real issue rather than merely decide the issue of a customary marriage alone as agreed between the parties. If I were to do so the plaintiff would be within her rights to seek an amendment of her particulars of claim in order to n to have another day in court.

[17] I am satisfied that on the evidence before me the relationship between the plaintiff and the deceased has the characteristics of a life partnership or is akin to a marriage.

In the result, I make the following order:

1. There was no valid customary marriage concluded between the plaintiff and the deceased, Mr Joseph Radebe.
2. The plaintiff has established that the deceased was under a legal duty to support her and her minor child.
3. The defendant is ordered to pay the costs



**NONYANE AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA, GAUTENG
DIVISION, PRETORIA**

Counsel for the Plaintiff : Adv. W Binase
Instructed by : Chuene Attorneys
Counsel for the Defendant : Adv. JH Jooste
Instructed by : Mothle Jooma Sabdia Incorporated
Date of trial : 28 - 29 October 2015
Date of Judgement : 30 September 2016