REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A789/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: YES / ~~NO~~

22/6/2018
DATE

SIGNATURE

In the matter between:

DOROTHY HELEN CAWOOD

(SELF & o.b.o. ALANNAH ZOË CAWOOD)

Appellant

(Plaintiff *a quo*)

and

ROAD ACCIDENT FUND

Respondent

(Defendant *a quo*)

JUDGEMENT

DE VOS J:

[1] This is an appeal against the granting of absolution of the instance by Her Ladyship Khumalo J dated 28 April 2016. Subsequent to granting the judgement, leave to appeal was denied. On 18 October 2016 the Supreme Court of Appeal granted the appellant leave to appeal against the aforementioned judgement.

[2] It is common cause that the appellant was the plaintiff (in her personal capacity as well as in her representative capacity as mother of a minor girl) in the court *a quo*, while the respondent was the defendant. For the sake of convenience and expediency, the appellant shall be referred to as in the court *a quo* viz. '*the plaintiff*', and the respondent shall be referred to as '*the defendant*'.

[3] It is also common cause that the plaintiff was the only witness as plaintiff, and closed her case after leading her evidence. The defendant closed its case without calling any witnesses. An application for absolution of the instance was then brought, which was upheld by the court *a quo*.

[4] It is not in dispute that on 27 October 2012, Mr Izak Johannes Roux (hereinafter referred to as '*the deceased*') was killed when a motor vehicle collided with him on the R101 between Mookgopong (previously Naboomspruit) and Modimolle (previously Nylstroom), Limpopo Province.

[5] The plaintiff testified that at the time of his death, the deceased:

[5.1] was living with the plaintiff as husband and wife;

[5.2] was the biological father of their minor child;

[5.3] maintained the plaintiff and the minor; and

[5.4] had embarked upon preparations together with the plaintiff to marry the plaintiff.

[6] In the premises, the plaintiff, in both her aforementioned capacities, sued the defendant for damages which she and the minor had suffered as a result of the loss of support occasioned by the death of the deceased.

[7] When the trial commenced, the defendant conceded that the deceased died as a result of injuries sustained during a motor vehicle accident and that the deceased was the father of the minor child referred to above. It was further conceded that the minor child was entitled to be compensated as a result of the death of the deceased. The only remaining issue was whether the plaintiff, in her

personal capacity, was entitled to be compensated due to the death of the deceased on the basis that, was it not for his death, he would still have maintained her.

[8] The plaintiff's uncontested evidence can be summarised as follows:

[8.1] She first met the deceased in 2000 when she returned from overseas and found him as a lodger, lodging with her parents.

[8.2] The plaintiff's relationship with the deceased commenced in approximately 2000.

[8.3] Their minor child was born in 2005, and was fathered by the deceased.

[8.4] Although the plaintiff and the deceased only started living together as husband and wife in 2011, she and the deceased "were together" since 2000 in the sense that the deceased worked at another place and came home to them (herself and their minor child) over weekends.

[8.5] She and the deceased both worked during that time (2000 – 2011) and they pooled their salaries and each paid for "*some stuff*".

[8.6] Approximately a year before the deceased was killed, the plaintiff moved from Modimolle, where they had resided until then, to Mookgopong. She then stopped working, and the deceased maintained her and the minor child. The reason for the relocation is that her father, who was a farmer in the Modimolle distric, had a stroke. The farm was sold, and a property in Mookgopong was bought. The property consisted of a house and a flatlet. She and the deceased moved into the flatlet, together with their daughter, while her parents lived in the main house.

[8.7] Due to the fact that Mookgopong was much nearer to the construction site where the deceased was employed, he was able to return home on a daily basis and they lived together as husband and wife.

[8.8] The plaintiff has never had a relationship with any other man since she started her relationship with the deceased.

[8.9] The plaintiff and the deceased were going to be married on 15 December of the year in which he was killed (he was killed on 27 October 2012). The wedding was thus approximately six weeks in the future, calculated from the death of the deceased.

[8.10] The wedding arrangements had advanced to the stage that the plaintiff had, inter alia, provisionally agreed with the deceased on which guests they were going to invite; they had already selected a venue and photographer; and the plaintiff had commenced fitting wedding dresses. Various documents, which were gathered during the period pertaining to upcoming wedding, were referred to by the plaintiff. One of the documents the plaintiff referred to is a provisional list of wedding guests. The list speaks for itself as it contains names of guests tabulated under the names of herself and the deceased. The list also contains a date which the plaintiff identified as a potential date for the wedding.

[8.11] After the wedding, the deceased would have continued to maintain the plaintiff as before the intended marriage.

[9] Under cross-examination plaintiff testified:

[9.1] Her relationship with the deceased became serious from "*maybe 2002*".

[9.2] At that time, the deceased was employed elsewhere, but would come home to the plaintiff on weekends.

[9.3] The deceased completely supported and maintained the plaintiff from about 2011, but before then, they pooled their resources and the plaintiff could always have relied on the deceased.

[9.4] The relocation to Mookgopong was necessitated by the plaintiff's father having suffered a stroke in 2010 and the death of her aunt.

[9.5] As a result of the relocation to Mookgopong the deceased was closer to his place of employment and he moved in with the plaintiff.

[9.5] Given the difficulties from being married on a Friday (which would make it difficult from guests from afar to attend) the plaintiff and the deceased decided to get married on a Saturday, which she believed to have been 15 December 2012.

[9.6] The provisional guest list was in the plaintiff's handwriting, and it was not drawn up long after the deceased asked the plaintiff to marry him. According to her estimation the list could have been drawn up somewhere around June/July 2012.

[9.10] Other people knew about the forthcoming wedding as well as the documents she produced or obtained from different service providers concerning the planned event.

[10] The court *a quo* questioned the plaintiff regarding the reasons for the planned marriage and the plaintiff testified:

[10.1] She and the deceased also wanted to have a boy.

[10.2] The move to Mookgopong had the effect that they could live separately from her parents, although in a flatlet on the same property.

[10.3] The deceased could come home on a daily basis, as it was not far away from the construction site where he was employed.

[10.4] The reason she stopped working is that she had been running a take-away food business which was doing badly, and according to her estimation the business came to an end around the end of 2011.

[10.5] The deceased told her that she should stop working at the business. This clearly implied that he would fully maintain her without a contribution from her side.

[11] In re-examination the plaintiff testified that during the last two years before the deceased's death, the deceased lived with the plaintiff as if they were husband and wife.

[12] The court *a quo* referred to ***Paixão and Another v Road Accident Fund*** **[2012] ZASCA 130; 2012 (6) SA 377 (SCA) at 382** where it was held by the Supreme Court of Appeal that "*given the sui generis character of the remedy there seems to be no proper reason to restrict it only to family or blood relationships when social changes no longer require this*". The cout recognised that the remedy was gradually extended to include permanent heterosexual relationships where the tacit undertaking of reciprocal duty of support/maintenance was proven on a balance of probabilities.

[13] The court a *quo* proceeded to compare the facts in ***Paixão supra*** with the facts placed before it by the plaintiff. In analysis of the plaintiff's evidence the court *a quo* indicated that even after the birth of their child in 2005, the deceased continued to go to his place of work at a remote location and then returned to her parents' home where he was a lodger. The court *a quo* held that although the plaintiff testified that she and the deceased would put their resources together, she never alleged to have been living together with the deceased as a family. On that basis the court *a quo* concluded that nothing can be inferred from these facts. In my view the court *a quo* misdirected itself and failed to take into consideration the plaintiff's evidence that the deceased returned and stayed with her over weekends until the time that they moved to Mookgopong. The court *a quo* ignored the reason provided by the plaintiff for her and the deceased not staying together on a continuous basis, such reason being that the deceased worked at a construction site which was too far away to justify such a living arrangement. The court further held that the plaintiff's evidence to the effect that they lived together in the same flatlet since 2011 was not substantiated. The court concluded that the defendant's argument is correct that "*it is less probable that the arrangement would have been different when they moved to Mookgopong due to the Plaintiff's father's stroke*". There is no factual basis for this finding. The plaintiff's clear evidence is to the effect that they moved in together on a permanent basis. The court further criticises the evidence of the plaintiff for the plaintiff's failure to call relatives, friends, or community members to attest to the so-called significant change of circumstances, even though the plaintiff indicated that such persons are available.

[14] The defendant argued that it was held in ***Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A)** that "*if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him*". This decision is qualified. A negative inference is "***only a proper one if the evidence is available and if it will elucidate the facts***" [own emphasis]. There was no need for the plaintiff to call any further witnesses, as her evidence was uncontested. As such, the facts need not be elucidated, as no facts were placed before the court *a quo* to contest the plaintiff's evidence. Therefore, no negative inference could be drawn by the court *a quo* in this regard.

[15] The court *a quo* concluded that the discrepant reasons the plaintiff gave for the relocation and the fact that several probabilities may be inferred from the circumstances makes her evidence not sufficient to be relied upon. This conclusion cannot be upheld. On reading the record, I cannot find any other probabilities except the clear evidence of the plaintiff. The court *a quo*'s finding that the probability thereof is questionable without any substantial proof or corroboration, and that "*(n)o credible inference . . . can be drawn from such facts*" is without a factual basis. The criticism regarding the fact that the plaintiff and the deceased did not pay any rent after they moved into the flatlet is also unfounded. The inference that there was no reason for the deceased to have been exonerated from paying rent under such conditions except as being a lodger is a meaningless one. This finding is in direct conflict with the plaintiff's evidence that they did not pay rent as they were assisting her mother after-hours and attended to her father who was in a wheelchair. The court also criticised the plaintiff's evidence on the basis that the sharing of responsibilities was not adequately explained and the facts were therefore unclear and contradictory, making them less probable. The court again found "*(h)er mother would have been a perfect witness to testify in substantiation of all these allegations but was not called*".

[16] It is unnecessary to deal with the entire judgement, save to state that the major reason for the finding made by the court *a quo* results from the view that other witnesses should have been called to corroborate the plaintiff's version. To conclude that the deceased would not have continued to maintain the plaintiff as he had done in the approximately one year preceding his death – without any evidence to support such a conclusion – amounts to pure speculation. No contradictory evidence was adduced.

[17] Not a single imputation was made against the plaintiff's evidence, neither during her evidence-in-chief, nor under cross-examination, nor by the court *a quo*. More importantly, nowhere was it put to the plaintiff that her evidence is false or contains improbabilities. This court must therefore accept the dicta in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** **2000 (1) SA 1 (CC) at paras 61 – 63** where it is held that "*(i)f a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct . . . It should be made clear not only that the evidence to be challenged but also* how *it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others, and to explain contradictions on which reliance is to be placed*". Of utmost importance is the fact that nowhere was it put to the plaintiff that her evidence is a fabrication. It was not even put to the plaintiff that it will be contended during argument that her evidence is fabricated. If the possibility of a fabrication was put to the plaintiff, she would have been in the position to consider calling other witnesses to corroborate her version. Given the cross-examination by the defendant, there was no necessity for the plaintiff to adduce further evidence.

[18] In the absence of any suggestion or contention put to the plaintiff regarding her credibility, the court *a quo* should have proceeded from the premise that the plaintiff's evidence constituted the proven facts unless the trial court rejected her evidence as incredible or inherently improbable to

such a degree that it could not be accepted. No such finding was made by the court *a quo*. In the absence of such a finding the court *a quo* should have determined the probability of a tacit agreement existing between the plaintiff and the deceased as far as the deceased's maintenance of the plaintiff, in her personal capacity, was concerned.

[19] Once it is accepted that the evidence of the plaintiff constitutes the proven facts, the probabilities are overwhelmingly in the plaintiff's favour, i.e. that there was a tacit agreement between the plaintiff and the deceased that he would continue to maintain her and their minor child. The court *a quo* concluded that the deceased would not have continued to maintain the plaintiff as he had done in the approximately one year preceding his death, without any evidence to support such a conclusion. To reach such a conclusion the court *a quo* should have totally rejected the plaintiff's evidence. Such finding did not occur, nor would it have been justified if it did.

[20] The arguments raised before us by the defendant do not take the matter any further. It merely repeats that witnesses should have been called to corroborate the plaintiff's version. I have already mentioned that there is no such requirement in terms of onus. Defendant's counsel referred to ***Paixão supra***, and specifically **para 29** thereof, where it was held that *"the plaintiff's assertion, without more, that he or she was in life partnership, cannot be taken as sufficient proof of this fact. (In this case the fund conceded that the relationship was a life partnership.) 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 that the parties, in the absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments — ie a duty to support — to each other"*. See also ***Du Plessis v Road Accident Fund*** **2004 (1) SA 359 (SCA).**

The defendant contended that the plaintiff failed to prove on a balance of probabilities that there was a tacit agreement between herself and the deceased to support and maintain each other, had the deceased not died.

[21] When the facts in ***Paixão supra*** are compared with the plaintiff's case, there are obvious differences. These differences, in my view, strengthen the plaintiff's case above ***Paixão supra*** for, inter alia, the following reasons:

[21.1] The deceased had, as a matter of fact, maintained the plaintiff prior to his death.

[21.2] The plaintiff and the deceased had had a child together.

[21.3] The relationship between the plaintiff and the deceased was of long duration. She had never had a relationship with any other person since she took up with the deceased.

[21.4] The deceased had asked her to marry him and they were in the process of planning their wedding.

[21.5] They intended to have another child.

[21.6] They lived together in a separate flatlet, although on the same premises as the plaintiff's parents, for almost a year preceding the deceased's death.

[21.7] There is no indication that the plaintiff was to be employed in the near future.

[22] The relationship described by the plaintiff was unquestionably akin to a marriage. Hence, there existed reciprocal undertakings between the plaintiff and the deceased to support each other. See ***Engela v Road Accident Fund*** **2016 (1) SA 214 (GJ) at para 13.** The right to support does not arise because it is a spousal benefit, but rather because the obligation to support was assumed in a relationship akin to a marriage. See ***JT v Road Accident Fund*** **2015 (1) SA 609 (GJ).**

[23] In my view, all the facts tend to show that the relationship between the plaintiff and the deceased was of a nature similar to a marriage, proving that a binding duty of support was assumed by one person in favour of another. The evidence of the plaintiff, without being capable of being rejected

on its own, should have been given the weight which it deserved. Thus, the plaintiff was entitled to assume that her unchallenged testimony was accepted as correct by the defendant, and the court *a quo* should have ruled on that basis. This is not what occurred. The plaintiff was the only person capable of adducing evidence as to her and the deceased's intention to get married. Only the plaintiff could testify in support of a tacit agreement between her and the deceased. Other witnesses would only have provided circumstantial evidence. A relationship of the kind which was described by the plaintiff is based on elements of a personal nature and, to a large extent, happens behind closed doors. The meaning and purpose of the relationship takes place in the minds of the people involved in the relationship, and therefore other witnesses would not have been in the position to testify about the relationship between the plaintiff and the deceased.

[24] The test to apply in a matter of this nature is set out in ***Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA)** by Harms JA **at para 2**:

> "*The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in* Claude Neon Lights (SA) Ltd v Daniel*1976 (4) SA 403 (A) at 409G - H in these terms:*
>
> > '. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)*1958 (4) SA 307 (T).)'
>
> *This implies that a plaintiff has to make out a* prima facie *case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff* (Marine & Trade Insurance Co Ltd v Van der Schyff*1972 (1) SA 26 (A) at 37G - 38A; Schmidt* Bewysreg *4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt *at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit)*) - a test which had its origin in jury trials when the*

'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). *Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice*".

From the above it appears that the issue in an application for absolution from the instance does not concern itself with the defendant's plea. The essential issue which the court has to look at in applying the above test is "*whether the plaintiff has discharged its onus of showing the existence of a* prima facie *case*". See ***Hurwitz v Neofytou*** **(23542/2015) [2017] ZAGPJHC 193 (2 June 2017).** The facts presented by the plaintiff are of sufficient quality to say that there is sufficient evidence "*upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff*". The evidence of the plaintiff has discharged its onus of showing the existence of a prima facie case. Her evidence is neither improbable, nor incredible, nor capable of being rejected without proper reason.

[25] The appeal should therefore be upheld with costs, including the cost occasioned by the trial.

ACCORDINGLY, I PROPOSE THE FOLLOWING ORDER:

[1] The appeal is upheld.

[2] The order of the court *a quo* absolving the defendant from the instance with costs, is set aside, and replaced with the following order:

[2.1] The plaintiff's claim for loss of support in her personal capacity succeeds with costs, inclusive of the cost of senior counsel.

[3] The Respondent is ordered to pay the costs of the appeal inclusive of the cost of senior counsel.

DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

I AGREE.

BAQWA J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

I AGREE AND IT IS SO ORDERED.

RABIE J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing:	20 June 2018
Date of Judgement:	22 June 2018

Appearances:

For the Appellant:	Adv T A L L Potgieter SC
Instructed by:	Savage Jooste & Adams Incorporated
For the Respondent:	Adv J Malesa
Instructed by:	Tsebane Molaba Incorporated