

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

CASE NO: 2016/1728

13/5/2019

In the matter between:

REFILOE HOPEWELL LESIA obo

A[....] N[....] L[....]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOKOSE J

- [1] This is an action by the plaintiff in both her personal capacity and in her representative capacity on behalf of her minor child for damages for loss of support suffered as a result of the death of the deceased in a motor vehicle accident on 1 March 2014.

- [2] On 6 December 2016 and by agreement between the parties, Pretorius J granted an order in favour of the plaintiff that the defendant was liable to pay one hundred per cent (100%) of the plaintiff's proven or agreed damages. The matter on hand is in respect of the quantum of the plaintiffs claim in the sum of R3 324 759,00 (three million three hundred and twenty-four seven hundred and fifty-nine rand).
- [3] Counsel for the plaintiff advised the court at the commencement of the matter that the defendant conceded that the deceased had a duty to support the minor child. The parties then applied for a further separation in terms of Rule 33(4) which order was granted.
- [4] The issue left for the court to determine was the existence of a duty of support between the plaintiff and the deceased in the absence of a formal marriage relationship having been concluded between them.
- [5] The plaintiff testified in her own matter. She testified that she and the deceased had started dating in 2009 at a time when she had a one-year old child, L [...], born of a previous relationship. After a while, the parties began residing together in Springs. They were both employed at the time and they shared all household expenses.
- [6] In about 2011 when the parties had begun to live together, the deceased asked the plaintiff to marry him and the engagement proposal was accepted. It was at this time that she realised that she was expecting a baby. The plaintiff testified that in her excitement she told her parents who were happy for her but cautioned that lobola negotiations must take place. She testified further that they had intended to get married during 2012 but that she was retrenched during September of that year.
- [7] The plaintiff testified further that they relocated from Springs to Duduza after she had been retrenched to save costs as the rentals were cheaper. The deceased continued to pay the rent and all expenses of the household. He would also give her money when he had extra for her personal use whilst she would attend to the household chores.
- [8] During 2013 a misunderstanding ensued between the parties resulting in the deceased moving from the common home. At that time, the plaintiff

then attended at the Magistrate's Court to obtain a maintenance order against the deceased. She testified further that they resolved their differences and reconciled. But when she wanted to cancel the maintenance application, she was advised by a maintenance officer that should the deceased fail to maintain the minor child, it would be difficult to obtain such order as she had previously cancelled the application. Accordingly, she proceeded with the process and obtained the order which she had not enforced at all after it was granted.

[9] In cross-examination, the plaintiff confirmed that she had been introduced to the deceased family. She had also accompanied the deceased's family to identify him at the mortuary on his death. She conceded that she had made a claim for maintenance for A[...] N[...] only as that was the deceased's only child with her. She did not claim maintenance for herself as she was not married to him at that time.

[10] The defendant closed its case without calling any witnesses.

[11] Counsel for the plaintiff brought to the court's attention the unreported case of *Cawood and Another v The Road Accident Fund*¹ in which the court concluded that:

"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 aquo 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 own capacity, was concerned."

[12] In the matter on hand, the plaintiff's evidence stands uncontested. It is evident that the relationship between the plaintiff and the deceased was an intimate one for which no other competent witness was called to testify

¹ (A789/2016) [2018] ZAPPHC 581 dated 22 June 2018

and place contradictory evidence before the court.

- [13] Accordingly, the plaintiff's evidence stands uncontested and is considered as conclusive in the circumstances.
- [14] A claim for loss of support on the death of a breadwinner is recognised by the common law as a "dependence" action. The object of this remedy is to place the dependants of the deceased in the same position they would have been in, but for the death of the deceased. This action is *sui generis* as the dependants derived their right not through the estate of the deceased but from the fact that they have suffered loss by the death of the deceased for which the defendant is liable.
- [15] The plaintiff must show that he has a right that is worth protecting to satisfy the requirements for a claim for loss of support. The court held in the matter of Paixao and Another v Road Accident Fund² that to prove the existence of a life partnership or relationship worthy of the law's protection, the claimant needs to demonstrate that the partnership had similar characteristics, particularly a reciprocal duty of support, akin to a marriage. On appeal, the court held that a tacit agreement between parties to a heterosexual life partnership established a reciprocal duty of support worthy of protection by the law. The SCA's decision was influenced by several factors including the *boni mores* of society, which the court noted require the courts to make a policy decision based on the recognition that social changes must be accompanied by legal norms to encourage social responsibility. The court held that the relationship amounted to more than a mere promise to marry and the question to be decided was whether or not the nature of the relationship between the parties gave rise to a reciprocal duty of support that the law must protect.
- [16] Counsel for the plaintiff argued that the matter on hand is one which is stronger than the Paixao case in that the plaintiff testified that there was an express oral agreement between her and the deceased to maintain one another which was supported by the deceased's conduct towards her. They had also promised to marry one another. Furthermore, the deceased

² 2012 (6) S 377 (SCA)

was working towards paying lobola to her family.

- [17] Counsel for the defendant disagreed with the view of the plaintiff that the Paixao case was on point. He was of the view that the only evidence of an existence of a duty of support on the part of the deceased towards the plaintiff was that they lived together and that they intended to get married. He was of the further view that the payment of rent and the purchase of groceries should be regarded as ordinary or normal support.
- [18] It is evident from the evidence before the court that the plaintiff had been in a relationship with the deceased for a long period. The plaintiff alleges that the deceased supported her and her minor children and in particular the child from a previous relationship. She has also explained that they had intended to marry and why the marriage had not taken place. I am satisfied that she was an honest witness whose answers explained the relationship between the parties satisfactorily.
- [19] Counsel for the plaintiff appointed two counsel and as such seeks the costs of two counsel should the court find for her. Counsel for the defendant was of the opinion that there was no need for two counsel to be appointed.
- [20] The determination of costs rests within the discretion of the court. This includes the costs of the employment of two counsel. In exercising this discretion the court determine whether it was a 'wise and reasonable precaution' on the part of the plaintiff to employ the services of two counsel.³ Factors to be taken into account in determining whether it was indeed a reasonable and prudent precaution include the importance of issues to be determined, the complexity of the legal and factual issues, the quantum of the claim and the volume of evidence.
- [21] The plaintiff was of the view that it was a wise and reasonable precaution to employ two counsel as the importance of the matter could not be underestimated as both the mother and the minor child (the plaintiff in her personal capacity and on behalf of the minor child) had lost the support they would have had but for the tragic death of the deceased.

³ Van Wyk v Rondalia 1967 (1) SA 373 (T)

Furthermore, the quantum was significant and at the pre-trial conference which was held a couple of days before the trial, the defendant's legal representatives disputed the application of the order to the plaintiff in her personal capacity.

[22] Counsel for the defendant was of the view that the matter in casu was not a complex one. Quantum was not being dealt with and as such there was no necessity for the matter to be burdened with two counsel.

[23] Having taken into account the arguments of both counsel in respect of the costs of suit, I am of the considered opinion that there was no need for the employment of two counsel.

[24] Accordingly, the following order is granted:

The draft order attached hereto and marked "**X**" is incorporated herein and made an order of court.

MOKOSE J

Judge of the High Court
of South Africa Gauteng
Division, Pretoria

For the Plaintiff:

Adv C Woodrow

Adv JL Verwey

instructed by

Frans Rabie Attorneys

For the Defendant:

Adv OM Mulibana

instructed by
TM Chauke Attorneys

Date of Hearing : 29 April 2019

Date of Judgement : 13 May 2019