

‘Dependants’ action’ extended to heterosexual life partners

***Paixão and Another v Road Accident Fund (SCA)* (unreported case no 640/11, 26-9-2012) (Cachalia JA)**

By Nomfundo Manyathi

In a recent decision, the Supreme Court of Appeal (SCA) extended the common law dependants’ action to heterosexual life partners. In reaching its decision, the court recognised that there are many forms of family relationships in South Africa and in certain circumstances, such as in the present matter, claims for maintenance and loss of support should be extended to heterosexual, unmarried life partners.

The matter came before the SCA after the appellants’ claim was dismissed by the South Gauteng High Court. The SCA set aside the High Court judgment and ordered the respondent, the Road Accident Fund (RAF), to pay the appellants’ claim for maintenance and loss of support after their breadwinner died in a car accident.

Factual background

MP met the deceased, JG, in 2002. At the time JG was married to another woman according to Portuguese law but was not living with her. In 2003 JG fell ill and MP nursed him until he was able to return to work. The couple lived together in a permanent life partnership. During this period JG financially supported MP and her three children as the sole breadwinner.

The couple planned to marry after JG divorced his wife. In 2005 he did so according to South African law but postponed marrying MP until his divorce was also finalised in Portugal. JG and MP also executed a joint will in which they nominated each other ‘as the sole and universal heirs of our entire estate and effects of the first dying of us’. The will stated that in the event of their simultaneous deaths, MP’s three daughters – referred to as ‘our daughters’ – were to inherit in equal shares.

In 2007 JG’s divorce was finalised in Portugal and there was no longer any impediment to his marrying MP. They planned to marry in Portugal in April 2008 and began making wedding arrangements. However, JG died in a motor vehicle accident in January 2008.

Court *a quo*

The plaintiffs (MP and her youngest daughter) argued that the deceased had contractually undertaken to maintain and support them, that he was legally obliged to do so and would have done so for the remainder of MP’s life and until her youngest daughter became self-supporting. They sued the RAF under s 17 of the Road Accident Fund Act 56 of 1996 (the Act) for loss of maintenance and support.

The defendant, however, argued that the plaintiffs had not established a legally enforceable agreement between the deceased and MP and even if they had, the agreement was not enforceable against a third party such as the fund.

In the High Court the first plaintiff argued that there was a tacit agreement between her and the deceased that he would support her and her children. Further, the plaintiffs contended that their constitutional rights to equality and dignity would be violated if a duty of support was not recognised for permanent life partnerships, but was in respect of formal marriages.

The High Court found that the deceased had supported the plaintiffs out of 'gratitude, sympathy and kindness' in return for their assistance during his illness rather than from any legal duty. It held that it 'would be an affront to the fabric of our society ... and seriously erode the institution of marriage' if the dependants' action were to be extended to the plaintiffs. It therefore dismissed their claim against the fund but granted them leave to appeal to the SCA.

SCA

The main issue on appeal was whether or not the common law should be developed to extend the dependants' action to permanent heterosexual life partnerships. In reaching its decision, the court had to determine whether the facts presented established a legally enforceable duty of support arising out of a relationship similar to marriage.

The SCA held that the case of the appellants (the plaintiffs in the court *a quo*) rested on two legs –

- firstly, that an express or tacit agreement existed between the appellants and the deceased that created a binding obligation on him to maintain and support them; and
- secondly, that the nature of the relationship, being akin to a family one, was deserving of the law's protection.

The court further noted that the object of a claim for maintenance and loss of support as a result of a breadwinner's death, recognised at common law as a 'dependants' action', 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. The court further noted that the remedy is only available to a dependant to whom the deceased, while alive, owed a legally enforceable duty to maintain and support.

The SCA added that the existence of a claim was determined by a *boni mores* criterion (as stated in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)) such that the court was required to make a policy decision based on the recognition that social changes must be accompanied by legal norms to encourage social responsibility.

The court noted that over the years the remedy was gradually extended to include new classes of persons and that the courts have recognised –

- a husband's claim for the loss of his injured wife's support (*Abbott v Bergman* 1922 AD 53 at 55 – 56);
- a claim of a divorcee who had been receiving maintenance payments from her ex-husband pursuant to a court order at the time of his death (*Santam Bpk v Henery* 1999 (3) SA 421 (SCA));
- a widow's claim arising from a marriage under African customary law (*Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC));
- a claim of a Muslim widow whose marriage under Islamic law had not been registered as a civil marriage under the Marriage Act 25 of 1961 (*Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA)); and
- a claim by a partner of a same-sex permanent life relationship who had tacitly undertaken reciprocal duties of support with the deceased (*Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA)).

The SCA found that although the courts have emphasised the importance of marriage and the nuclear family as social institutions of society that give rise to important legal obligations, particularly the reciprocal duty of support placed on spouses, the nuclear family has not, for a long time, been the norm in South Africa, which has lower rates of marriage and higher rates of extra-marital child-bearing than most countries. It also noted that millions of South Africans live together without entering into formal marriages because of legal, religious, social, cultural, financial or other reasons.

In this matter, the SCA found that the appellants had tacitly established the existence of a legally enforceable duty of support and saw no reason of principle or policy not to extend the protection of the common law to the appellants. The court disagreed with the High Court's finding that the deceased had 'merely promised to take care' of the family, but had not undertaken a legally enforceable obligation to do so.

'The appellants tacitly established the existence of a legally enforceable duty of support. Having regard to the incremental extension of the dependants' action through the times, our ideas of morals and justice, and of equity and decency, I can see no reason of principle or policy not to extend the protection of the common law to the appellants here. In my view, the "general sense of justice of the community" demands this,' Cachalia JA said in the judgment.

The SCA noted that the 'most crucial' fact in the case was that the deceased had undertaken to support the appellants and was already doing so before the planned marriage. 'Crucially, they had already undertaken reciprocal duties of support, agreed to formalise their relationship through marriage and executed a family will as evidence of their commitment to each other.'

Importantly, this, the court held, indicated that the deceased considered the appellants as his family and all that the marriage would do would be to formally recognise their existing relationship.

The court also noted that evidence that the parties intended to marry may be relevant in determining whether a duty of support exists, as in this case. However, it held that this did not mean that there must be an agreement to marry before this duty is established. In light of its conclusion, the court did not need to consider whether it would amount to unfair discrimination for the law to give protection to the duty of support arising from a marital relationship but not to a relationship where the duty arises in the context of heterosexual permanent life partnerships.

The SCA therefore upheld the appeal with costs. It held that the dependants' action is to be extended to unmarried persons in heterosexual relationships who have established a contractual reciprocal duty of support. It ordered the respondent to pay the first appellant R 1,7 million and the second appellant R 451 626.

- See p 26.