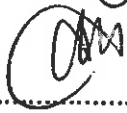


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="radio"/> NO
(3)	REVISED YES
23/11/18	
DATE	SIGNATURE

CASE NO: 21427/2017

In the matter between:

BRENDA JACOBS

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

[1] The plaintiff issued summons against the defendant, for loss of maintenance and support arising from the death of Wesley Stevens (*the deceased*) in a motor vehicle collision on 12 August 2015. The deceased suffered injuries as a result of the collision and passed away from these injuries on 14 September 2015.

[2] At the commencement of the proceedings this court was directed to a minute prepared pursuant to a meeting held between the parties on 7 November 2018. ¹ In the said minute the parties had agreed on the *locus standi* of the plaintiff, the negligence of the insured driver and the substantial compliance of the Road Accident Fund Act.²

[3] Consequently, this court was only required to determine whether the deceased before succumbing to his injuries, owed the plaintiff a duty of support, which would render the defendant liable in terms of section 17(1) of the Road Accident Fund Act 56 of 1996.

[4] The parties further requested the court to separate the issue of the *liability* and that same should be determined separate to that of the *quantum*. As a result, the court was requested in the event of the issue of *liability* being determined in favour of the plaintiff, to postpone the quantum *sine die* for adjudication at a later date. In terms of the provisions of Rule 33(4), the court ordered such a separation.

[5] Ms. Brenda Jacobs testified that at the time of the death of the deceased, Mr. Wesley Stevens, she was in a relationship with the deceased. The said relationship started six years prior and soon after engaging in it, the deceased who was a married man, but not living with his wife, had moved into her house with her alongside her two minor children. For the duration of their relationship and all along the deceased was employed and was maintaining her and her minor children. She never worked and was a stay at home partner. She at all material times was aware that the deceased was married to one, Christelle Stevens.

[6] Prior to his death, the deceased had proposed to her and they had decided on the date of the 15th September 2015 to solemnize their union. This was however subject, to the divorce of the deceased and Ms. Stevens being finalized. During cross-examination, the witness conceded that she was in a relationship with the deceased for just under a year before, he had disclosed to her that he had been married. Furthermore, that she persisted with her relationship with the deceased knowing full well that he had been married as he had assured her that his love relationship with his

¹¹ Exhibit A Bundle D1 pgs 3-82

² Act 56 of 1996

wife had ended.

[7] This then the totally of the evidence presented by the plaintiff.

[8] The defendant adduced no rebuttal evidence and its cross-examination of the plaintiff was aimed at impugning the plaintiff's assertion that the deceased had a duty to support her.

[9] Section 9 of our Constitution provides as follows:

.....

.....

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience belief, culture language and birth.

.....

.....

[10] The defendant in refusing to recognize the plaintiff's loss of support claim had placed reliance on the decision *Paixao v Road Accident Fund* (640/2011) [2012] ZASCA 130 (26 September 2012). In paragraph 23 the following was held:

"Of course the mere fact that the parties had a binding agreement inter se does not mean that it was enforceable against third parties such as the fund. Put in another way the appellants had to establish not only that they had an enforceable agreement against the deceased but that the obligations created by the nature of their relationship were worthy of the law's protection. As I have said this must be determined by reference to the boni mores criterion."

[11] Counsel on behalf of the fund had argued that upon the court making a determination of an enforceable agreement having been in existence between the plaintiff and the deceased, this court was then required to apply the *boni mores* criteria,

in order to finally conclude that the plaintiff would have a valid claim against the defendant.

Agreement creating a binding legal obligation

[12] As mentioned firstly, this court had to determine whether there was a valid and binding agreement between the plaintiff and the deceased. An agreement may be made expressly or tacitly, and where it is made expressly it may be made orally or in writing. In order to determine as to whether a tacit agreement came into being, one would have to look at the surrounding circumstances and the conduct of the parties. Where the parties, are not in agreement, that indeed a contract existed such as is the case in the present matter, it is for a court to decide whether a contract came into existence.

[13] The uncontroverted evidence presented by the plaintiff, was that during the cohabitation of the parties for a period of six years prior to the death of Mr. Stevens, the deceased was the sole income earner for their household and that he was responsible to maintain her and her minor children and that he indeed did so until he died. The evidence further shows that the deceased had expressly promised the plaintiff that he was going to marry her as soon as his divorce from his wife was finalized. It was the evidence of the plaintiff that throughout their relationship their respected families accepted one another and that they had regarded them as husband and wife.

[14] The question then to be asked is whether the facts establish a legally enforceable duty to support arising out of a relationship akin to a marriage?

[15] On the facts presented, I am satisfied that the deceased undertook to support the plaintiff with the intention to be legally bound by such undertaking. The deceased therefore, owed the plaintiff a contractual duty to support.³ Once a dependent established the duty, it follows, that the law ought to protect it.

Boni Mores Criteria

³ Du Plessis v Road Accident Fund 2004 (1) SA 359 para 16

[16] It is so that our society recognizes the sanctity of marriage and by extension the reciprocal duty spouses owe each other. In *Dawood and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); BCLR 837 (CC) the court said the following regarding the institution of marriage:

“Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society.”

[17] Furthermore, the court said:

“.....Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.”

[18] The matter however does not end there. There can be no doubt that our courts also has a duty to develop the common law. This is the power which they have always had.⁴ Today the power must be exercised in accordance with the provisions of section 39(2) of the Constitution which requires that common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. In *Du Plessis*⁵ Kentridge AJ quoted the case of *Salituro* with approval:

“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappear. Nonetheless there are significant constraints on the power of the [J]udiciary to change the law.....In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law

⁴ *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* [1992] ZASCA 63; 1992 (3) SA 579 (A) at 590G-H.

⁵ *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC)

*reform.....The [J]udiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.*⁶

[19] Having regard to our South African context, millions of South Africans live together without entering into any formal marriages. This is simply a fact of life, although as Mokgoro J and O'Reagan J observed in *Volks*, their circumstances differ significantly:

*'Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners.'*⁷ This however does not mean that our courts demean the value or importance that our society places in marriage as an institution.

[20] In the present matter, the evidence presented showed that the respective families of both the plaintiff and the deceased did not regard their cohabitation as opprobrious. Cohabitation outside a formal marriage, and dare I say, even where one of the parties is still married, is now widely practiced and accepted by many communities, including our South African community. In the present matter, as already alluded to the plaintiff and the defendant had taken the decision to get married and shortly prior to his death, was even making plans for the actual wedding. Both parties for a period of six years prior thereto, had undertaken reciprocal duties of support, with the deceased providing financially for the household.

[21] It is precisely based on this reciprocal duty of support which the plaintiff has establish as a matter of fact in a relationship akin to a marriage, that she should be afforded protection as a dependent. The Plaintiff's relationship with the deceased, to my mind was similar to a family relationship arising from a legally recognized marriage. Having found this, it therefore, follows that her dependents' action is to be afforded to her as an unmarried person in a heterosexual relationship and that she should not be

⁶ *R v Salituro* [1991] SCR 654 (Canada) at paras 666G-H and 670F-I (*Salituro*)

⁷ *Volks NO v Robinson* 2005 (5) BCLR 466 BC (CC) para 120

discriminated upon as section 9 of our Constitution, affords her that protection.

[22] Therefore, having regard to the **boni mores** and albeit that our society continues to value the sanctity of marriage, the reality is that some parties find themselves living together intending to get married and attracting reciprocal duties of support but having a legal bar to get married. This was precisely the case in point with the plaintiff and the deceased in question.

ORDER

[23] Consequently, the following order is made:

23.1 The merits is determined 100% in favour of the Plaintiff;

23.2 The trial on quantum is postponed sine die;

23.3 The defendant is to pay the Plaintiff's costs of suit on a High Court Scale as per the court order, marked "X".



COLLIS J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

Appearances:

For the Plaintiff: Adv. Fourie
Attorney of the Plaintiff: Geldenhuys Malatji Inc.
For the Defendant: Adv Mabuza
Attorney for the Defendant: Matabane Inc

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

<p>74</p> <p>Gildenhuys Lessing Malatji Inc Tel: (012) 428 8600</p>
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BEFORE THE HONOURABLE Colis J
ON ~~13~~ 23 NOVEMBER 2018 AT COURT 8 A

C.J.C

CASE NO: 21427/2017

In the matter between:-

BRENDA JACOBS

PLAINTIFF

-and-

THE ROAD ACCIDENT FUND

DEFENDANT

C.J.C **DRAFT COURT ORDER**

AFTER HEARING COUNSEL, the following order is made:

- 1.
- 1.1 The is 100% liable to compensate the Plaintiff for the proven or agreed damages;
- 1.2 The remaining aspects of quantum are postponed sine die.

2.

The Defendant is ordered to pay the costs of suit of the Correspondent and Instructing attorneys, on the High Court scale, which costs include (but not be limited to):

- 2.1 The costs of the preparation of 6 trial bundles as per the Gauteng High Court Practise Directive and as agreed upon in the Pre-Trial Minutes;

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- 2.2 The costs of counsel;
- 2.3 The reasonable costs of the attorney, which includes reasonable travelling costs, costs for preparing for Pre-Trial Conferences and costs for actual attendances to all Pre-Trial Conferences, all Rule 35(9) notices R37(4) & R37(6) notices, Rule 36(10) notices, filing notices, costs of formulating application to compel, Further Particulars, costs of formulating the draft order;
- 2.4 Costs of the attorney in attending to court limited to one day fee;
- 2.5 The costs of the inspection in loco including travelling expenses at the AA rate if any;
- 2.6 The reasonable costs of the plaintiff in attending trial, including travelling and accommodation expenses if any;
- 2.7 The reasonable costs for preparation for trial;
- 2.8 Costs of the interpreter.

3.

Should the Defendant fail to pay the Plaintiffs party & party costs as taxed or agreed with 14 (fourteen) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at a rate of 10.00% per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

4.

The Plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraph 3 above, serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant seven court days to make payment of the taxed costs.

5.

