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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 2012/10855

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

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DATE

.....
SIGNATURE

In the matter between:

RADEBE, MOLLY KHABONINA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MILTZ, AJ:

INTRODUCTION

1. The plaintiff, a 34 year old widow, sues the Road Accident Fund (“*the defendant*”) for the loss of support suffered by her and her minor children as a result of the death of her husband Lifter Bafana Thobela (“*the deceased*”) who died as a result of injuries he sustained in a motor vehicle collision on 24 February 2011.
2. The plaintiff originally claimed loss of support also for Victor Thobela who she testified had been supported by the deceased prior to his death. However, at the commencement of the trial the claim for loss of support of Victor was abandoned.
3. I will revert later in this judgment to deal with the quantum of the claims for loss of support. It is necessary first to deal with the question of the defendant’s liability for the plaintiff’s claim.
4. Aside from admitting that the deceased died as a result of the injuries he sustained in a collision on 24 February 2011, the defendant placed everything in issue at the trial. It is therefore necessary to deal with the plaintiff’s evidence, none of which was controverted by the defendant. The defendant called no witnesses and knew from the outset that it could not rebut any of the facts testified to by the plaintiff.

5. The defendant's case was devoid of substance to such an extent that Ms Mathebula, who appeared for the defendant, declined to make any submissions in closing argument (other than to agree with the suggestion by Mr Smit, who appeared for the plaintiff, that the actuarial report of Mr Gerard W Jacobson could be amended and relied on by me in determining the quantum of damages).
6. Before referring to the evidence I must express my concern at the substantial resources of the Road Accident Fund and of the justice system that are being abused and wasted in matters such as this. It is unacceptable that the defendant should place everything in the claim in issue and concede nothing, all in the knowledge that it will not be able to present even a semblance of a defence when the trial proceeds.
7. Most alarming in this regard is that even after forcing the plaintiff to proceed by way of action, the defendant apparently did nothing at all to investigate the claim. Nothing in the Court file discloses that either party discovered any documents. There are no notices to suggest that either party called on the other to make discovery, to provide any particulars for trial or to make any admissions at any time. A trial conducted in such a manner is not a trial at all.
8. The persons responsible for this farcical regime should be held accountable for the enormous waste of valuable resources that this unjustifiable and indefensible approach to litigation consumes. I have

no doubt that very few of the substantial number of cases against the defendant in this division would ever see the inside of a Court if they were properly investigated and considered at the time and after the claims were made. Even if litigation did become necessary the relevant procedures provided in the Uniform Rules of Court and the rules of practice in this division are more than adequate to provide that the Court determining a particular action is tasked at the trial with determining only those issues, if any, which remain properly in issue between the parties.

9. It is regrettable that in circumstances such as this the Court should have to make a determination against the defendant relying entirely on the plaintiff's evidence solely because the defendant failed to investigate and present any case at all. I intend to mark the disapproval I express herein with a punitive costs award.

THE EVIDENCE

10. The plaintiff testified that the deceased was her husband and the father of her children. She handed in a handwritten document which she said constituted the memorial of the lobola agreement entered into between the respective families of the deceased and her family. She testified that the lobola agreement was given effect and that the deceased and his family complied with all their obligations to the plaintiff's family in terms thereof.

11. She also testified that after the lobola was paid a party was held at which goats and sheep were slaughtered. The party was attended by the plaintiff's and the deceased's families and friends. At the party the plaintiff wore the traditional dress of the deceased's family in a ceremony. The bra, coat, headdress and shoes that she wore were given to her by the deceased's family to wear in the ceremony. The plaintiff was accompanied by her family to the party. After the ceremony, which took place on 19 November 2005, the plaintiff's family departed and left the plaintiff with the deceased and his family. The plaintiff lived with the deceased until his death.

12. During argument Mr Smith referred me to the judgment of Dlodlo J in *Fanti v Boto and Others* 2008 (5) SA 405 (C) and particularly to paragraphs [19] and [20] at 413 G-J where the Learned Judge stated the following in respect of customary legal principles:

“[19] It is actually relatively easy to prove the existence of a customary marriage in view of the fact that there are essential requirements that inescapably must be alleged and proved. These would be:

- (i) consent of the bride;*
- (ii) consent of the bride's father or guardian;*
- (iii) payment of lobola; and*
- (iv) the handing over of the bride.*

See: Mabuza v Mbatha 2003 (4) SA 218 (C) at 223.

[20] The same requirements are set out as follows by Olivier, Bekker et al in their work Indigenous Law (Lexis Nexis):

- (i) *a consensual agreement between two family groups with respect to the two individuals who are to be married and the lobola to be paid;*
- (ii) *the transfer of the bride by her family group to the family of the man.*

Regard being had to the above requirements for the validity of a customary marriage, payment of lobola remains merely one of the essential requirements. In other words, even if payment of lobola is properly alleged and proved, that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements. See: Gidya v Yingwana 1944 NAC (N and T) 4; R v Mane 1947 (2) PH H 328 (GW); Ziwande v Sibeko 1948 NAC (C) 21; Ngcongolo v Parkies 1953 NAC (S) 103."

13. The evidence of the plaintiff summarised above satisfies me that the requirements for a valid customary marriage were established by the plaintiff.
14. I have no hesitation in accepting that the plaintiff consented to the union, that her father who was a beneficiary of most of the deceased's family's obligations in terms of the lobola agreement agreed thereto, that the lobola due was paid and that the plaintiff was duly handed over to the deceased and his family.
15. The plaintiff then testified that she and the deceased had three minor children together. The first child, NPR, was born on 6 July 1994, the second, TPR, was born on 15 September 1998 and the third, PAGR, was born on 5 June 2007.

16. N has successfully completed matric and wants to study law. T in Grade 8, that is, her first year of high school and she plans to study medicine after school. The third child, P, has recently commenced her school career and obviously her aspirations for the future are uncertain.
17. The plaintiff testified that the deceased was self-employed. He ran two tuck shops from approximately 1995 until his death. The plaintiff handed in photographs depicting the places of business of the deceased being the two tuck shops and some stock on the shelves and in baskets. Both businesses appear from the photographs in question to have been small neat grocery shops which were conducted from permanent structures.
18. The plaintiff testified that for eight months prior to his death the deceased had given her R15 000 a month for household expenses as well as for the maintenance and education of the minor children. No evidence was given either in relation to the household and other expenses or as to the financial needs of the children.
19. The only acceptable evidence presented as to the income which the deceased provided to the household that consisted of the plaintiff, the 3 minor children, Victor and the deceased is the plaintiff's oral evidence that I have already referred to above.

20. I am concerned, having regard to the nature of the businesses in the photographs and the nature of the goods that were sold, that the plaintiff may have exaggerated the amount of money that was given to her by the deceased to meet her monthly expenses.
21. Nevertheless, as I have already observed, there is no evidence to contradict her say so in this (or any other) regard. Accordingly, I cannot reject her evidence in any respect as I have no basis for doing so.
22. However, the possibility that the reported income produced by the deceased probably was exaggerated as well as the fact that I have not been presented with any documentation or other evidence disclosing the monthly expenses that the money was used to discharge, are amongst the factors that I will include in determining the contingency to be applied in the quantification of the damages that will be awarded for the loss of support claims.
23. I am satisfied on the basis of the plaintiff's evidence that the plaintiff personally and as the natural and legal guardian of the minor children born to her and the deceased suffered damages due to the loss of support occasioned to them by the death of the deceased on 24 February as aforesaid.

THE QUANTUM OF THE CLAIM

24. In the amended particulars of claim, the plaintiff claims loss of support in an amount of R1 129 773. This is broken down as to:
- 24.1. loss of support for the plaintiff - R332 279;
 - 24.2. loss of support for N - R119 735;
 - 24.3. loss of support for T - R230 633;
 - 24.4. loss of support for P - R447 126.
25. The amended claims are premised on loss of support of each of the children until 31 December following their respective 21st birthdays. In providing tables with the figures for loss of support, Mr Jacobson made certain deductions based on the assumptions referred to in his report and by applying certain recognised contingencies thereto.
26. For unforeseen contingencies based on factors such as errors in the estimation of future earnings and life expectancy, possible loss of earnings due to unemployment and sickness, retirement at an earlier age, dilution of the family income by birth of additional children and general hazards of life, Mr Jacobson deducted 5% in respect of accrued contingencies and 15% in respect of prospective contingencies relating to the plaintiff. He also deducted a 15% remarriage deduction from the calculation for her loss.

27. In respect of the children he has provided two bases for his calculations. The first is that the minor children are dependant until the age of 18 years and the second is on the basis that they are dependant until the age of 21 years. For the purpose of the award, I am prepared to assume that the minor children would have been dependant on the deceased until 31 December following age 18.
28. I also feel some unease about accepting the contingency deductions recommended by Mr Jacobson particularly in view of the fact that the projections of future income are based entirely on the plaintiff's evidence of the support she received from the deceased. I accordingly consider it appropriate to increase the percentages as I do below to reduce the amount estimated for the loss of future earnings.
29. In the premises, I consider that the future contingency for the plaintiff herself should be 25%, that of T 17.5% and that of P 20%. I have adjusted the figures accordingly. I accept the contingency for remarriage by the plaintiff as calculated by Mr Jacobson as well as his figures for accrued contingency.
30. In the circumstances I consider that an appropriate award to be paid as compensation to the plaintiff in respect of the loss of support occasioned to her and her children by the untimely death of the deceased is an amount of R998 062. This figure incorporates the accrued loss as calculated by Mr Jacobson, prospective losses as

revised by me and also the burial costs of R13 500, which were conceded by the defendant during the course of the trial.

ORDER

31. The following order is made:

1. The defendant is ordered to pay the plaintiff the amount of R998 062-00 together with interest thereon at the prescribed rate of 15.5% per annum calculated from 14 days after date of judgment to date of payment.
2. The defendant is ordered to pay the plaintiff's costs of suit, on the attorney and client scale, including the qualifying and other taxable costs of the actuary Gerard W Jacobson.

I. MILTZ
 ACTING JUDGE OF THE SOUTH
 GAUTENG HIGH COURT,
 JOHANNESBURG

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