

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

Case No: 37392/12

Date: 17 October 2014

Not reportable

Not of interest to other judges

In the matter between:

M[...] M[...] K[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MNGQIBISA-THUSI,

1. The plaintiff has instituted a claim against the defendant for damages in her personal capacity and representative capacity as the natural mother and guardian, on behalf of the two minor children allegedly born of the union between herself and the deceased. The claim arises from the death of S[...] P[...] L[...] ("the deceased") in a collision which occurred on 3 September 2011 along the Nebo-Jane Furse Road, Makwete.

2. In terms of section 17 of the Road Accident Fund Act 56 of 1996 the respondent is obliged to compensate any person for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle.

3. The parties agreed for the separation of issue of merits/liability and quantum. A ruling was made in terms

of Rule 33(4) whereby liability and quantum were separated and quantum was postponed *sine die*.

4. Further, the parties agreed that the following issues are to be determined:

4.1 the *locus standi* of the plaintiff; and

4.2 the issue of liability.

5. The defendant disputes that the plaintiff and the deceased were married in terms of customary law.

6. The plaintiff evidence is follows. During December 2009 the deceased family representatives, S[...] T[...] (uncle) and J[...] H[...] (brother) came to her family to pay lobola. She was not involved in the negotiations but was called to identity the emissaries. She later learnt that her family demanded lobola in the amount of R10 000.00 plus two cows. A certain amount was paid as lobola with the intention of paying the balance at a later stage. She further testified that as the deceased worked in Pretoria, they only saw each other at the end of each month or fortnight when he came to visit her at her parental home. Two children were born of the marriage. The plaintiff further testified that she and the deceased never lived together. She also testified that the handing-over ceremony was never held.

7. The defendant called A[...] T[...] ("T[...]") as a witness. He testified that he did not know the plaintiff. He only heard that his nephew (the deceased) was going to marry his cousin. His brother S[...] was appointed as the family representative to negotiate about the lobola. He later learned that S[...] had paid on amount of R1 000.00 as a deposit. He further testified that if there were any lobola negotiations, he would have been involved. According to T[...], in their custom after lobola is paid in full there is a wedding ceremony held where the bride wears a white gown and a cow is slaughtered. He denied that a wedding ceremony was ever held for his nephew.

8. Counsel for the plaintiff submitted that if should be find that the plaintiff and the deceased had entered into a customary marriage and counsel further submitted that the facts that is does not appear that all the rituals pertaining to the conclusion of a customary marriage was performed, should not be decisive in that customary marriages were dynamic. Counsel further urged this court to exchange the evidence on the basis that it was no reliable as he was not present at the time of the lobola negations took place.

9. Counsel for the defendant argued that there was no customary marriage concluded between the plaintiff and the deceased and that the plaintiff should be excluded as a beneficiary. Counsel further submitted that only the younger child Pholosho Matseke born on 12 June 2011 should be compensated.

10. Section 3 of the **Recognition of Customary Marriages Act** 120 of 1998 provides that:

"3(1) For a customary marriage entered into after the commencement of this Act to be valid—

'(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each under customary law;

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law,"

11. The applicant bears the *onus* of proving that there was a customary marriage entered into between herself and the deceased; *vide Baadjies v Mathebula* 2002 (3) SA 427 (WLD) at para [15]-[22]. The essential requirements of a valid customary marriage are that:

(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 to the groom's family.

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

12. Having regard to the above-mentioned requirements for the validity of a customary marriage, payment of lobola is merely one of the essential requirements. However, that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements.

13. It is common cause that a portion of the lobola was paid with the intention of the balance to be paid later. Furthermore, it is common cause that the handing over of the bride ceremony was never held. In view of the fact that one of the essential requirements for a customary marriage was not conducted, I am of the view that no valid marriage was concluded between the deceased and the plaintiff. Consequently, the plaintiff is not entitled to any compensation.

14. With regard to the issue of liability the plaintiff called warrant officer Borura Jim Moela as a witness. He is based at the Jane Furse police station. His evidence is as follows. On 3 September 2011 he was the first police officer to attend the accident scene. The collision happened along the Nebo to Ga-Mampuru road. Moela described the road where the accident happened as a descent from Nebo and ascending towards the

direction of Ga-Mampuru. Next to the road there is a bottle store. On arrival at the scene he found a group of people and saw a motor vehicle on the side of the road. He was approached by the driver of the insured vehicle who informed him that as he was travelling along the road, he saw a person running from the bottle store towards the road. He tried to swerve to avoid hitting him but unfortunately collided with the person. He took a statement from the insured driver whilst still at the scene. Moela could not, however, determine what the distance was between the road and the bottle store. In his opinion, the insured driver should have seen the person before he reached the road. Moela further testified that the insured driver also informed him that when the collision occurred he was driving at approximately 80km an hour.

15. The insured driver did not testify.

16. With regard to the issue of liability the only evidence before this court is that of Moela who testified as to what the insured driver told him about how the accident occurred when he took a statement from him on the day of the incident. It is common cause that the accident happened on a public road where it is reasonable to expect pedestrian's to cross the road in view of the evidence by Moela that next to the road there is a bottle store.

17. Counsel for the plaintiff argued that the insured driver should be held to have been negligent in that he did see the deceased running towards the road and should have timely taken evasive steps to avoid colliding with the deceased. Counsel conceded that negligence on the part of the deceased cannot be excluded as he, as a pedestrian should have been on the lookout for oncoming vehicles before trying to cross the road. Counsel submitted that an apportionment of liability should be applied in terms of which it is held that the deceased was 20% negligent in the cause of the collision.

18. Counsel for the defendant argued for absolution from the instance on the ground that the evidence of Moela was not satisfactory as to what the insured driver told him and since the insured driver did not testify, there is no evidence proving that the liability of the defendant. In the alternative counsel argued that should it be found that the insured driver was negligent, only the youngest child of the deceased should be compensated as the plaintiff did not provide evidence proving that the plaintiff's eldest child was that of the deceased. This submission was not challenged by the plaintiff's counsel.

19. It is expected that a reasonable driver would be more cautious when travelling on a road where he is likely to encounter pedestrians. It is not disputed that the area where the collision happened was a built-up area where there was even a bottle store. Taking into account that the insured driver had stated in his evidence that he saw the deceased running towards the road from the bottle store, as a reasonable driver he ought to have reduced in order to avoid hitting him. Continuing to drive at a speed of 80km an hour after seeing a person running towards the road you are travelling in amounts to negligence. However, as correctly

pointed out by counsel for the plaintiff, the deceased contributed to the collision by running onto the road without first checking if it was safe to do so. I am therefore satisfied that the plaintiff and the insured driver were responsible for the cause of the collision and would apportion their negligence on a 70% and 30% basis in favour of the plaintiff.

20. Accordingly the following order is made, that:

1. No valid customary marriage was concluded between the deceased and the plaintiff.
2. The defendant is liable to compensate the deceased youngest child for 70% loss of his/her proven damages.
3. The defendant to pay the costs of these proceedings.

N P MNGQIBISA-THUSI

Judge of the High Court

Appearances:

For plaintiff: Adv Matsemala

Instructed by: Mphela & Associates

For defendant: Adv Van Staden

Instructed by: Dyason Inc.