

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 17212/13

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

.....  
**SIGNATURE**

.....  
**DATE**

In the matter between:

**PAULINA MAHAPELOA**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**WINDELL J:**

## **INTRODUCTION**

[1] This is a dependant's action against the Road Accident Fund for loss of support caused by the death of Simphiwe Titus Thetyana. The plaintiff alleges that she was the deceased's permanent life partner; that he owed her a legal duty to support her and that she is, therefore, entitled to lodge a claim against the RAF. The RAF disputes that there was an agreement between the plaintiff and the deceased creating a legal obligation between the parties.

## **THE RELEVANT FACTS**

[2] Ms Paulina Mahapelo met the deceased in 2008 when she was still in school. She was in Grade 10 and 19 years old. The deceased was 26 years of age. They started out of as friends and only became lovers later. This was her first boyfriend. She fell pregnant with his child in August 2009 and she left school in the middle of her Grade 11 year in 2010. She gave birth to a girl, Olwethu, in June 2010. Her grandmother raised her and she was staying with her at her grandmother's house after the baby was born. Her grandmother complained about the baby's crying and the switching on of the lights during the night to attend to the baby. The plaintiff told the deceased about the complaints and after he consulted with his mother, she was invited to move in with him and his mother.

[3] Soon after she moved in the deceased told her that he wanted to start lobola negotiations. She, therefore, assumed that he wanted to get married. She also wanted to marry him. She loved him and he loved her. The deceased supported her and tended to her needs and that of the baby. Six months after she moved in with him he passed away as a result of a motor vehicle accident.

[4] She testified that they discussed the future and decided that she would go back to school to obtain her matric qualification. She would then enrol at the nursing college to train as a nurse. He would support her financially.

[5] Deceased mother testified that her son was a man of his word, had good morals and was overall a good son. She met the plaintiff when the plaintiff's family reported the pregnancy to her. After the baby was born the deceased told her that the plaintiff experienced problems with her grandmother because of the baby. He asked her if it would be in order if the plaintiff and the baby moved in with them. She gave permission and the plaintiff moved in. The deceased has never brought a girl home before. The deceased never discussed his intention to marry the plaintiff with her. She was not aware of any previous relationship that the deceased might have had. The plaintiff is still staying with her four years after the deceased has passed away. She considers the plaintiff as her daughter.

[6] The fund adduced no rebuttal evidence.

## **THE LAW**

[7] The question that needs to be answered is if the deceased in his lifetime owed the plaintiff a legal duty of support. Whether a duty of support exists will depend on the circumstances of each case.

[8] The common law was extended in *Paixao v RAF 2012 (6) SA 377 (SCA)* to provide for a dependant's action in permanent heterosexual relationships. The salient facts on which the court found that there was a permanent life partnership were the following. Ms Paixao and the deceased became friends in 2002. Their relationship grew as did

the bond with her daughters. The deceased paid for Ms Paixao daughter's wedding as he wanted to be part of their family and he felt responsible for them. He moved in with them in 2003. They executed a joint will and nominated each other as the sole heirs of their entire estate. He supported them financially and paid for everything which included the university fees of Ms Paixao daughter. He planned to marry Ms Paixao and they travelled to Portugal to meet his parents. They pooled their resources when Ms Paixao was retrenched and they were accepted by their relatives, community and friends as a family unit. They had been living together for 6 years before he passed away.

[9] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) dealt with same sex relationships. The court took the following facts into consideration in determining whether the duty of support existed between the parties.

*"[25] ..... Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death. It appears probable that they have undertaken reciprocal duties of support."*

[10] In *Du Plessis v RAF* 2004 (1) SA 359 (SCA), which also dealt with same sex relationships, the Court was also tasked to consider if the plaintiff proved a legally enforceable duty of support on the part of the deceased. The court quoted the matter of *Satchwell supra* with approval and stated the following in par [14]; [15] and [16]:

*[14] In the present case the case for drawing an inference that the plaintiff and*

*the deceased undertook reciprocal duties of support is even stronger. The plaintiff and the deceased would have married one another if they could have done so. As this course was not open to them, they went through a 'marriage' ceremony which was as close as possible to a heterosexual marriage ceremony. The fact that the plaintiff and the deceased went through such a 'marriage' ceremony and did so before numerous witnesses gives rise to the inference that they intended to do the best they could to publicise to the world that they intended their relationship to be, and to be regarded as, similar in all respects to that of a heterosexual married couple, ie one in which the parties would have a reciprocal duty of support. That having been their intention, it must be accepted as a probability that they tacitly undertook a reciprocal duty of support to one another.*

*[15] Further support for this finding is the fact that the plaintiff and the deceased thereafter lived together as if they were legally married in a stable and permanent relationship until the deceased was killed some 11 years later; they were accepted by their family and friends as partners in such a relationship; they pooled their income and shared their family responsibilities; each of them made a will in which the other partner was appointed his sole heir; and when the plaintiff was medically boarded, the deceased expressly stated that he would support the plaintiff financially and in fact did so until he died.*

*[16] In the light of the foregoing I am satisfied that the plaintiff proved that the deceased undertook to support him with the intention of being legally bound by such undertaking. The deceased, therefore, owed the plaintiff a contractual duty of support.*

[11] In order for plaintiff's claim to succeed there must be proof that there was an agreement between the parties that created a binding legal obligation. The agreement may be made expressly or tacitly. A tacit agreement is inferred from the surrounding circumstances and conduct of the parties. It is for the court to decide whether a contract probably came into existence. See *Paixoa supra* at par [18].

[12] In order to merit recognition, a relationship must have attained a sufficient (but indefinable) core of stability and commitment. The Court held in *National Coalition for*

*Gay and Lesbian Equality v Minister of Home affairs 2000 (2) SA 1 (CC)* that:

“[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. ....”

[13] In *Volks NO v Robinson 2005 (5) BCLR 466 (CC)* the parties *inter alia* lived together for 16 years. The court was satisfied that their relationship satisfied the threshold criteria recognized in *National Coalition for Gay and Lesbian Equality v Minister of Home affairs* matter. In *Verheem v RAF 2012 (2) SA 409 (GNP)* the court found that an enforceable duty did exist on the grounds that the relationship between the parties was permanent, stable and long-term. The facts were, briefly, as follows. In this case, the deceased and his female life partner had been living together since 1990. Two daughters were born of this relationship, while the plaintiff also had a daughter from a previous relationship. The family of five lived together and the deceased raised the plaintiff's daughter as if it was his own child. The intended to marry one another, but felt that they could not afford a “decent wedding” and, as time passed, there were ever

increasing expenses, especially the costs as to the upbringing of the three daughters who were more or less the same age. The couple were nevertheless regarded by their family and friends as being “man and wife”.

[14] In *Mc Donald v Young 2012 (3) SA 1 (SCA)* plaintiff and respondent had cohabited as man and wife for approximately seven years. After their relationship broke down, plaintiff unsuccessfully instituted a high court action against respondent for an order declaring that an express joint venture agreement had existed between them in respect of certain immovable property, alternatively for an order that respondent pay him maintenance. On appeal, the Supreme Court of Appeal agreed with the high court's finding and found that no duty of support arose by operation of law in the case of unmarried cohabitants, any obligations arising during the subsistence of their relationship arising only by agreement. It further held that a tacit contract was established by conduct and that there had to be evidence of conduct justifying an inference that there was consensus between them. At par [25] the court stated the following:

*“[25] It is trite that a tacit contract is established by conduct. In order to establish a tacit contract, the conduct of the parties must be such that it justifies an inference that there was consensus between them. There must be evidence of conduct which justifies an inference that the parties intended to, and did, contract on the terms alleged. It is clear from the appellant's evidence that there was no consensus between the parties. The appellant, on his own testimony, was uncertain about his financial future. He realised that he would only be entitled to what had been agreed between the parties, hence his desire to have a written contract 'to fall back on'. The respondent's attitude as testified to by the appellant, that he would leave the relationship without any financial benefit, is an indicator that she had not tacitly or otherwise agreed to support the appellant. I am not satisfied that this court can conclude from all the relevant proven facts and circumstances that a tacit contract — in terms of which the respondent undertook*

*to financially maintain the appellant for as long as he needed such maintenance — came into existence.”*

[15] Counsel for plaintiff contended that as the defendant did not adduce any evidence in rebuttal and as the evidence of the plaintiff was not seriously disputed that the plaintiff discharged the onus. In *Paixao supra*, Cachalia JA remarked the following:

*“I appreciate that it is not always easy for defendants in the fund’s position to refute evidence of a plaintiff dependant’s assertion that the deceased had undertaken a duty to support him or her. But this concern, I think, is overstated. **A plaintiff’s assertion, without more, that he or she was in life partnership, cannot be taken as sufficient proof of this fact.** (In this case the fund conceded that the relationship was a life partnership.) **Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics – particularly a reciprocal duty of support – to a marriage. Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other. The implied inference to be drawn from these proven facts must be that the parties, in the absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments – ie a duty to support – to each other.** (my emphasis). Courts frequently undertake this exercise without much difficulty – as this and other cases such as *Amod*, *Satchwell* and *Du Plessis* demonstrate. Life partnerships therefore do not present exceptional evidential difficulties for defendants.*

## CONCLUSION

[16] The plaintiff was still in school when she fell pregnant. The deceased was her first boyfriend. Because of the pregnancy she had to leave school but intended to return and finish her matric qualification after the baby was born. She also wanted to further her education and was planning on going to nursing school to become a nurse. After



the baby was born she was still living with her grandmother. There is no evidence to suggest that she would have moved in with the deceased if it was not for the complaints of her grandmother. The parties were both very young and were living together for only 6 months when the deceased passed away.

[17] The deceased only introduced the plaintiff to his mother after she fell pregnant. The mother of the deceased was not even aware of her son's intention to start lobola negotiations. One would have expected the deceased to tell his mother of his intentions to marry the plaintiff if it was their intention to be permanent life partners.

[18] In the *Volks* matter it was observed at par [120], that some people 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.

[19] It is common cause that there was not an express agreement between the plaintiff and the deceased. The plaintiff relies on a tacit agreement. The conduct of the parties must be such that it justifies an inference that there was consensus between them. There are simply not enough facts to prove the existence of a permanent life partnership. I am not satisfied that the plaintiff discharged the onus in proving a legally enforceable duty of support on the part of the deceased.

[20] In the result the following order is made:

1. The claim is dismissed with costs.

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**L WINDELL**

**JUDGE OF THE HIGH COURT**

Attorney for plaintiff: Van der Elst Inc.

Counsel for plaintiff: Adv. D. Goodenough

Attorney for defendant: Kekana Hlatswayo Radebe Inc.

Counsel for respondent: Adv. Makhaleni

Date matter heard: 21 November 2014

Judgment date: 12 December 2014