



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No. 18996/2011

In the matter between:

**BENINIA CHITIMA**

Applicant

and

**THE ROAD ACCIDENT FUND**

Defendant

**Coram:** BOZALEK J  
**Judgment:** BOZALEK J  
**Heard:** 11 October 2011  
**Delivered:** 15 December 2011

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***For the Applicant:*** *Adv C Cawood*  
***As instructed by:*** *VanDer Spuy Attorneys*  
*(Ref: L Willemse)*

***For the Respondent:*** *n/a*  
***As Instructed by:*** *n/a*

REPORTABLE



THE REPUBLIC OF SOUTH AFRICA

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**CASE NO: 18996/2011**

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**BENINA CHITIMA**

Plaintiff

versus

**THE ROAD ACCIDENT FUND**

Defendant

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**JUDGEMENT: 15 DECEMBER 2011**

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**BOZALEK J:**

[1] The applicant, a Zimbabwean national resident in South Africa since 2004 as a refugee, is the partner of the late Mr Lameck Chihota ("the deceased") who was fatally injured in a motor vehicle accident in Cape Town on 12 June 2006. She has instituted an action against the respondent, the Road Accident Fund, for loss of support suffered as a result of the deceased's death in both her personal capacity and, as the natural mother and guardian,

on behalf of the two minor children born of the union between herself and the deceased.

- [2] The applicant's claims for loss of support are based, in the first part, on her marriage to the deceased in terms of customary law in Zimbabwe in 1996 coupled with her allegations that at all material times the deceased had a duty in law to support herself and the minor children and did in fact provide them with such support.
- [3] It appears that the respondent stands ready to reach agreement with the applicant in respect of her personal claims but it first requires her, in the absence of a customary marriage certified in terms of the Black Laws Amendment Act, 76 of 1963, to obtain a court order confirming the validity of her marriage to the deceased.
- [4] The relief sought by applicant is an order that her "*unregistered, customary marriage to the deceased in September 1996 be recognised/confirmed as a valid marriage and or marriage in terms of a customary law of Zimbabwe for the purposes of her claim against the Road Accident Fund*". The relief is not opposed by the respondent.

### THE FACTS PERTAINING TO THE CUSTOMARY MARRIAGE

- [5] According to the applicant's founding affidavit she and the deceased met in 1989 and were in a relationship for a number of years before they got married. In September 1996 the deceased approached the applicant's parents seeking their permission to marry her. She was pregnant with their first child. The applicant's parents agreed to the marriage subject to the deceased paying *lobolo* which he duly did. Over a period of some days in September 1996 the applicant was escorted by members of her family to the deceased's family who were gathered to receive her as part of the customary wedding ceremony and her handing over as "*makoti*" to the bridegroom's family. Thereafter cooking, cleaning and a small feast and celebration took place.
- [6] In support of this account the applicant annexed confirmatory affidavits from her sister, the deceased's uncle and her parents. They confirmed attending the wedding ceremony, which was held according to custom, and the payment of the *lobolo*.
- [7] The applicant confirmed that she and the deceased lived together as husband and wife from the time of their marriage to his death but that the customary marriage, was, however, never registered or solemnized in accordance with the general law of Zimbabwe.

## THE LAW IN ZIMBABWE

[8] The applicant testified that unregistered customary marriages or unions such as hers are not regarded as a valid marriage in Zimbabwe. An affidavit from a practising attorney in Zimbabwe, Mr Blessing Diza, was filed confirming that, by reason of s 3(1) of The African Marriages Act [Chapter 238] and s 3(1) of the Native Marriages Act 23 of 1950, an unregistered customary union is not regarded as a valid marriage in Zimbabwe.

[9] However, the attorney cites section 6(1) of the Customary Law and Primary Courts Act 6 of 1981 which provides that an unregistered customary union may, in certain cases, be treated by a court as valid for all civil purposes.

It reads as follows:

*"6.(1) Subject to the provisions of section 3 of the African Marriages Act [Chapter 238], if in any civil case a question arises as to the effects of a marriage which was contracted according to customary law by a person at a time when he already had another wife or other wives married to him according to customary law, the court may treat such marriage as valid for all civil purposes, in so far as polygamous marriages are recognized by customary law."*

[10] This proviso, although not of direct assistance to the applicant, does indicate at least limited recognition of customary marriages in Zimbabwean law.

[11] More to the point, however, are the provisions of sections 12(3) and 4(a) of the aforesaid Act which stipulate that a community court may make an order for maintenance against the husband in favour of his spouse in a customary marriage.

The section reads:

"(3) Without derogation from its powers to make any other order for maintenance, a community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [Chapter 35].

(4) For the purposes of an order for maintenance in terms of subsection (3), a community court shall, notwithstanding anything to the contrary contained in customary law, regard-

(a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during the marriage and, after the dissolution of their marriage, until her remarriage;"

[12] In *Zinmat Insurance Company Limited v Chawanda* 1990(2) ZLR 143 (SC) the Zimbabwean Supreme Court held that the provisions of sections 12(3) and 4(a) give a wife in an unregistered customary union a legal right to support from her husband and create, for her husband, a legal obligation to provide such support. It held further

that, having regard to the notion of justice and the interests of the litigants balanced against the community as a whole, it was desirable to extend the dependant's action to a customary wife in respect of whom the duty of support arises by virtue of legislation. The court thus held that the wife in such a union could seek relief against the person who, by his negligent conduct, deprived her of her husband's support.

### **THE LAW IN SOUTH AFRICA**

[13] It is trite that the contract of a marriage gives rise to a reciprocal duty of support and that a surviving spouse is entitled to bring a claim for loss of support arising out of the unlawful killing of the spouse. The common law duty of support is, furthermore, a flexible concept which has been extended to include same-sex partnerships as well as persons married in terms of Islamic law. See *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) and *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

[14] In our legal system customary unions such as that contracted between the applicant and the deceased enjoy statutory recognition as valid marriages and, subject to compliance with certain statutory formalities, found a claim for loss of support arising out of the unlawful killing of a partner.

[15] The legislature first acknowledged the duty of support arising out of a customary union as underpinning such a claim through the enactment of the Black Laws Amendment Act, No 76 of 1963 ("the Amendment Act") which set right the judgment in *SANTAM v Fondo* 1960 (2) 467 (A). In that case it was held that no such claim could be brought because the duty of support in a customary union was not recognised by the common law. It was, however, only some 35 years later through the Recognition of Customary Marriages Act, 120 of 1998 ("the Recognition Act") that the legislature fully accepted customary unions as valid marriages for all purposes.

[16] In terms of s31(1) and (2) of the Amendment Act a claim for damages against a wrongdoer for loss of support suffered by a party to a customary union arising out of the wrongfully caused death of such party's spouse is enforceable. The claimant must, however, produce a certificate issued by a Commissioner (now a magistrate) as contemplated in terms of s31(2) read with ss2(A) certifying the existence of the union and the names of the parties. These provisions cannot be read, however, as applying to individuals whose customary union or marriages were concluded beyond the borders of South Africa.



[17] It was the Recognition Act that gave full recognition to customary marriages for all intents and purposes, arguably rendering s31 of the Amendment Act superfluous. Section 2 thereof provides as follows:

1. *"(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.*
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.*
- (3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.*
- (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages."*

[18] Again, however, these provisions are of no direct assistance to the applicant since, regard being had to the definitions section, they apply only to customary marriages concluded in accordance with customary law which is defined as the customs and usages *"traditionally observed among the indigenous African peoples of South Africa"*. They are thus not applicable to the applicant notwithstanding that her relevant tribal customs and beliefs may be the same or substantially similar to those of black South Africans.

## THE ISSUE

[19] The question which arises is whether the surviving partner in an unregistered customary union concluded in Zimbabwe has an action in delict in South Africa against the respondent for damages for loss of support arising out of the wrongful death of her partner in a motor vehicle accident.

## ANALYSIS

[20] The applicant's Zimbabwean nationality coupled with her reliance for a duty of support arising from a customary union concluded in that country, but asserted in this Court a claim for a delict committed locally, gives rise to a conflict of laws. In any such issue three elements potentially arise:

- (a) the jurisdiction of the forum and its competence to hear and determine a case;
- (b) the selection of the appropriate rules of a system of law (the forum's or foreign substantive law) which should be applied to resolve the dispute over which it has jurisdiction and the extent to which the *lex causae* should be applied and;
- (c) the recognition and enforcement of judgments rendered by foreign courts.

See LAWSA 2 ed vol 2 part 2 at 26 para 281

[21] The first and third elements do not arise in the present instance and thus the Court's task is essentially to choose the applicable law through the customary process of characterization, selection and application.

[22] The core of the applicant's claim lies in a duty of support arising out of a marriage or quasi marriage giving rise in turn to a delictual claim against the statutory insurer of the party alleged to be responsible for her partner's unlawful death. As such the starting point of the enquiry must be the validity of the marriage or union.

[23] In terms of our common law the validity of foreign marriages is determined by the law of the place where the marriage is celebrated, the *lex loci celebrationis*, which would be Zimbabwe on the facts of the present matter. See *Seedat's Executors v the Master* (Natal) 1917 AD 302 at pg 307 and *AS v CS* 2011 (2) SA 360 (WC) at 366. On the applicant's own case her marriage to the deceased was not a valid marriage for the purposes of the law of Zimbabwe. However, notwithstanding that they may be unregistered, Zimbabwean law does recognize such customary unions in certain circumstances and for certain purposes through the provisions of s 6(1) and 12 (3) and 4(a) of the Customary Law and Primary Courts Act 6 of 1981.

[24] The duty of support upon which the applicant relies is a personal consequence of the marriage relationship between her and the deceased. As such it is governed by the domiciliary law of the parties at the time of the act in question, namely, the accident which caused the deceased's death. See Forsyth, *Private International Law*, fourth Edition, Juta at pg 274.

[25] The applicant's papers are silent on whether she and the deceased regarded Zimbabwe or South Africa as their domicile at the time of his death. This, however, presents no stumbling block since the duty and right of support flowing from a customary union is recognized by both legal systems. Our legal system in fact gives much broader statutory recognition to customary unions and there is therefore no public policy reason to withhold recognition of the applicant's customary union and the concomitant duty of support.

[26] Having determined the relevant personal consequences of the applicant's marriage, attention must now be given to its intersection with the delict which gives rise to the applicant's putative claim. The delict was committed locally and the governing considerations suggest in my view that the *lex loci delicti commissi* should apply. As Forsyth observes it seems natural that where an accident occurs the laws of the territorial sovereign

should determine the consequences of the acts causing the relevant damage.<sup>1</sup>

[27] Our legal system recognises a loss of support claim such as that asserted by the applicant based upon a customary marriage subject only, as far as the relationship is concerned, to proof thereof. In this regard see *Fanti v Boto and Others* 2008(5) SA 405 (CPD) where Dlodlo J, restated the essential requirements to prove the existence of a customary marriage as being the consent of the bride, the consent of the bride's father or guardian, the payment of *lobolo* and the handing over of the bride. (at pages 413 e-i). The applicant's description of her customary marriage in Zimbabwe mirror the elements of such a union in South Africa.

[28] 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. The RAF Act does not therefore preclude the applicant from bringing a claim for loss of support.

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<sup>1</sup> At page 239

[29] From a constitutional perspective s9 of the Bill of Rights provides that everyone is equal before the law and has the right to equal protection and benefit of the law. As part of the same right the State may not unfairly discriminate, directly or indirectly against anyone on a range of grounds including marital status and culture. Our courts have interpreted the Bill of Rights as applying to both citizens and aliens alike. As Stewart Woolman notes<sup>2</sup> *"the text gives us no reason to assume that resident aliens – who have legally entered the country and remain in good legal standing – will receive anything less than the levels of constitutional protection required for a personhood ... The courts will err in favour of extending non-citizens the full panoply of guarantees whilst they reside in South Africa."* See *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)*<sup>3</sup>.

[30] Bearing in mind, further, that our common law duty of support is a flexible concept which has been extended and developed over time, I can see no reason why the applicant should not enjoy the right to sue for compensation for any loss of support she has suffered as a result of the death of her partner.

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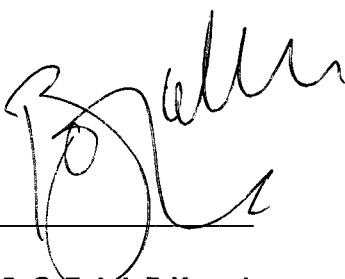
<sup>2</sup> Constitutional Law of South Africa 2<sup>nd</sup> edition volume 2 31 35

<sup>3</sup> 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC)

[31] In the result I propose to grant the applicant appropriate relief albeit different to that sought in the Notice of Motion. In that form it lacks clarity and can be interpreted as requiring this court to declare the applicant's unregistered customary union in Zimbabwe to be a valid marriage, a power more appropriately exercised by the Zimbabwean courts.

[32] The following order is granted:

It is declared that the applicant's unregistered customary marriage to the deceased, LAMECK CHIHOTA ("the deceased") in September 1996 is recognised as having given rise to a duty of support in respect of the applicant sufficient for the purposes of her claim against the Road Accident Fund for damages for loss of support arising out of the death of the deceased following a motor vehicle accident in Cape Town on or about 12 June 2006.



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**L. J. BOZALEK, J**  
**JUDGE OF THE HIGH COURT**