THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Cases no: 487/01 and 495/01
REPORTABLE

In the matter between:

ROAD ACCIDENT FUND Appellant

and

MONGALO, M E Respondent

In the matter between:

NKABINDE, Palesa Joyce Appellant

and

ROAD ACCIDENT FUND Respondent

Before: Vivier JA, Olivier JA, Cameron JA, Navsa JA and Mpati JA
Heard: 14 November 2002
Judgment: 2 December 2002

Certificate under Act 76 of 1963 – 'Conclusive proof' of customary union – Can be impugned if obtained by fraud

---

JUDGMENT

CAMERON JA:

[1] The Road Accident Fund (the Fund) is the statutory body that deals with compensation for motor vehicle injuries.[1] At its request these two appeals were enrolled for hearing on the same day. They raise the same law point: whether the statutory provision that a certificate issued by a Commissioner[2] 'shall be accepted as conclusive proof of the existence of a customary union' excludes the admission of evidence that the certificate was obtained by fraud.[3]

[2] In each matter, the plaintiff alleged that she was the widow by customary union of a deceased road accident victim and claimed damages for loss of support. In both, the Fund admitted liability for damages resulting from the death of the deceased, and the only outstanding issue was whether the plaintiff was a partner to a customary union with the deceased when the collision occurred.

[3] *Mongalo* involved a ruling on a point of law. The parties in the Court below asked Lewis J to rule under Rule 33(4)[4] on 'the

---

[1] Road Accident Fund Act 56 of 1996, s 2(1).
[2] Under the Black Administration Act 38 of 1927.
[3] Black Laws Amendment Act 76 of 1963, s 31(2A). The sub-section was inserted by s 5 of Act 83 of 1984.
[4] Rule 33(4) of the Uniform Rules of Court provides that 'If, in any pending action, it appears to

status of a certificate' issued in terms of the Black Laws Amendment Act 76 of 1963 (the 1963 Act).[5] Section 31 provides:

> **Right of a partner to a customary union to claim damages from person unlawfully causing death of other partner**
> (1) A partner to a customary union as defined in section thirty-five of the Black Administration Act, 1927 (Act 38 of 1927), shall, subject to the provisions of this section, be entitled to claim damages for loss of support from any person who unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.
> (2) No such claim for damages shall be enforceable by any person who claims to be a partner to a customary union with such deceased partner, unless-
> (a) such person produces a certificate issued by a Commissioner stating the name of the partner, or in the case of a union with more than one woman, the names of the partners, with whom the deceased partner had entered into a customary union which was still in existence at the time of death of the deceased partner; and
> (b) such person's name appears on such certificate.
> (2A) A certificate referred to in subsection (2) shall be accepted as conclusive proof of the existence of a customary union of the deceased partner and the partner or, in the case of a union with more than one woman, the partners whose name or names appear on such certificate.
> (3) Where it appears from the certificate referred to in subsection (2) that the deceased partner was survived by more than one partner to a customary union, all such surviving partners who desire to claim damages for loss of support, shall be joined as plaintiffs in one action.
> (4) (a) Where any action is instituted under this section against any person by a partner to a customary union and it appears from the certificate referred to in subsection (2) that the deceased partner was survived by a partner to a customary union who has not been joined as a plaintiff, such person may serve a notice on such partner who has not been joined as a plaintiff to intervene in the action as a co-plaintiff within a period of not less than fourteen days nor more than one month specified in such notice, and thereupon the action shall be stayed for the period so specified.

---

the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot be conveniently decided separately'.

[5] Apart from the short title provision (s 33) and s 31, the rest of the statute has been repealed.

> (b) If any partner to a customary union upon whom a notice has been served in terms of paragraph (a), fails to intervene in the action within the period specified in such notice or within such extended period as the court on good cause shown may allow, such partner shall be deemed to have abandoned her claim.
> (5) If a deceased partner to a customary union is survived by more than one partner to such a union, the aggregate of the amounts of the damages to be awarded to such partners in terms of this section shall under no circumstances exceed the amount which would have been awarded had the deceased partner been survived by only one partner to a customary union.
> (6) A partner to a customary union whose name has been omitted from a certificate issued by a Commissioner in terms of subsection (2) shall not by reason of such omission have any claim against the Government of the Republic or the Commissioner if such omission was made bona fide.
> (7) Nothing in this section contained shall be construed as affecting in any manner the procedure prescribed in any other law to be followed in the institution of a claim for damages for loss of support.

[4] The only point the Fund raised at that stage before Lewis J was the contention that s 31 of the 1963 Act had been superseded by s 4 of the Recognition of Customary Marriages Act 120 of 1998[6] (which provides that a customary marriage certificate 'constitutes prima facie proof' of the existence of such a marriage).[7] Lewis J rejected this argument and, following the decision of Flemming DJP in *Finlay and Another v Kutoane*[8] that a customary marriage was 'incontrovertibly evidenced' by a certificate, whose finality 'eliminates the need for evidence' about the union, ruled that the Fund was not entitled to lead evidence to rebut its validity. Since

[6] The 1998 Act came into force on 15 November 2000.
[7] Section 4(8): 'A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof

this ruling entailed that there would be judgment for the plaintiff on the merits of her claim, it was clearly appealable,[9] and Lewis J later granted the necessary leave.

[5] In *Nkabinde*, similarly, the parties in the Court below asked Snyders J to rule under Rule 33(4) on the question whether the plaintiff was a partner to a customary union with the deceased at the time of the collision. Both parties led evidence on the issue. Snyders J after an examination of the authorities held that it could never have been the intention of the legislature to elevate a fraudulently obtained certificate to conclusive proof of an untruth, and that the Fund could lead evidence to attack the certificate on the basis of fraud.[10] On the evidence, Snyders J found that the certificate tendered had been fraudulently procured, and granted absolution from the instance with costs. She refused the plaintiff leave to appeal on both the law point and her factual conclusions, but this Court later granted the necessary leave.

'CONCLUSIVE PROOF' AND FRAUD

---

of the existence of the customary marriage and of the particulars contained in the certificate.'
[8] 1993 (4) SA 675 (W) 684A-B, 685H-I.
[9] See Harms *Civil Procedure in the Superior Courts* C1.16 'Judgment or order'.
[10] Reported at [2001] 3 All SA 611 (W).

[6] The starting point in establishing the meaning of 'conclusive proof' must be principle. This Court stated the principle in question in *African and European Investment Co Ltd v Warren and Others*.[11] A statute of the Transvaal Republic provided that a surveying diagram signed by the State President was to be 'een wettig en onwederlegbaar document' (a lawful and unimpeachable document). De Villiers JA observed:

> 'But there is no document in law which is wholly unimpeachable. Any document can be upset on the ground of fraud.'

[7] Powerful policy reasons underlie this principle. Deliberate deceit in the procurement of a document must taint its entire subsequent existence, and the law cannot permit propagation of the fruits of dishonesty. The intrinsic meaning of 'conclusive' does not impede this conclusion. 'Conclusive' means 'decisive, convincing' (Concise Oxford Dictionary). It suggests that the condition or state it qualifies brings something to a conclusion. It does not mean that the conclusion in question must in all circumstances be unimpeachable or unassailable. In principle, therefore, a statutory provision that a document constitutes 'conclusive proof' of a state

[11] 1924 AD 308 325.

of affairs cannot immunise the document from attack on the basis that it was procured fraudulently.

[8] This approach accords with authority. In *Registrar of Asiatics v Salajee*,[12] the statute provided that a certificate of registration 'shall be accepted as conclusive evidence' that its lawful holder was entitled to enter and reside in the Transvaal. The certificate had been obtained by the admitted fraud of one Fakir, who falsely stated that Salajee, then a boy of 16, was his son. For the purposes of the appeal it was accepted that Salajee believed that Fakir was his father and was not a party to the fraud. The Full Court (Curlewis JP, Stratford and Tindall JJ) held that the certificate could be annulled only if the holder (Fakir) was proved to have been guilty of fraud in its procurement. Stratford J stated:

> 'But to say that a certificate is to be conclusive proof of the facts to which it speaks is not the same thing as saying that the certificate cannot itself be attacked on the ground of fraud in its procurement.'[13]

Tindall J put it thus:

> 'Where an applicant himself was a party to a fraud by means of which the certificate was obtained, it is against the policy of our law to allow him to

[12] 1925 TPD 71.
[13] At 72.

retain the certificate, no matter what interests he may have acquired in the country in the meantime.'[14]

[9] What is material is the clear conclusion of all the judges in *Salajee* that the holder's own fraud could be proved to invalidate the certificate despite the statutory provision that it was 'conclusive'.[15] The judges there were at pains to protect the rights of the innocent youth who had subsequently relied on rights acquired through the false declaration of his professed parent. This they did by distinguishing between the holder of the certificate and other parties. These considerations do not arise in the present case. No distinction between the holder of the customary union certificate and any other person who may be entitled to derive rights from it arises. Fraud in obtaining a certificate, whether by the holder or any other person, renders the certificate assailable.

[10] But statements this Court made in *S v Moroney*[16] appear to stand in the way of this conclusion. At issue was a statutory provision that a notice in the *Government Gazette* that a publications committee had declared a publication 'undesirable'

---

[14] At 76.
[15] See too *Glenfield and Others v Zebediela Employees' Co-operative Trading Society Ltd and Another* 1950 (2) SA 155 (T) per Murray J at 165.
[16] 1978 (4) SA 389 (A).

was 'sufficient proof' of its undesirability. The appellant was charged with producing an undesirable publication. At the trial the State led no evidence, but merely produced the *Government Gazette* notice. This Court held that this was not enough to establish the accused's guilt. The decision turned on the distinction between 'sufficient' and 'conclusive' proof. Had the statute provided that the notice would be 'conclusive', the Court held, its mere production would establish the accused's guilt beyond reasonable doubt.[17] Van Winsen AJA (with whom Wessels ACJ and Corbett JA concurred) said in this context that 'conclusive proof' of a fact 'connotes proof which a court is obliged to accept, to the exclusion of all countervailing evidence, as establishing that fact', and that the effect of such an enactment was 'to create a *presumptio iuris et de jure* that the document or certificate establishes incontrovertibly the truth of that fact'. 'No evidence', he said 'may be led to controvert it.'[18]

[11] In emphasising the greater leeway that 'sufficient proof' left, Van Winsen AJA referred to certain South African authorities as establishing the distinction between 'sufficient' and 'conclusive'

[17] per Wessels ACJ at 399H.

proof.[19] But none of the authorities he cited offers support for the suggestion that in the case of 'conclusive' proof' 'all countervailing evidence' must be excluded, if that was intended to embrace also evidence of fraud. *Salajee* is in fact to the contrary, and I consider that the statements about the meaning of 'conclusive proof' in *Moroney* (which were not necessary to decide the meaning of 'sufficient proof') must be disclaimed now as erroneously over-broad.

[12] 'Conclusive proof' in s 31(2A) therefore does not mean that evidence of fraud cannot be led to impugn the certificate. Apart from principle, the remaining provisions of s 31 show how unjust the opposite conclusion would be. The section creates an entitlement on the part of the partner to a customary union to claim damages for loss of support from any person who unlawfully causes the death of the other partner (s 31(1)).[20] Where it appears from the certificate that more than one customary union partner has survived the deceased, 'all such surviving partners

---

[18] 406F-H.
[19] *Salajee* (above), *Glenfield* (above), and *SA Army Fund v Umdloti Beach Health Committee* 1974 (4) SA 948 (N) 954C-H and *African and European Investments* (above).
[20] Section 31 was enacted to remedy the decision in *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A) that a partner to customary union does not under the common law have a claim for damages for loss of support.

who desire to claim damages for loss of support, shall be joined as plaintiffs in one action' (s 31(3)) (though such a person may later join as a co-plaintiff (s 31(4)(a))). The nub is the provision that the surviving partners must share the damages between them (s 31(5)). The effect of a fraudulently obtained certificate on the genuine customary union partner or partners could therefore be most materially adverse. As Snyders J pointed out, it could never have been the intention of the legislation to license injustice of this kind through fraud.

[13] It follows that the decision of Snyders J on the law point[21] was correct, and the ruling of Lewis J incorrect. It remains to add that the decision in *Finlay and Another v Kutoane*[22] (by which Lewis J considered herself bound) is also incorrect on the points in issue in this appeal, as is in my view also Flemming DJP's disapproval of the decision of Didcott J in *Hlela v Commercial Union Assurance Co of South Africa Ltd*,[23] which seems to me to be clearly correct.

THE TRIAL JUDGE'S FACTUAL FINDINGS IN NKABINDE

[21] [2001] 3 All SA 611 (W) 616-617.

[14] At the trial in *Nkabinde*, the plaintiff called a magistrate, Mr Sepenyane. As an additional commissioner he issued the certificate upon which the plaintiff relied to prove her customary union with the deceased. The Fund then led evidence from the mother and father of the deceased. Thereafter the plaintiff herself testified in support of the existence of the customary union.

[15] Magistrate Sepenyane had no recollection of the actual certificate, which he issued on 17 June 1998, some ten weeks after the fatal collision, and which asserted that the plaintiff and the deceased had entered into a customary union in about May 1997. But his unchallenged testimony established his method of scrutinising applications for customary union certificates where one of the parties was deceased. This was to inquire from the 'closest next of kin' of both the husband and the widow, who would necessarily in the first instance be the parents of both, as well as the widow herself.

[16] Magistrate Sepenyane's was the only disinterested evidence on the question of payment of lobolo (or bride price)[24] in a customary

---

[22] 1993 (4) SA 675 (W) 684A-B, 685H-I.
[23] 1990 (2) SA 503 (N).
[24] The Recognition of Customary Marriages Act 120 of 1998 s 1 contains the following definition of 'lobolo': 'the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma,

union. He explained that to ascertain whether a customary union existed, he would inquire whether there was 'any lobolo paid or were there negotiations towards lobolo prior to the paying of the lobolo'. He emphasised that –

> 'of necessity, in some instances, you would find that not all the lobolo had been paid at the time of death say for instance in this case, the husband, but I would have satisfied myself that there were negotiations towards lobolo and lobolo was paid'.

[17] The deceased's parents then testified. They both denied that their son had contracted a customary union with the plaintiff. It was common cause that the Nkabinde family had in about May 1997 paid an amount of R200 to the plaintiff's family. This, they insisted, was 'damages' because their son was sleeping with the plaintiff. At the instance of an intermediary acting on behalf of the plaintiff's attorneys, the deceased's father, the plaintiff and her mother had appeared before Magistrate Sepenyane. The deceased's father asserted that it was the plaintiff's mother who told the magistrate that lobolo had been paid. For his own part he merely remained silent.

---

lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage'.

[18] Snyders J accepted the evidence of the deceased's parents and rejected that of the plaintiff. She found that the deceased's father perpetrated a fraud in the procurement of the certificate, and that the plaintiff, with the knowledge that there was no customary union, assisted in the fraud. She therefore found that the Fund had discharged the burden of proving that the certificate had been obtained fraudulently.[25]

[19] It is well established that an appeal court will intervene only sparingly in factual and credibility findings of a trial court, which has the advantage of seeing the witnesses and of assessing first-hand their commitment to truth. In the present matter, however, it seems to me that Snyders J erred in her factual conclusions.

19.1 First, the Fund set out to prove a fraud. While the standard of proof remains a balance of probabilities, evidence seeking to establish dishonest conduct is necessarily always subjected to careful scrutiny. That scrutiny in the present case shows, in my view, that the fraud asserted was not proved.

19.2 Second, the father of the deceased, who denied the customary union, was a most unsatisfactory witness. By his own admission

[25] [2001] 3 All SA 611 (W) 618-619.

he was doubly dishonest. And he was a far from disinterested witness.

(a) He at the very least colluded (even on his own version) in misleading the magistrate about the existence of a customary union between his son and the plaintiff. His attempt to minimise his role in the proceedings before the magistrate was most implausible. He asserted that the magistrate had asked him no questions, but had questioned only the plaintiff's mother about payment of lobolo. Not only would such a course have been inherently improbable, but it was directly at variance with Magistrate Sepenyane's unchallenged affirmation that he always questioned both sets of parents before concluding that a customary union existed.

(b) He was also dishonest in that he colluded with the plaintiff in lodging a false claim against the Fund for a non-existent child of the deceased.

(c) Finally, when he came to testify, the deceased's father may have had a material interest in disclaiming the possibility of a customary union between the plaintiff and his son (in so far as the deceased's means of supporting dependants, and

thus their total potential claims against the Fund) would have been limited. He was by that stage himself a claimant against the Fund, in both his own name and as the grandfather of the deceased's dependant.

The problems of proving a fraud by relying on evidence of this calibre are evident.

19.3 Third, it is correct that the deceased's mother also denied the customary union. She unlike the deceased's father did not appear before the magistrate, and she was not party to the fraudulent claim against the Fund. However, she appeared to prevaricate on crucial aspects of her testimony, and her connection with her spouse and resultant interest in the dismissal of the plaintiff's claim attenuates the reliance that can be placed on her evidence.

19.4 Fourth, Snyders J in my view erred in her assessment of the evidence of the plaintiff.

(a) The learned judge wrongly found that the plaintiff had testified that the deceased's father had told her that a customary union came into being only after the last amount of lobolo had been paid and after a family feast was held. The judge erroneously

concluded on this basis that on the plaintiff's own version no customary union could have come into existence. In fact the plaintiff consistently stated that she believed that money had been paid 'as a deposit for my lobolo', and that a customary union had in fact been contracted. The details of further lobolo payments she could not attest to, because the men determined these. The plaintiff's belief and assertion that a customary union could arise even though lobolo had been only partly paid are congruent with the evidence of Magistrate Sepenyane.

(b) It was (as previously mentioned) common cause that the deceased's family had paid the plaintiff's family R200. The document evidencing the payment recites that the R200 was 'for Palesa' [the plaintiff]. The deceased's parents' insistence that this was 'damages' for their son's sleeping with the plaintiff becomes unconvincing when the following is borne in mind. They tried to maintain that the plaintiff stayed with them only when their son returned home at weekends and for holidays. Yet from other portions of the evidence of both parents it is plain that the plaintiff was staying continuously

with them as part of their family. This also gives significance to the admitted fact that when before the deceased's death the plaintiff returned to her parents, it was the family of the deceased who were sent out to procure her return. Against this background, the plaintiff's assertion that the R200 payment was intended to constitute part payment of lobolo is by no means implausible.

[20] In all these circumstances – the poor quality of the evidence of especially the deceased's father; and the persuasive features in the plaintiff's own account – the conclusion is inevitable that the Fund failed to discharge the burden resting on it of proving that the certificate was procured by fraud. This makes it unnecessary to consider some difficult questions about when a customary union comes into existence and how it is evidenced. Whatever the answer to those questions might be, the Fund has failed to prove that the certificate evidencing the customary union between the plaintiff and the deceased was fraudulently procured.

[21] In these circumstances the plaintiff in *Nkabinde* was entitled to judgment on the merits of her claim.

[22] There was some suggestion in the *Mongalo* matter that because of the course the Fund's argument took before Lewis J the Fund should be deprived of part of its costs, but in my view no sufficient justification has been advanced to vary the usual order.

[23] There are accordingly orders in the following terms:

A In the *Mongalo* matter:

(1) The appeal succeeds with costs, including the costs of two counsel.

(2) The ruling of the Court below is set aside.

(3) In its place there is substituted:

'(i) The defendant is entitled to lead evidence impugning the validity of the plaintiff's certificate in terms of s 31 of Act 76 of 1963 on the basis of fraud.
(ii) The plaintiff is to pay the costs of the argument on the ruling.'

B In the *Nkabinde* matter:

1. The appeal succeeds with costs.

2. The judgment and order of the court below is set aside.

3. In its place there is substituted:

'(i) The defendant is liable for any damages the plaintiff may be able to prove.

(iii) The defendant is to pay the costs of the action.'

E CAMERON
JUDGE OF APPEAL

VIVIER JA)
OLIVIER JA) CONCUR
NAVSA JA)
MPATI JA)