

SOUTH AFRICA / JUDGMENT

Muthivelo and Others v Minister of Police and Another (2757/2014) [2020] ZAGPPHC 374 (2 July 2020) [2020] ZAGPPHC 374

COURT

North Gauteng High Court, Pretoria

BEFORE

Bhoola

CASE / FILE NUMBER

2757/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

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

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

Case

Number: 2757/2014

In the matter

between:

Fuelufhelo
Muthivelo
1st
Plaintiff
Mokhosane
Emma Sikhwama
2nd
Plaintiff
Fuelufhelo
Muthivelo o.b.o
Rinae
Florence Muthivelo
3rd
Plaintiff

and
Minister of Police
Thabang
Tshisele
1st Defendant
2nd
Defendant

JUDGMENT

BHOOLA AJ:

Introduction

- [1] This matter concerns the determination of the quantum of damages to which the second and third plaintiffs may be entitled for loss of support arising from the death of the deceased as a result of a shooting incident.
- [2] The matter came before me on the civil trial roll of 24 June 2020. I stood the matter down until 26 June to provide the parties with an opportunity to confer as to the manner in which the trial would be conducted. This was after hearing submissions from counsel for both parties and refusing a request from defendant's counsel that that matter should be heard in open court, as this was not practical in the current circumstances. The defendant's counsel indicated that he

wished to lead evidence of a witness on loss of support and also sought the opportunity to cross examine the plaintiffs' witnesses. I was concerned that the request that the matter be heard in open court would result in a further delay and was not in the interests of justice. The matter was ready for trial and was already six years old, summons having been issued in 2013 following the incident in

2011. I indicated to the parties that they should discuss leading evidence, should they decide to do so, via videoconference in line with Judge President's Consolidated Directive of 11 May 2020 and accordingly stood the matter down. When the matter resumed on 26 June 2020 defendant's counsel filed an affidavit of his witness, the brother of the deceased, Reuben Setjie, in which he disputed the fact that the deceased had provided any support to the plaintiffs and confirmed that the deceased was a student at the time of his death.

Background

facts

- [3] On 12 March 2011 at Madimbo village, Mutale, Venda, the deceased (Desmond Moloko Setjie), 22 years old at the time, was wrongfully and unlawfully shot by the second defendant, a peace officer acting in the course and scope of his employment with the first defendant. The deceased succumbed to the injuries sustained in the shooting incident. The principal of Ratshisase secondary school confirmed in a letter that the deceased had been a grade 12 student at the school in 2011 when he was shot.
- [4] First plaintiff, the common law wife of the deceased, gave birth to their child, ("the minor child" on whose behalf she acts as the third defendant) six months after the death of the deceased. The second defendant is the mother of the deceased. They claimed (in separate actions which were consolidated) damages for loss of support arising from the duty of the deceased to maintain and support them. The first defendant admitted the shooting by the second defendant but disputed liability for loss of support.
- [5] The consolidated claim came before Swanepoel AJ in this Division and the court, in its judgment of 25 June 2018, noted that the merits had largely been settled. It granted a separation of merits and quantum and proceeded to determine whether the deceased had a duty to support the plaintiffs. The court had regard to the first plaintiff's

evidence that she and the deceased were not legally married but they lived together in the deceased's family home and had been in a relationship for three years. The first plaintiff testified that the deceased was a scholar but he worked piece jobs to support her. She fell pregnant and their child, the minor child, was born six month's after the deceased was killed. The second plaintiff, the mother of the deceased, testified that the deceased earned money from repairing appliances and doing construction work and that he supported her. Regarding the evidence led that he was still a student, the court had regard to the letter from the school principal but found that the first plaintiff gave conflicting versions about whether he was enrolled at the school. Her evidence was also that he would be away often for long periods at a time when they assumed he was working. The court found: "However, it is clear that whether or not he was still enrolled at the school, he did maintain the family. He might have done so whilst studying and working on a part time basis."

- [6] The court heard evidence from Jeffrey Setjie, a brother of the deceased, who confirmed that the deceased had often given him pocket money and had paid for food and utilities for the family. He also confirmed that the deceased had worked on construction jobs and he had seen him repairing appliances.

- [7] The court found the following evidence to be common cause or not contested:

7.1 First plaintiff had been in a relationship with the deceased for some three years prior to his death, and had lived with him as man and wife. They were never legally married.

7.2 First plaintiff is the mother of the minor child, Rinae.

7.3 The deceased worked at part-time jobs, and supported the family from that income.

7.4 Neither first plaintiff nor second plaintiff had ever been employed, and they were, at the time of his death, reliant on the deceased's financial support, as was the minor child.

[8] Swanepoel AJ found that the first plaintiff's claim was not proven as it had been alleged in the pleadings that she and the deceased were married and this was not the case. In regard to the second plaintiff, the court found that her evidence that the deceased had undertaken to support her, and that he had actually done so, was true. Furthermore,

defendants' counsel had conceded that the deceased had a duty to support the second plaintiff.

[9] In regard to whether the child was that of the deceased and the first plaintiff, the court accepted that it was uncontested that the first plaintiff and the deceased had lived together as man and wife in the home of the deceased, the entire family knew the child to be that of the deceased and there was no evidence of involvement with another

man. The court was satisfied, despite the absence of an unabridged birth certificate, that the minor child was the biological daughter

of the deceased. The court concluded that the deceased had a legal liability to maintain his mother and his daughter.

[10] This was the decision on the merits and the determination of the quantum was postponed sine die. This is the matter now before me.

Quantum

[11] When the matter commenced on 26 June 2020, counsel for the parties informed me that they had agreed when the matter was stood down that no witnesses would be led in evidence via videoconference, but that the defendants' counsel, Mr Mokotedi, would seek to leave to introduce an affidavit from Mr Reuben Setjie, a brother of the deceased. Having regard to the contents of the affidavit, I determined that it was not admissible as the plaintiffs would not have the benefit of cross-examination and would thus be prejudiced, and further that Swanepoel AJ had already ruled on the merits, including the duty of support. The contents of the affidavit confirmed that the deceased was a student at the time he was shot, and that he could not have been financially supporting the plaintiffs. The deponent also denied that the first plaintiff was in a common law relationship with the deceased and that the minor child was his child. I ruled that the affidavit was not admissible and was not relevant to determining the issue of quantum.

[12] Mr Mokotedi submitted that it was indeed relevant as it confirmed that there was no financial support provided to the second and third plaintiffs. He also sought a further postponement to enable him to cross-examine the actuary on the assumptions made and the basis of his calculations. Mr Mokotedi submitted that the actuarial calculations were not

supported by the source documents, being affidavits of the first and second plaintiffs, but this is factually incorrect. Mr van der Westhuizen, counsel for the plaintiffs, submitted that the matter had previously been postponed in February 2020 for the purpose of the defendants obtaining an actuarial report, which they had not done, and that they could not now seek to cross-examine the actuary on his assumptions and contingencies. The court as per Swanepoel AJ had moreover already ruled that there was a duty of support. This issue was moot, or in his words, the ship had already sailed. In any event, Mr van der Westhuizen cited authorities for his submission that the courts were generally reluctant to permit cross-examination of actuarial experts^[1]. Partly for wanting to avoid a further delay and furthermore given my concern that cross-examination of the actuary would be of no benefit in the absence of an actuarial report from the defendant's actuary in regard to why the normal contingencies should be deviated from, I ruled that the matter should proceed by way of submissions and refused to grant a further postponement.

- [13] Mr Mokotedi submitted that, in the circumstances we currently face as result of the Covid-19 crisis, many of the actuarial assumptions in the actuary's report were incorrect and should be revisited by the court. For example, the actuarial calculation was based on the second plaintiff's continuing to rely on her son for support until the age of 65, but longevity assumptions were no longer as they were prior to the crisis. Nor would employment continue as in many circumstances Covid-19 had affected the jobs of many individuals and he urged me to take judicial notice of the impact of the crisis, and to apply a 25%

contingency in these circumstances or apply an apportionment of 50%. Furthermore, he submitted that the assumption made by the actuary that the amount with which the deceased supported the first plaintiff, would revert to the minor child was incorrect and there was no basis for this conclusion. As I understand this submission, it is to the effect that since Swanepoel AJ had rejected the first plaintiff's claim, the minor child's claim should similarly be rejected as unproven. In regard to the second plaintiff, Mr Mokotedi argued that in the absence of any documentary proof from her in regard to the R 1000- cash per month she allegedly received from her deceased son, the actuary should not have considered this as a source. [2] The actuary's calculations are therefore purely speculative and they should, he submitted, be disregarded.

- [14] Notwithstanding the novelty of Mr Mokotedi's submissions, I am not persuaded to have regard to any evidence other than that in the actuarial report. Nor am I persuaded that contingencies other than the normal should apply. Mr van der Westhuizen submitted that in regard to the contingencies Mr Mokotedi sought to persuade me to apply, they might in future become relevant but could not apply to the present matter. I agree. In addition, Mr van der Westhuizen submitted that under normal rules of succession the mother's claim having fallen away, the child would inherit what her mother received from the deceased and the submission that she would not be entitled to any amount in respect of loss of support was incorrect.

[15] Hence, based on the submissions of Mr van der Westhuizen I determine that the loss of support based on the calculations by the actuary, should be as follows:

Second plaintiff:

Past loss: R130 000

Future loss: R184 300

Third plaintiff:

Past loss: R74 600

Future loss: R125 600

If the usual contingencies of 5 % and 15% are deducted the amounts to be paid to the second and third plaintiff are as follows:

Second plaintiff

Past loss: R 123 500 (5%)

Future loss: R 156 570 (15%)

Third plaintiff

Past loss: R70 870 (5%)

Future loss: R106 750 (15%)

Total: R 457 690

Order

[16] In the result, I make the following order:

1. The draft order marked X is made an order of this court.

—

U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearance:

For the Plaintiffs : Adv van der Westhuizen

Instructed by : Erwee Attorneys,

c/o Dyason Inc

Pretoria

Ref Mr Gous (DC2788)

For the Defendants: Adv Mokotedi

Instructed by : The State Attorney

Ref: M Letsholo (Mmletsholo@justice.gov.za)

[1] Inter alia Shield Insurance Co. Ltd v Hall 1976 (4) SA 431 A and Shield Insurance Co. Ltd v Booyesen

(1979) 3 SA 953 A.

[2] In second plaintiff's reply to notices in terms of rule 35(3) she stated that she was a pensioner and that the deceased supported her by providing her with cash in the sum of R 1000 per month (17333/13 pre-consolidation case number).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2020/374.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/muthivelo-and-others-v-minister-unknown-topic-agpphc-2020>

Prepared on 13 October 2026 · Esheria