

SOUTH AFRICA / JUDGMENT

Tema and Others v Limpopo Head of Department for Health and Others (4292/2022) [2023] ZALMPPHC 19 (3 May 2023) [2023] ZALMPPHC 19

COURT

Limpopo High Court, Polokwane

BEFORE

M V Semanya

CASE / FILE NUMBER

4292/2022

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA;
LIMPOPO DIVISION;
POLOKWANE

CASE

NO: 4292/2022

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

03 MAY 2023

SIGNATURE:

AJP SEMENYA M.V
In

the matter between:

MPSHE
GILBERT TEMA
:
FIRST APPLICANT
MAKGAFELE
MAVIS TEMA
:
SECOND APPLICANT
RAPAHAAHLE
EMLY MPHAAHLELE
:
THIRD
APPLICANT
And
LIMPOPO
HEAD OF DEPARTMENT FOR HEALTH :FIRST
RESPONDENT
LIMPOPO
HEAD OF DEPARTMENT FOR
: SECOND RESPONDENT
SAFETY
AND SECURITY
DIRECTOR
GENERAL DEPARTMENT OF HOME AFFAIRS: THIRD RESPONDENT
LEBOWAKGOMO
POLICE
: FOURTH RESPONDENT
STATION
COMMANDER

JUDGMENT

Delivery: The judgment shall be handed down electronically by email to the parties' legal representatives. The date of hand down shall be deemed to be the 03 MAY 2023 at 14:00.

SEMENYA AJP:

[1] The applicants launched an application in which they seek relief in terms of which, in the main, a declaration that the human remains which were found in the peripheral area of Mamaolo village was that of their brother Motswiri Jackson Tema (Motswiri), is made. The applicants further seek this court to order the Home Affairs Department to issue a death certificate and for the Lebowakgomo

Police Station Commissioner to release the remains for burial purposes. The respondents filed notice to abide but which was later

withdrawn.

- [2] The applicants are siblings born of a mother named Ramatsemela Tema. They aver that they had a brother by the name of Motswiri Jackson Tema, who was last seen by the first applicant on the 20 April
2021. The first applicant states that he had agreed with Motswiri that they will see each other again on the 23rd. On that date, the first applicant went to Motswiri's place but did not find him. A case of a missing person was reported to the police after he and others could not find him, despite diligent search. A two-day search conducted by the K9 unit (dog unit) of the police, a helicopter and members of the community yielded no positive result.
- [3] Approximately one month thereafter, the first applicant received a call from a member of the South African Police Service who informed him that they have found human remains next to Mamaolo village. He was requested to come and view it and to see if he can be in a position to identify it as that of his missing brother. He proceeded to the spot but could not identify the face of the remains due to its advanced stage of decomposition. An inquest docket under CAS 281/05/2021 was thereafter open. The human remains were and still are stored in the Government mortuary and are marked LIM03/216/2021.
- [4] The police arranged that the applicants should undergo DNA tests in order to determine if there is a relationship between them and the remains. In a report compiled by R C Janse van Rensburg, a Forensic Head: Forensic Science Laboratory, a unit of the South African Police Service, it is stated that no conclusion could be made as to whether the first applicant is the biological sibling of the donor of the teeth extracted from the remains marked LIM03/216/2021.
- [5] The applicants aver that through the advice they received from Dr Thakadu Arnold Mamashela, the deponent to the answering affidavit,
- and through his private practice, another DNA test was conducted by AMPATH Genetic Laboratory, in order to determine the relationship
- between the applicants and the remains. The report of the second test was that the data provided does not support a half-brother or half-sister relationship between the remains and the first and second applicants. It was found that the first and the third applicants are likely to be full siblings.
- [6] In an explanatory note of the AMPATH report, it is stated that, unlike paternity tests, there are no obligate alleles in kinship test and therefore it will not always provide a conclusive result, hence the results are reported as the likelihood in support or against an alleged relationship.
- [7] The first respondent opposes the application on the strength of the AMPATH Genetic Laboratory test result and refuses to release the remains into the hands of the applicants on that basis. It avers that it cannot release the human remains which is in a decomposed state when DNA result were conclusively excluding any blood relationship between the remains and the applicants.

- [8] Regulation 15(1) and (2) of the Regulations Regarding the Rendering of Pathology Services Promulgated in Government Gazette No. 41524 dated 23 March 2018 under the National Health Act 61 of 2023 provides as follows:

“Identification of body

15. (1) A body must, where visual identification is possible, only be identified by a spouse, partner, major child, parent, guardian, major brother, major sister, care -giver or any person with personal knowledge of the deceased and is in possession of his or her own authentic identification document and that of the deceased, validated by the Department of Home Affairs or the deceased person's consulate or embassy or country of origin.
- (2) Where visual identification is not possible, scientific means of identification must be instituted by the authorised medical practitioner, supported by the South African Police Service.”
- [9] The first respondent avers that scientific identification means were resorted to because visual identification was not possible. On this point, the applicants contend that it is not correct that visual identification was impossible. In this regard the applicants state that Motswiri once sustained an injury on his leg. He, first respondent, took him to Lebowakgomo hospital where he was admitted.

He states that Motswiri was operated and what he refers to as ‘iron-met was inserted to fix his bones. He further alleges

that due to that injury, Motswiri had to use a crutch [medical stick] up until the date of his disappearance.

- [10] Lebowakgomo and Mankweng hospital records are annexed to the founding affidavit. It is noted in the hospital records that Motswiri Jackson Tema was admitted at these two hospitals following a knee fracture he sustained while walking. According to the records, he was brought to the hospital by one Ngwato. The first applicant avers that he is the person who took Motswiri to the hospital and that Ngwato is his clan name. On the entries of the 16 June 2016, it is recorded that Motswiri was diagnosed with right neck femur fracture, post ORIF (Open Reduction Internal Fixation).
- [11] The first applicant states that he believes that the human remains which were found at Mamaolo is that of his brother. This belief is based on the metal he has seen on the leg of the remains, as well as a crutch which was found next to it. He contends that these are the unique features with which he has identified the remains as those of Motswiri. He states that these features could be seen on the photos of the human remains which were photographed by police forensic personnel.
- [12] The photos annexed to the founding affidavit are in black and white, which makes it difficult for one to see the metal and the crutch as alleged by the applicants. However, the first respondent admits that the two features were indeed found with the human remains. The

first respondent submits that the presence of the metal on the neck of the knee does not salvage the applicants' case. According to Dr Mamashela, metals fixated on patients in hospitals have a unique number written on hospital records, and that this is used to assist in the determination and identification of the body. He states that nothing was engraved in the 'iron-met' found on the corpse. He states further that the iron met and the walking stick cannot be scientific factors acceptable to the Department of health as identification of a corpse.

- [13] It is not the applicants' case that the stick and the metal provide scientific proof of the identity of the corpse. They regard this as visual identification as envisaged in section 15 of the Regulations. As stated above, there is an entry on the hospital

records that an Open Reduction and Internal Fixation was done. The applicants would not know why the hospital decided to use a metal which was not engraved with a unique number when they inserted it on the human remains which is the subject matter of this case. I cannot imagine that the respondent is suggesting that the metal found on the bones of the remains was not fixated there in a hospital.

- [14] Dr Mamashela states in the answering affidavit that the DNA test result he sent to the Laboratory in his private capacity, and not in his capacity as an employee of the Department of Health, are conclusive. This cannot be true. The results are couched as follows in the report:

"SUMMARY AND INTERPRETATION OF THE RESULTS:

Based upon the provide data and the genetic data, the combined likelihood ratio is 0,01546744724932077 and indicates that LIM 03/216//2021 and Raphaahle, EM are likely to be unrelated. Unlike a paternity test, there are no obligate alleles in a kinship test and therefore it will not always provide a conclusive result. The results are reported as likelihood in support or against an alleged relationship. While likelihood ratios greater than 1 are generally regarded as comprising evidence in favour of the alleged biological relationship, the strength of the value should be considered in context with all circumstances..."

The conclusion is that both results, namely, results of the DNA test conducted by the police and those commissioned by Dr Mamashela are inconclusive.

- [15] I find the disputed facts in this case are not real or genuine. The first respondent did not deny the existence of the unique features relied upon by the applicants to identify the human remains as those of their brother. The hospital records confirm the metal referred to by the applicants. The DNA results does not conclusively exclude the relationship between them, it is a likelihood which, according to the laboratory, must be assessed together with other circumstances. This being a civil case, the applicants are required to prove their case on a balance of probabilities and not beyond reasonable doubt. The applicants have made out a case for the relief sought. On the basis of the Plascon-Evans rule, I am satisfied that the applicants have discharged the onus that rest on them.

[16] On the point of law of non-joinder of the Member of the Executive Council, I agree with the applicants that the respondents have failed to show how the relief sought would order sought, if granted, would prejudice the MEC. This point of law cannot stand.

[17] With regard to costs, I do not find any reason to deviate from the general rule that costs should follow the result. I fail to find any valid reason why the notice to abide was withdrawn in the face of hospital records that supports the applicants' version.

[18] In the result I make the following order:

i. It is declared that the human remains found in the periphery of Mamaolo village and currently stored in a Government mortuary under Lebowakgomo Police CAS number 281/05/2021 and marked LIM03/216/2021 are those of Motswiri Jackson Tema, an adult male person with identity number 5[...];

ii. the first and second respondent are jointly ordered to release and/or cause to be released, the said human remains into the care of the applicants within five (5) days of this order;

iii. The third respondent is ordered to register the death of the Motswiri Jackson Tema and to issue a death certificate against the names of Motswiri Jackson Tema with identity number 5[...]; and

iv. the first respondent is ordered to pay the costs of the application.

M V SEMENYA

ACTING JUDGE PRESIDENT OF THE HIGH COURT; LIMPOPO DIVISION.

APPEARANCES;

Counsel for the Applicant: Mr. Buthane Instructed by: Buthane Rasemana Att. Counsel for the Respondent: Adv. GDM Dube Instructed by: State Attorneys. Date of hearing 11 APRIL 2023 Date of judgment: 03 MAY 2023

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Prepared on 10 October 2026 · Esheria