THE HIGH COURT OF SWAZILAND

Fundiswa Zono-Alting	Plaintiff
Stanley Bongani Mnisi N.O.	Defendant
Civ. Trial No. 890/99	
Coram	S.W. SAPIRE, CJ
For Plaintiff	Mr. L. Mamba
For Defendant	Mr. L. N. Khumalo.

The claim is for a declaration that the deceased was the father of the child and for maintenance for the minor child to be paid out of the estate. The applicant alleges that her son Pieter Alting was born from a relationship between herself and the deceased and the applicant states that she and the deceased lived together as man and wife from 1991 onwards. The child whom the applicant states was conceived of sexual intercourse between her and the deceased in November 1995, was born on 29th August, 1996. The applicant claims to have been faithful to the deceased and not to have had relations with anyone else so that only the deceased can be the father of the child. The onus is therefore on the applicant to establish that the deceased was the father of her child.

I have considered whether the other children of the deceased should have been joined. The executor seems to have been in touch with the deceased's children, other than the de cuius on whose behalf the applicant sues.

The crucial question the court must determine is whether the deceased was indeed the father and was legally liable to maintain the child.

If it is proved that the person had intercourse with the mother of the child and a child is born he is liable to maintain that child unless he can show that he could not possibly have been the father. The respondent has suggested a number of reasons why the deceased was not the father. There is nothing to controvert the applicant's positive evidence.

It was argued on behalf of the applicant that because the Late Mr. Alting was a white person and the applicant was a black person an inference could be drawn that because the child was coloured the child is his. The fact remains that these two people lived together and that a child was born within the period sufficiently close to the death of the father for him to be the father of the child. There remains the uncontradicted evidence of the applicant that the child was born of intercourse between her and the deceased The minor child. Pieter Alting is declared to have been born out of the union of the applicant and the late Peter Alting

The respondent is directed to amend the draft Liquidation and Distribution account by inclusion of a claim for the maintenance of a minor child Pieter Alting;

JUDGMENT

(27/08/99)

This is an application by a major spinster, as she described herself. Her claim is made on behalf of her minor child, a son now aged three years old, against the Respondent who is the executor Testamentary in the Estate of the Late Peter Alting (ref. E.H. 35/96.) The claim is for a declaration that the deceased was the father of the child and for maintenance for the minor child to be paid out of the estate. The applicant alleges that her son Pieter Alting was born from a relationship between herself and the deceased and the applicant states that she and the deceased lived together as man and wife from 1991 onwards. They first lived together in Port Elizabeth. In 1994 they moved to Swaziland where they resided at Thembelihle until the deceased died on 15th March, 1996.

The applicant claims to have married the deceased in a customary ceremony performed in the Xhosa

fashion. She does concede that the marriage was not valid according to the law of the Republic of South Africa, and therefore not valid locally. She does however contend for a putative marriage having existed between the deceased and herself. She does not have to go so far, for the father of a child bora out of wedlock is liable to maintain his "illegitimate issue". This obligation passes to his estate.

See Carelse v Estate de Vries1 which has been consistently followed 2

The child whom the applicant states was conceived of sexual intercourse between her and the deceased in November 1995, was born on 29th August, 1996. The applicant claims to have been faithful to the deceased and not to have had relations with anyone else so that only the deceased can be the father of the child. There is no evidence to contradict this.

The respondent has not admitted the claim to maintenance and has not made any provision therefore in the Liquidation and Distribution account which he has framed and lodged with the Master of the High Court. The account provides for the distribution of the residue of the estate (some E255 000) between two surviving sons of the deceased.

The master has declined to approve the account, because of this omission. The respondent, should prima facie, have reframed the account in accordance with the Master's requirements and left it to the heirs and beneficiaries to object if so advised. The Administration of Estates Act3 however is so old and its provisions so inadequate that I approach the matter as an application for a declariter which is the form which it takes in the notice of motion. The onus is therefore on the applicant to establish that the deceased was the father of her child.

Only the executor has been cited as a respondent. I have considered whether the other children of the deceased should have been joined. If not all of them, should not at least those whose inheritances will be affected by any order made, have been joined? The executor seems to have been in touch with the deceased's children, other than the de cuius on whose behalf the applicant sues.

One of the beneficiaries under the will has filed an affidavit attested by his sister who is not a beneficiary from the estate. The substance of the affidavit is to this effect, that the deceased in the months before his death was so ill and disinterested in his relationship with the applicant, that he could not have been the father. She is not an expert in these matters and her opinion is of no persuasive force even if it were admissible.

The respondent has not submitted any evidence of an independent medical practitioner, to advance the opinion, which the sister of the deceased says she has formed. The is no evidence of the doctor if any who attended the deceased in his final illness, and no explanation as to why this is so.

The point of non-joinder has not been taken. No one having an interest in the estate has sought to be joined, notwithstanding all seem to have knowledge of the proceedings. I therefore decided that there is no point of non-joinder to be considered.

The crucial question the court must determine is whether the deceased was indeed the father and was legally liable to maintain the child.

In the Republic of South Africa the maintenance court has the jurisdiction to determine paternity. In Swaziland as in the Republic proof is on a balance of probabilities. See Mayer v Williams4.

The Children's Status Act 82 of 1987 s 1 now provides that if in any legal proceedings at which it has been placed in issue whether any particular person is the father of an extramarital child it is proved by way of a judicial admission or otherwise that he had sexual intercourse with the mother of that child at any time when that child could have been conceived, it will, in the absence of evidence to the contrary, be presumed that he is the father of that child.

If the mother of the child was married at the time of conception or birth or during the intervening period, the rebuttable presumption pater est quern nuptiae demonstrant operates. The presumption may be rebutted on a balance of probabilities. The presumption does not apply in the present case as such because no valid marriage existed. The common law recognises and acknowledges similar inferences that may be drawn, even where no marriage does exist.

If as in this case the mother is not married, two presumptions embodied in the Children's Status Act would assist her if the case were to be heard in the Republic of South Africa. There is no corresponding legislation in Swaziland.

Section 1 provides that if in any legal proceedings at which it has been placed in issue whether a person is the father of an extramarital child, it is proved by way of judicial admission or otherwise that he had sexual intercourse with the mother of the child at any time when the child could have been conceived, it is, in the absence of proof to the contrary, presumed that he is the father of the child. This presumption does however find a counterpart in the common Roman Dutch Law which governs both in the Republic of South Africa and locally. The position is that if it is proved that the person had intercourse with the mother of the child and a child is born he is liable to maintain that child unless he can show that he could not possibly have been the father.

There is a further provision regarding blood test in the South African Act. It is clear that the scientific tests can exclude any person as being the father of any particular child but this would require that some blood or other tissue of the child and of the father and possibly of the siblings would also be necessary.

As far as the first presumption is concerned it is quite clear and uncontradicted that Mr. Alting lived with the applicant and that they lived here in Mbabane until the date of his death. The child was born only a month or two after his death so that he could well have been the father.

The respondent has suggested a number of reasons why the deceased was not the father. These amount to no more than speculation. There is nothing to controvert the applicant's positive evidence.

It was argued on behalf of the applicant that because the Late Mr. Alting was a white person and the applicant was a black person an inference could be drawn that because the child was coloured the child is his. Of course that takes the matter no further at all. It only has to be stated to demonstrate its logical weakness.

The fact remains that these two people lived together and that a child was born within the period sufficiently close to the death of the father for him to be the father of the child.

The respondent has suggested that comparison of blood samples could be decisive and indeed the other children of the deceased have offered to have blood taken from them for testing purposes.

The position is that however I cannot order the applicant to have the minor child subjected to any tests or to order that any other tissue be taken for blood test or DNA comparison. The wife cannot be compelled to submit herself and the child to blood tests: see E v E 1 More recent cases have watered this down. The question was answered to this effect in Seetal vs Pravitha and another2. This was a judgment of His Lordship Mr, Justice Didcott, He after an extensive survey of the authorities governing in many jurisdictions ruled that even if it was in his discretionary power as upper guardian of a minor, to order that the minor undergo tests for the purpose of inter alia determining his paternity, such discretion should only be exercised in a case where it would be to the minor's advantage. In this present case there is no advantage to the minor to have the late Mr. Alting excluded as his father.

There remains the uncontradicted evidence of the applicant that the child was born of intercourse between her and the deceased. There is no acceptable or credible evidence that the deceased was medically incapable of intercourse or procreation at the relevant time.

The papers do not raise any disputes of fact, which could be determined on oral evidence. The respondent has produced no evidence of medical experts or otherwise whose oral testimony would controvert the case made out by the applicant that intercourse did take place from which the.

In view of these considerations I come to the conclusion that the applicant is entitled to the order she seeks in terms of prayer 1 in the notice of motion, that is, that a declaration be made that the minor child Pieter Alting is bora out of the union between the applicant and the late Peter Alting.

The question then arises what sort of maintenance has to be paid. The duty to support lies on both of

the child's parents, even in the case of a so called illegitimate. There is not sufficient material before the court to determine what the amount of maintenance is which the estate would have to pay, having regard to the applicant's resources and the needs of the child.. The question may have to be determined actuarially. There will not necessarily be agreement on the values of all the relevant factors. Payment to the mother of a large sum of money to provide for the maintenance of the child, is not a course, which would commend itself. The court

1 1940 TPD 333

would have to be satisfied that there is sufficient safeguard in place to protect the minor's interests.

There is nothing presently before me and certainly no calculation on which I can order a specific amount to be paid out of the estate. In all probability an actuarial calculation would have to be made and a capital amount could be paid into a commercial bank to administer in trust, in order to provide for payments to the child on a periodical basis and as and when any special or extraordinary needs have to be met.. I am not satisfied that is desirable that a large sum of money should be paid to the applicant. Some sort of provision would have to be made. In this connection it seems to me that in the absence of agreement it may be necessary to again approach the court.

I leave it to the respondent and the applicant to determine the correct amount of maintenance and how this is to be paid. If an acceptable formula cannot be determined by consent, the matter may again be referred to the court with amplified evidence on the child's needs, and the actuarial calculations, which have to be made.

In any event the order which is presently sought is one directing the respondent to amend the draft liquidation and distribution account by the inclusion of a claim for the maintenance of the minor child Pieter Alting. This covers the situation as I have seen it. The applicant asks for costs in the attorney and client scale but there is no reason for awarding an extraordinary order for costs in this case

Accordingly the order is :-

1. The minor child . Pieter Alting is declared to have been bom out of the union of the applicant and the late Peter Alting

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2. The respondent is directed to amend the draft Liquidation and Distribution account by inclusion of a claim for the maintenance of a minor child Pieter Alting;

3. The respondent as executor is ordered to pay the costs of this application.

S. W. Sapire CJ