

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Appeal Case No. 37/2005

In the matter between:

GELANE NTOMBIZILE GAMEDZE
(nee Dlamini) Appellant

and

MOTOR VEHICLE ACCIDENT
FUND 1st Respondent

SOPHIE D. SHONGWE 2nd Respondent

CORAM: BROWDE, AJP

TEBBUTT, JA

ZIETSMAN, JA

JUDGMENT

TEBBUTT, JA

[1] John Mkwapela Shongwe, to whom I shall refer as "the deceased", died on 27 January 2001 as the result of a fatal road traffic accident, leaving a widow, Sophie D. Shongwe, to whom he was married by civil rites on 3 November 1975.

[2] It seems, however, that his widow was not the only love of his life. The appellant, Gelane N. Gamedze says that she is the

natural mother of an illegitimate child, Sicelo Ishmael Shongwe who was born on 4 October 1984. She avers that the deceased was the father of the child who, she says, was "born out of wedlock as a result of a love affair between myself and John Mkwapela Shongwe."

[3] The appellant alleges that during his lifetime the deceased "fully maintained" the said child averring that its "social, educational and medical needs were attended to and fully provided for by the deceased."

[4] The appellant says that as a result of the death of the deceased, the support by him of the child has been lost and she has lodged a claim with the first respondent Fund for compensation by it for such a loss, relying upon the paternity of the deceased of the child as the basis for her claim.

[5] The second respondent, the widow of the deceased has contested the paternity of the deceased in respect of the child.

[6] As a result, the appellant launched proceedings in the High Court by way of a Notice of Motion in which she sought in

terms of prayer 1 thereof an order declaring that the minor child SICELO ISHMAEL SHONGWE is the child of the late JOHN MKWAPELA SHONGWE. Opposition to the application came only from the deceased's widow, the second respondent.

[7] In her opposition to the application the second respondent raised two points *in limine*. The first was that the appellant had no *locus stand* to bring the application. This point was correctly dismissed by Maphalala J, before whom the matter was argued, and no more need be said about it. What is in contention, however, relates to the second point *in limine*, which the learned judge upheld. He dismissed the application because of what he found was a dispute of fact regarding the paternity of the child.

[8] He said the following:

"I am in agreement with Mr. Mkhathshwa that applicant ought to have foreseen the dispute of fact as regards the paternity ... and it would appear to me that applicant should have proceeded by way of action."

It was solely for that reason that the

learned judge dismissed the application with costs. The present appeal is brought against that decision.

[9] In coming to his decision the learned Judge clearly erred. In response to the allegation by the appellant in her founding affidavit that "the said minor child was born out of wedlock as a result of a love affair between myself and John Mkwapela Shongwe", the second respondent merely answered as follows:-

"I take note of this paragraph. It is however significant to point out that the minor child is currently 20 years old and will be turning 21 on 4 October 2005."

[10] The significance of the age of the child is not clear since, as I have pointed out, the only order sought by the appellant was a declaration that the deceased was the father of the child. As stated above the purpose behind the application is an intention by the appellant to claim for loss of maintenance on behalf of the child from the first respondent. The second respondent, for reasons which are not clear, since she has not made a claim on behalf of the child, has however, sought to prevent such claim from

being made at all. It was for this reason that she argued that the application should be dismissed because of the so-called dispute of fact about whether or not the deceased was indeed the father as alleged by the appellant. However, to that allegation the second respondent replied as follows in different paragraphs of her affidavit:

[11](i) *"For purposes of this affidavit I will not deny that there is a possibility that he is the father of the minor child."*

(ii) *"As stated above, what is in issue is not the paternity of the minor child, but whether the applicant is entitled to claim for the loss of his support as I am the one who has always looked after the minor child's mental and financial needs."*

[12] That was not the issue raised in the appellant's application. The sole issue was whether the deceased was the father of the child in question. As to this she said:

(a) *"Although I do not deny that the minor child was most probably fathered by my late husband, I however fear that the applicant has merely launched this application to institute a claim with the Motor Vehicle Accident Fund, to which she would not be entitled, as she has not supported the minor*

child during his lifetime, and that by instituting a claim the applicant is in fact perpetrating a fraudulent action, which this court should not condone."

(b) 'As indicated above in this affidavit, the paternity of the minor child is not in issue...".

[13] Despite all the above statements which demonstrate that the paternity of the child was not in dispute, and despite the fact that the only order sought was a declaration pertaining to the paternity, the learned judge nevertheless, in refusing to grant the declaration, found, as set out above, that there was a dispute of fact.

[14] As shown above, there was, in fact, no such dispute of fact and consequently the appeal succeeds, with costs.

The order of the Court is accordingly set aside and the following substituted: -

"An order is granted in terms of prayer 1 of the Notice of Motion and the second respondent is ordered to pay the costs."

P.H. TEBBUTT, JA

I AGREE

J. BROWDE, AJP

I AGREE

N.W. ZIETSMAN, JA

Delivered in open court at Mbabane on
the....day of May 2006