IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CASE NO. 12/2006

In the matter between

NONHLANHLA ND LANGAMANDLA Appellant

And

MOTOR VEHICLE ACCIDENT FUND 1st Respondent

SOPHIE D. SHONGWE 2nd Respondent

Coram

BROWDE, AJP

TEBBUTT, JA

ZIETSMAN, JA

For Appellant: Adv. M.L.M. Maziya

For Respondent: Adv. K. Lapham

JUDGMENT

TEBBUTT, JA

[1] This appeal, being of similar ilk to the appeal in Appeal Case 37/2005 Gelane Ntombizile Gamedze vs Motor Vehicle Accident Fund and Sophie D. Shongwe, the two cases were heard together. Both involved the alleged paternity of illegitimate minor children by one John Mkwapela Shongwe. Although certain of the facts in this appeal are much the same as in the Gamedze case, I shall nevertheless, for convenience sake, again set them out herein.

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

[3] His widow was, however, allegedly not the only woman in his life. The appellant, Nonhlanhla Ndlangamandla, says that she is the natural mother of three illegitimate minor children, Nikiwe Ncobile Shongwe, Njabulo Clement Shongwe and Sabelo Khaya Shongwe, born on 29 July 1993, 3 May 1992 and 30 May 1998 respectively. She avers that the deceased, as in the Gamedze case, was the father of these three children who were

"born out of wedlock as a result of a love affair between myself and John Mkwapela Shongwe".

[4] The appellant alleged that the deceased during his lifetime "fully maintained" the said children "averring that their" social, educational and medical needs were attended to and fully provided for by the deceased."

[5] The appellant states that as a result of the death of the deceased, the support by him of the minor children had been lost and she has lodged a claim with the first respondent fund for compensation by it for such loss, relying upon the paternity by the deceased of the children as the basis for her claims.

[6] The second respondent, the deceased's widow, who has also lodged a similar claim, has contested the deceased's paternity of the children.

[7] As a result the appellant brought an application by way of Notice of Motion for an order in prayer (1) thereof declaring that her minor children are the children of the late John Mkwapela Shongwe. Opposition to the application came only from the deceased's widow, the second respondent.

[8] In her opposition the second respondent raised two points *in limine.* The first was that the appellant had no *locus standi* to bring the application. Maphalala J, before whom the matter was argued, correctly dismissed this point and no more need therefore 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 children.

[9] In his decision he said

> "*On the second issue of the dispute of facts the reasons given in Gelane Ntombizile Gamedze also apply on the facts of the present case. It is trite that where a declaratory order is sought, if a dispute of fact is foreseeable, a declaration should be sought by way of action .... Further, for ease of reference the ruling in Gelane Ntombizile Gamedze forms part of the present ruling.*"

[10] In the Gamedze case the learned judge found that there was a dispute of fact in regard to the paternity of the illegitimate minor child in that case, which was the only issue before him. As this Court has found in the Gamedze case there

was indeed no dispute of fact in respect of the paternity of the child there, the second respondent in this case who was also the respondent in that case conceding "that the minor child was most probably fathered by my late husband" and stating that "the paternity of the minor child is not in issue...". The learned judge therefore clearly erred in his decision in that case.

I turn then to consider the question of whether there is a dispute of fact in regard to the paternity of the three children in the present case.

While it may be thought to be generally undesirable to attempt to resolve factual conflicts on affidavit, it is not an inflexible rule to have to do so. In some instances a denial by a respondent of facts alleged by an applicant may not be such as to give rise to a real, genuine or bona fide dispute of fact. In the well-known and oft-cited case of ROOM HIRE CO. fPTY) LTD v JEPPE STREET MANSIONS (PTY) LTD 1949(3) SA 1153(T) at 1162, Murray AJP said the following:

> "*The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a*

respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's

mere allegation of the existence of the dispute of fact conclusive of such existence. 'In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence...' (Per Watermeyer CJ in Peterson v Cuthbert & Co Ltd (supra at 428)).

At 1165 Murray AJP went on to state:

"*(A)bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases ... The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.*"

In DA MATA v OTTO NO 1972(3) SA 858(A) at 882 Wessels JA

said the following:

> *"In the preliminary enquiry, i.e. as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent*
>
> *intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided only after viva voce evidence has been heard."*

In the case of Peterson v Cuthbert & Co Ltd (supra) referred to by Murray AJP in the Room Hire case, one of the issues raised in a matter involving a lease of a property was whether the lessors needed the property for their own use. The lessee denied that they did. Watermever CJ queried whether this gave rise to a genuine dispute of fact. In his denial the lessee said he had no knowledge of the lessor's reasons for requiring the property but queried their truth and said that they should be investigated in

a trial action. Watermeyer CJ considered that this did not give rise to a genuine dispute of fact.

There is a further principle that must also be borne in mind. It is this. The Court should not hesitate to decide an issue of fact on affidavits merely because it may be difficult to do so. In SOFFIANTINI v MOULD 1956(4) SA 150(E) at 154 the following appears:

> "*It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.*"

Again, in NDHLOVU AND ANOTHER v MINISTER OF JUSTICE AND OTHERS 1976(4) SA 250(N) at 252, the Court said the following:-

> "*A Court will not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so.*

SOFFIANTINI v MOULD 1956(4) SA 150(E). It will in every case examine the quality of the evidence in relation to the apparent dispute to see whether it cannot be satisfactorily determined without the aid of oral evidence."

[16] That approach has since been followed in a number of South African decisions (see, for example, REED v WITTRUP 1962(4) SA 437(D) at 443; VAN VUUREN v JANSEN 1977(3) SA 1062(T)). In CARRARA AND LECUONA (PTY) LTD v VAN PER HEEVER INVESTMENTS LTD & OTHERS 1973(3) SA 716(T) at 719 G., Colman J, after quoting Soffiantini v Mould (supra), said that

> "*I accept the duty to avoid fastidiousness and to make a robust approach to the matter, applying as much commonsense to the problem as I may happen to command.*"

(See also WIESE v JOUBERT EN AUDERE 1983(4) 182(0) at 202F-203C; MINISTER OF HEALTH v DRUMS AND PAILS RECONDITIONING CC 1997(3) SA 867(N) at 872F - 873G). It has also been followed by this Court as recently as November 2005 in JOHN BOY MATSEBULA AND OTHERS v

CHIEF MADZANGA NDWANDWE AND ANOTHER Civil Appeal 15/2003 (unreported).

[17] In elaboration of her averment that the deceased was the father of her children the appellant stated in her founding affidavit that he had "never denied paternity" of them and "fully acknowledge responsibility" because "he fully maintained "them". She also said that the births of the children were duly reported to the Shongwe elders in accordance with Swazi law and custom.

In support of the latter averment, the appellant attached to her founding papers an affidavit by an elder sister of the deceased who confirmed that the birth of the minor children was duly reported to the Shongwe elders. She said "all rites were performed on the said children to indicate their arrival to the Shongwe homestead." She added:

> "*The paternity of the said children has never been denied by the late John Mkwapela Shongwe and the children have been maintained and looked after by him throughout his lifetime.*"

As evidence of her averment and that of the deceased's sister

that the deceased had maintained, supported and looked after the children, the appellant also attached two affidavits: one from the headmaster of the Ngwane Park Primary School and one from the children's doctor. The former said that the children were enrolled as pupils in his school and that "the father of the minor children the late John Mkwapela Shongwe" always paid their tuition fees until his death. He annexed receipts of such payments to his affidavit. The doctor said that "the medical needs of the children were attended to by me on the instructions of their father John Mkwapela Shongwe from their birth until the demise of the said Mr. Shongwe". He annexed copies of their medical records which reflect the "medical history" of the children as "c/o Mr. John Shongwe".

Second respondent's response to the appellant's averment that she was the natural mother of the three minor children and that they were "born out of wedlock as a result of a love affair between myself and John Mkwapela Shongwe" was the following:-

> "*I have no knowledge of the contents of this paragraph, cannot admit or deny the contents and consequently deny the contents of this paragraph in its entirety. I have never been advised by either my late husband or any other*

person that my late husband had fathered three children by the applicant."

Second respondent further stated that:-

"*12.2 My late husband had never admitted paternity of the minor children. The applicant is put to the proof thereof .*

12.3 My late husband had never attended to the social, educational and medical needs of the minor children. The applicant is put to the proof of this allegation.

She also denied that the birth of the children was reported to the Shongwe elders.

[22] In regard to the affidavit of the deceased's sister, second respondent said:

"*This affidavit purports to be support of the applicant's claim that the minor children are indeed those of my late husband, but I deny this in its entirety and deny that this constitutes any form of proof.*"

[23] In respect of the affidavits by the headmaster and the doctor second respondent said:

> "*The affidavits by the doctor and the headmaster only confirms that a person calling himself by the same name as my deceased husband had paid the accounts. This is no proof of it having been my late husband. Neither of these persons had indicated that they had known my late husband and had identified him as being the father of the children.*"

[24] The second respondent's responses to the appellant's allegations in regard to the paternity of the children in question, amount to nothing more than bare denials of those allegations. As set out above, in response to the averment that the children "were born out of wedlock as a result of a love affair between myself and the deceased", second respondent merely says that she has no knowledge of these facts, and cannot admit or deny them. This is obviously simply a bare denial and one falling within the category of denials referred to by Watermeyer C.J. in Peterson v Cuthbert and Co (supra) as not giving rise to a genuine dispute of fact.

[25] The other denials similarly are simple denials of the

allegations, the second respondent requiring the appellant to prove their truth. Applying the criteria in respect of such denials as laid down in the Room Hire case they do not raise genuine disputes of fact. Such disputes may be raised where the respondent "produces or will produce positive evidence by deponents or witnesses" in refutation of an appellant's allegations but not where there is merely a bare denial of those allegations, (see SEWMUNGEL AND ANOTHER NNO v REGENT CINEMA 1977(1) SA 814(n) at 820 E - F).

[26] In response to the affidavit of the sister of the deceased in support of the allegation that the minor children were indeed those of the deceased she again merely states "I deny this in its entirety and deny that this constitutes any form of proof - once more, a bare denial.

[27] Her suggestion that a person with the same name as the deceased had paid the school fees and medical accounts of the children as deposed to by the children's headmaster and doctor is so far-fetched and untenable as to justify its being rejected on the papers. It would be a remarkable coincidence indeed if a man, other than second respondent's late husband, also called Shongwe and having exactly the same names as him viz John Mkwapela Shongwe had fathered the appellant's children and

had paid the children's school fees and medical expenses, stopping doing so at precisely the same time as the deceased died. Second respondent also says that neither indicated that they had known the deceased but the doctor said he had attended to the children "on the instructions of their father, John Mkwapela Shongwe".

[28] Moreover adopting a robust, commonsense approach to the issue I find that the following facts militate against refusing the present order sought.

(i) The appellant says on oath that the deceased was the children's father.

(ii) The deceased's sister says he never denied being their father and supported them.

(iii) He paid the children's school fees and had them attended to by their doctor on his instructions, paying the accounts so incurred.

(iv) The second respondent's bare denial of these facts do not detract from the genuineness of them. That he never acknowledged them to her, as she avers, is not improbable, he no doubt wishing to keep their existence secret from her.

It would be common sense to find that he was their father.

[29] In the result the appeal succeeds with costs and, as in the Gamedze case, the order of the Court *a quo* in the present case is 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, J.A.

I AGREE

J. BROWDE, A.J.P.

I AGREE

N.W. ZIETSMAN, J.A.

Delivered in open Court at Mbabane on the'..18th .day of May 2006