

Supreme Court of Appeal of South Africa

**MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal

Date: 5 September 2014

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

**Minister of Police v Mboweni**

Mr Mahlali died as a result of an assault perpetrated on him by other prisoners while he was in police custody. The Minister of Police accepted liability for failing to protect Mr Mahlali from harm while in police custody. The claims of his wife and two daughters, one from a previous relationship, for damages for loss of support were settled and judgment was given for payment of the agreed amounts.

The mothers of the two children wished to pursue a further claim for damages on behalf of their daughters based on a breach of the children's right to parental care in terms of section 28(1)(b) of the Constitution. The Minister of Police did not accept that such a claim is recognised in law. The parties therefore formulated an agreed statement of facts on which they asked the high court to determine whether such a claim was a valid claim in law. The high court upheld the claim although it held that liability was not admitted and issued a declaratory order that the minister of police was liable for such damages as might be proven at a further hearing.

The SCA today set aside that judgment and referred the case back to the high court for determination after a trial. It did so on the basis that the procedure adopted by the high court was incorrect. The parties had failed to place the relevant facts concerning the nature of the relationship between Mr Mahlali and his daughters before the judge and it was accordingly not possible to say whether and to what extent there had been a loss of parental care in the sense given to that expression by the Constitution.

The SCA also pointed out that the proper interpretation of the constitutional right in section 28(1)(b) of the Constitution is a matter of some difficulty as the right embodied in the section is expressed as being a right to family care or parental care or appropriate alternative care outside the family environment. This alternative formulation raises issues concerning the persons responsible for ensuring the right is fulfilled that the high court had not addressed. It also raised issues concerning the existence and scope of the legal duties on the police and the appropriateness of a remedy of constitutional damages in addition to the damages recoverable in respect of the loss of support arising from the death of the family breadwinner.

Lastly the existence of such a remedy could have a substantial impact on public funds, such as those of the Road Accident Fund, who were not represented before the high court. Accordingly an opportunity ought to have been given for bodies such as that to participate in the proceedings. The judgment of the high court was accordingly set aside and the matter referred back for trial in which the issues could be fully and properly canvassed.