



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

NOT REPORTABLE

Case No: 374/13

In the matter between:

MINISTER OF SAFETY AND SECURITY

APPELLANT

and

NTOMBENKOSI HLOMZA

RESPONDENT

Neutral citation: *Minister of Safety & Security v Hlomza* (374/13) [2014] ZASCA 51
(2 April 2014)

Coram: **Mpati P and Lewis, Mhlantla and Saldulker JJA and Legodi AJA**

Heard: **18 March 2014**

Delivered: **02 April 2014**

Summary: Where there is no evidence to establish the elements of a dependant's action for loss of support an order of absolution from the instance is appropriate.

ORDER

On appeal from: Eastern Cape High Court (Mthatha) (Van Zyl J, Pakade ADJP and Notununu AJ sitting as the Full Court on appeal).

1 The appeal is upheld with costs including those of two counsel.

2 The order of the full court is set aside and replaced with:

‘The appeal is dismissed with costs including those of two counsel.’

JUDGMENT

Lewis JA (Mpati P and Mhlantla and Salduker JJA and Legodi AJA concurring):

[1] This is an appeal against a decision of the full court in the Eastern Cape High Court, Mthatha (Van Zyl J, Pakade ADJP and Notununu AJ concurring) which granted dependants’ claims for loss of support brought by the respondent, Mrs N Hlomza, for herself and her minor children against the appellant, the Minister of Safety and Security. I shall refer to the appellant, for the sake of convenience, as ‘the police’, whom the Minister was representing. The trial court (Griffiths J, in the same division) had granted absolution from the instance in respect of the claim for loss of support as there was no evidence to support Mrs Hlomza’s claim that the police were legally responsible for the death of her husband, and the father of her children, who had committed suicide by shooting himself with a firearm issued to him for use in the course of his duties as a policeman.

[2] The full court upheld the appeal against the order of absolution from the instance, and granted an order that the police were liable for 'any proven damages' that Mrs Hlomza and her children might have suffered as a result of Mr Hlomza's death. The appeal against that order is with the leave of this court.

[3] The bare facts, which appear only from the pleadings since no evidence was led by either party, are that on 13 February 2005 Mrs Hlomza's husband, a policeman attached to the Central Police Station, Fort Gale, Mthatha, shot her in the jaw and neck, causing injuries, and then shot and killed himself with the same firearm. The firearm belonged to the police and had been officially allocated to him for use in the course of his duties as a policeman.

[4] Mrs Hlomza instituted action against the police for damages for herself arising from her injuries, loss of support for herself and her children as a consequence of the death of her husband, and funeral expenses. At the outset of the trial the court ruled, at the request of the parties, and in terms of rule 33(4) of the Uniform Rules of Court, that the issues of liability and the quantum of damages would be dealt with separately. By consent as well, a Provincial Order (3 of 1998) for the regulation of state-owned firearms by members of the South African Police Service when not on duty, was placed before the trial court. It was the only evidence before that court because at the outset, counsel for Mrs Hlomza indicated that in view of the admissions made by the police in their plea, a *prima facie* case for her had been made and that the police were put on their defence.

[5] Counsel for the police also led no evidence. As Griffiths J said, the proceedings amounted to a 'trial without a trial'. The entire matter accordingly turned on the claims made in the particulars and on certain of the admissions made by the police on which Mrs Hlomza relied. The pleadings are thus significant. I shall not deal in any detail with those relating to the injuries caused to Mrs Hlomza, since liability for that claim was admitted by the police in their plea to the particulars of claim. But they denied liability for her husband's death and the ensuing claims for loss of support. It is thus the claims for loss of support brought by Mrs Hlomza personally and on behalf of her four children that were in issue.

[6] Paragraph 7 of the particulars of claim alleged that the shooting of Mrs Hlomza and the commission of suicide by her husband were caused by the negligence of the police in that (inter alia):

'7.1 they failed to seize the official firearm from possession of the deceased despite previous reports of violence made by the plaintiff to them against the deceased;

7.2 they failed to seize the official firearm from possession of the deceased despite previous requests to them by the Plaintiff to do so;

7.3 they became aware that the deceased had threatened to shoot the Plaintiff and/or manifested threats of violence towards the Plaintiff but failed to take steps to seize the official firearm from possession of the deceased;

...

7.6 they allowed the deceased to be in possession of an official firearm even after working hours well knowing that the deceased had previously threatened to shoot the Plaintiff;

...

7.8 they knew that the marriage relationship between the Plaintiff and the deceased had significantly deteriorated and the family life of the deceased was not stable but failed to seize the official firearm . . .;

7.14 they knew that the deceased had suicidal tendencies but failed to ensure that the deceased was deprived of the possession of the official firearm; . . . '.

[7] In para 8 of the particulars Mrs Hlomza averred that the police should have foreseen that she would be shot and that her husband would commit suicide, and that they should have prevented these acts by seizing the firearm from him. In response the police pleaded, in respect of paras 7 and 8 of the particulars, that they admitted only that the shooting of Mrs Hlomza was caused by their negligent omission, as detailed in para 7 of the particulars of claim, but they denied liability in respect of the allegations in paras 7.8 and 7.14, quoted above.

[8] They pleaded further that they ought to have foreseen the shooting of Mrs Hlomza by her husband and prevented it by taking possession of the firearm from him.

But, they stated: 'The rest of the allegations made herein are denied and the plaintiff put to the proof thereof.' It is thus patent that liability in respect of the dependants' claims was denied. Mrs Hlomza's legal representatives should have led evidence that established the allegations and not relied on admissions that were not made.

[9] However, counsel for Mrs Hlomza argued before the trial court (and in this court too) that the allegations specifically referring to her husband's suicidal tendencies and violent nature were superfluous: once it was admitted that the police had been negligent and had acted wrongfully in not removing Mr Hlomza's firearm from him, that was sufficient to found liability for the loss of support for his dependants.

[10] Counsel relied also on the decision of this court in *Minister of Safety and Security & another v Madyibi* 2010 (2) SA 356 (SCA) (an appeal from a decision in the Eastern Cape High Court, Mthatha) where it was held that the police were liable in very similar circumstances for the loss of support suffered as a result of the deceased's suicide. But in that case, not only was liability in respect of the dependants' action admitted, but evidence had been led to support the claim. Griffiths J referred to the record of the proceedings in *Madyibi* and pointed out that in that case the trial court had detailed the evidence of abuse and violence by the plaintiff's husband, including an episode where he had attempted to kill both himself and the plaintiff. As Griffiths J said of the facts in *Madyibi*: 'As may be seen, this is a far cry from the facts before me in the present matter'.

[11] The trial court concluded that although the police had admitted liability for Mrs Hlomza's injuries, thus accepting that the elements of the delict had been present – fault in the form of negligence, wrongfulness and that the negligence was the cause of the injuries – that did not amount to an admission that there was a causal link between their failure to dispossess Mr Hlomza of his firearm and his death by suicide. There was also nothing to suggest that his death had been foreseeable and that they had been negligent in failing to prevent it.

[12] As the trial judge said, the question of causation was 'complicated' by the absence of any evidence from which he could draw inferences as to whether the failure

to deprive Mr Hlomza of his firearm resulted in the suicide. The admission as to negligence in respect of Mrs Hlomza's injuries could not be stretched to include an admission of liability for loss of support, especially given the specific denials of liability in this regard in the plea. The police, said the learned judge, had 'steered clear from any admission which might, in any manner, be construed as an admission of any knowledge whatsoever on the part of the police that the deceased had any form of suicidal ideation or tendencies'.

[13] Even the admission of negligence on the part of the police in so far as Mrs Hlomza was concerned did not amount to an admission that the death by suicide of Mr Hlomza was reasonably foreseeable: thus neither fault nor causation had been shown in this regard. The trial judge granted absolution from the instance in respect of the dependants' claim for loss of support, but granted leave to appeal to the full court.

[14] Van Zyl J, writing for the unanimous full court, considered that the trial court had 'confined itself to the issue of causation'. That, as I have just indicated, is not correct. The trial court considered that there was no evidence to support the allegations of negligence and causation – hence the consideration of whether, on the facts known to the police from the particulars of claim, the suicide of Mr Hlomza should have been foreseen by them, and whether they failed to take steps to guard against the possibility of harm.

[15] On the basis of assumptions made by the full court and, despite the denials in the plea, it concluded that the death of Mr Hlomza was reasonably foreseeable; that the police's failure to dispossess him of his firearm was thus negligent; that it was also wrongful given the strictures on possession of official firearms by police officers when off-duty and their knowledge of his instability and lack of fitness to possess the weapon; and that the negligent conduct was the cause of the death leading to the loss of support by his dependants.

[16] All the assumptions made – for example, that suicide, in the context of a troubled domestic relationship is foreseeable – were pure conjecture. From the fact that Mr Hlomza had first shot his wife before killing himself, the full court inferred that the

suicide was predictable. It is not necessary to examine the assumptions and the conjecture as to what the police knew, or should have known and should have done: they are no more than speculative assumptions. The onus was on Mrs Hlomza to prove the facts giving rise to the Aquilian action, from which would flow the action for loss of support, on a balance of probabilities. She did not even make out a prima facie case.

[17] Finally, it must be mentioned that Mrs Hlomza applied for the condonation of the late filing of heads of argument prepared on her behalf. The excuse proffered by her attorneys was that they had left the matter to their correspondents in Bloemfontein and had not been aware of this court's rules and practice directions. That is not a justification for their conduct. It was their responsibility to ensure that all rules and directions were complied with. Mrs Hlomza has been badly let down by her legal advisers. Nonetheless, the police did not oppose the application for condonation and it was granted at the commencement of the appeal hearing.

[18] In the circumstances, the appeal must be upheld, which will have the effect that the order of the trial court is reinstated. It is ordered that:

1 The appeal is upheld with costs including those of two counsel.

2 The order of the full court is set aside and replaced with:

'The appeal is dismissed with costs including those of two counsel.'

C H Lewis

Judge of Appeal

APPEARANCES:

For the Appellant: S M Mbenenge SC (with him A M da Silva)

Instructed by:

The State Attorney, East London

The State Attorney, Bloemfontein

For the Respondent: N Dukada SC

Instructed by:

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