



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 643/08

THE MINISTER OF SAFETY AND SECURITY
XOLISA DLAKAVU

First Appellant
Second Appellant

and

DIDEKA FLORENCE MADYIBI

Respondent

Neutral citation: *Minister of Safety and Security v Madyibi* (643/08) [2009]
ZASCA 95 (17 September 2009)

CORAM: BRAND, VAN HEERDEN, PONNAN, MAYA JJA
and TSHIQI AJA

HEARD: 20 August 2009

DELIVERED: 17 September 2009

CORRECTED:

SUMMARY: *Delict – loss of support – wrongfulness – police negligently failing to dispossess sergeant of official firearm – sergeant taking his own life with firearm – claim for loss of support by dependants – wrongfulness established*

ORDER

On appeal from: The High Court, Transkei Division (Petse ADJP sitting as court of first instance).

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

VAN HEERDEN and PONNAN JJA (BRAND and MAYA JJA, and TSHIQI AJA concurring):

[1] On 21 January 2003, Sergeant Pumzile Madyibi (the deceased), who during his lifetime was the husband of the respondent, Dideka Florence Madyibi, shot and injured the latter and thereafter took his own life with a state issue firearm that had been allocated to him as a member of the South African Police Service for use even when not on duty. Pursuant to the shooting, Ms Madyibi instituted action, both in her personal capacity as also on behalf of the four minor children born of her union with the deceased, against the Minister of Safety and Security and Superintendent Xolisa Dlakavu, the station commissioner of the station to which the deceased had been attached (the first and second appellants, respectively, in this court).¹

¹ By the time the appeal came to be heard, Ms Madyibi had regrettably passed away. By then, one of her children had obtained majority and, by virtue of an order of the Mthatha High Court, a certain Nombeko Elizabeth Gwadiso was substituted for Ms Madyibi to prosecute the claim on behalf of the remaining three minor children in these proceedings. Nangamso Madyibi, the major son, was in terms of this order substituted for Ms Madyibi in respect of 'his part of the claim for loss of support'. Nothing however turns on that and before us no opposition was raised to the substitution.

[2] In her summons Ms Madyibi alleged that the shooting and commission of suicide by the deceased were caused by the negligence of Dlakuva and/or other policemen in that he and/or they had failed to dispossess the deceased of his official firearm, despite having become aware, over a protracted period of time, that the deceased was unfit to possess a firearm inasmuch as:

- (i) he had previously repeatedly threatened to shoot Ms Madyibi, had pointed a firearm at her and had threatened violence towards her and other members of the SAPS;
- (ii) Dlakuva and/or other policemen knew that the marriage relationship between the deceased and her had significantly deteriorated, that the family life of the deceased was anything but stable, and that the deceased had manifested suicidal tendencies.

Moreover, so the summons alleged, he and/or other policemen had failed to take steps to protect Ms Madyibi from being injured by the deceased when they could and should have done so, or to report the violent conduct of the deceased to their superiors within the SAPS. Accordingly, so it continued, Dlakuva and other policemen, who should have foreseen the deceased's wrongful conduct and the consequent loss, had a legal duty to protect her and the minor children, which they had breached.

[3] Even though the claims were initially disputed, at the conclusion of a trial which lasted several days before Petse ADJP in the Mthatha High Court, the typed transcript of the proceedings records:

'MR MBENENGE [Counsel for the Appellants]: . . . Having dealt with that portion of the claim in so far as it relates to the alleged negligence, which is as I have pointed out, now no longer in dispute, then the defendants accordingly concede Claim A, if I may remind Your Lordship, Claim A relates to general damages that are said to have been suffered by the plaintiff consequent upon the shooting incident.

COURT: Yes.

MR MBENENGE: So Claim A in its entirety is no longer being resisted. Then for now Your Lordship should allow us to say nothing about Claim B, Claim C in so far as it relates to the plaintiff suing in her representative capacity, is also being conceded. Let me say that again, M'Lord.

COURT: Conceded?

MR MBENENGE: Yes

COURT: Thank you.

MR MBENENGE: In other words plaintiff's claim for loss of support, her personal claim for loss of support is not conceded, [what] is being conceded is the claim brought by the plaintiff for and on behalf of the minor children . . . So much for Claim C. Then, M'Lord, flowing from that is the fact that the defendants made no concession with regard to the plaintiff's . . . Claim B. Then finally the defendants do not dispute being liable for costs of suit hitherto or up to and including today, that is costs of the hearing, the liability aspect.'

Later, and in order to further clarify the position Mr Mbenenge stated:

'Your Lordship will realise that what the defendants were doing in fact, was to place on record that which is not being resisted anymore. Less – it was less of making an offer to the plaintiff as seems to have been understood, so the understanding really is that we stand up to record what it is that is no longer being resisted.'

On the day that the matter was argued, counsel for the appellants informed the trial court that the appellants also admitted liability for Ms Madyibi's claim for loss of support in her personal capacity. Thus all that remained of the *lis* between the

parties was Claim B, being Ms Madyibi's claim for loss of income and her impairment of earning incapacity.

[4] After taking some time to consider the matter, Petse ADJP handed down a fully reasoned judgment in which he issued the following order:

'1 The First Defendant [the Minister of Safety and Security] is held liable to compensate the Plaintiff [Ms Madyibi] both in her personal and representative capacities for such damages as the Plaintiff may prove to have suffered in respect of the following:

1.1 pain and suffering, loss of amenities of life, past and future medical and hospital expenses;

1.2 loss of support;

1.3 loss of earning capacity.

2 The First Defendant shall . . . pay all the costs of suit incurred to date of this order.'

[5] Thereafter, as the learned judge in the court below put it – 'To my utter amazement ..., it came to my attention that the defendants had filed an application for leave to appeal against part of my judgment'. Petse ADJP nevertheless ultimately granted leave to the appellants to appeal to this court against that part of his judgment relating to Ms Madyibi's claim for loss of support, both in her personal as also in her representative capacities.

[6] In persuading the court below to grant leave, the submission was that the issues of negligence and wrongfulness had in error been conflated by counsel on behalf of the appellants. Accordingly, so the submission went, the element of wrongfulness not having been proved by Ms Madyibi, the court below ought not to have found in her favour.

[7] On appeal it was argued that the distinction between negligence and wrongfulness had clearly been overlooked by the court below, with the result that those issues had been conflated. Accordingly, so the argument proceeded, the concessions that had been made by counsel pertained only to negligence and did not embrace wrongfulness. In the result, there remained a live issue for determination by the court below, as also before us on appeal. All of that we shall assume, without deciding, in favour of the appellants.

[8] As best as we can discern the appellants' case, it is that the present matter is indistinguishable from that of *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA). In our view, however, counsel's reliance on *Brooks* is entirely misplaced for the following reasons. First, in this case the deceased died by his own hand, unlike the breadwinner in *Brooks* who was very much alive but had been rendered unable to support his dependant as a result of his incarceration in consequence of the law having taken its course. Second, suicide is not a crime, while the breadwinner in *Brooks* had, on the other hand, rendered himself incapable of supporting his dependant by perpetrating a most heinous crime. There were thus strong policy reasons in that case that militated against recognising a claim there. Third, in *Brooks* a basic ingredient for the dependant's action, namely the death of the breadwinner, was absent. Fourth, at the risk of stating the obvious, for as long as the breadwinner was alive, conduct, even were it to have been found to be wrongful, would only have been wrongful *vis-à-vis* the breadwinner and not the dependant – thus, for as long as the breadwinner had a right of action, there could also not have

existed a separate and independent right of action in the dependant for loss of support.

[9] It follows that, given the admittedly negligent conduct one encounters here, the appeal must fail: in our view, the conduct complained of was plainly wrongful and considerations of public or legal policy consistent with our constitutional norms would certainly demand the imposition of a legal duty in a matter such as this (see, for example, *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 39 and 41).

[10] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

B J VAN HEERDEN
JUDGE OF APPEAL

V N PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

S M Mbenenge SC
P h s zilwaInstructed by:
The State Attorney
c/o Jolwana Mgidlana Inc.
Mthatha
The State Attorney
Bloemfontein

For Respondent:

N Dukada SC
M n HinanaInstructed by:
V V Msindo and Associates
Mthatha
Ponoane Attorneys
Bloemfontein