REPORTABLE

SUMMARY

CASE NO.: I 1769/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARTHA CECILIA VAN WYK v TSHOOPALA MARTIN AMBATA

PARKER J

2010 June 29

Delict - Liability for – Assault by defendant, a trained soldier and also one trained in the art of unarmed close-quarters combat – Deceased dying after assault by defendant – Assault resulting in traumatic asphyxia – Court finding such defendant foresaw or should have foreseen the likelihood of risk of the throat-chop he executed causing death.

Delict - Negligence – Causation – On the facts and circumstances of case, Court applying *causa (conditio) sine qua non* test – On application of test Court concluding that negligent act of defendant caused death of deceased.

Delict - Widow as plaintiff – Plaintiff suing in personal capacity and in capacity of representative of minor children of deceased – Deceased having been the sole breadwinner of family – Court finding that widow entitled to bring action based on claim for loss of support for herself and the minor children of the deceased.

Evidence - Rule in *Hollington* case – Rule applied *in casu* – Court concluding that facts proved in criminal trial of defendant not relied on to prove facts in issue in other proceedings between different parties.

Held, that on the application of the *causa (conditio) sine qua non* test, the defendant's negligent act, that is the assault on the deceased, caused the death of the deceased, as there was a causal connection between the negligent act of the defendant and the death of the deceased.

Held, further, that in principle, the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or fact relevant to the issue in other proceedings between different parties.

CASE NO.: I 1769/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARTHA CECILIA VAN WYK **Plaintiff**

and

TSHOOPALA MARTIN AMBATA **Defendant**

***CORAM*: PARKER J**

Heard on: 2010 May 26 – 28
Delivered on: 2010 June 29

JUDGMENT

PARKER J: [1] The plaintiff has instituted action against the defendant because the plaintiff holds the defendant responsible for the death of the plaintiff's husband (Albertus Conrad van Wyk ('the deceased')) which death, the plaintiff avers, was caused by assault perpetrated by the defendant against the deceased. The plaintiff sues in her personal capacity and in a representative capacity as mother and natural guardian on behalf of her three children who were minors when the combined summons was filed with the Court on 22 February 2002. The plaintiff claims from the defendant the payment of N$360,000.00 (later amended to read N$224,427.00), interest *a tempore morae*, costs of suit and further and/or alternative relief.

[2] Up to the close of proceedings, the defendant was represented by legal practitioners; however, during the trial the defendant appeared in person. Mr. Denk represents the plaintiff.

[3] The defendant's plea is that the 'defendant admits having assaulted the deceased after the deceased initially threatened him with a firearm, whereafter he left and again returned and approached the defendant in a provocative manner.' However, 'the defendant denies that the deceased died as a result of the said assault.'

[4] At this juncture it would be efficacious to note from the evidence the following factual findings. The deceased did not threaten the defendant with any firearm or at all. If it was true the deceased had threatened the defendant with a firearm, the defendant did not report such a serious incident – a threat to his life or bodily security – to the Police at the Police Station which, according to the defendant, is a mere 500 metres from where the threat allegedly took place, as any reasonable law-abiding citizen in the position of the defendant would do. The defendant rather took the law into his own hands and brazenly went to the residence of the defendant where he demanded to be given 'the gun'; which gun, as aforementioned, turned out to be either the front end or the butt of a gun. Whereupon the defendant proceeded to a nearby bar or 'shebeen' with the sole aim of seeking out and confronting the deceased. The conduct of the defendant in these two events is indubitably demonstrative of the clear bellicose intentions of the defendant on that fateful day.

[5] I do not, therefore, for a moment accept the defendant's contrived evidence that as soon as the deceased laid eyes on him inside the shebeen, the deceased rushed in an attacking, doubled-up posture towards the defendant, and the defendant was forced to fight back to defend himself. There was no attack initiated by the deceased necessitating the defendant to defend himself. The deceased had not earlier on quarrelled with the defendant. The defendant did not offer any reasonable explanation as to why he held the view that the

deceased was preparing to attack him in the 'shebeen'. From the defendant's own evidence, he had earlier on seen the deceased leaning on what looked like a gun; but the deceased did not point that object at the defendant, or shout insults at him when the defendant was in the defendant's shop, busy counting the day's takings. The defendant rather testified that he saw the deceased go to the deceased's residence, and some moments later pass by the defendant's shop on his return from his residence, and then proceed in the direction of the 'shebeen'.

[6] The defendant's evidence that the deceased doubled up his body in an attacking mode, as aforesaid, inside the shebeen and rushed towards the defendant in the presence of a large crowd of revellers cannot possibly be true. There is no evidence that any reveller, apart from the defendant, saw this show. Mr. Denk put to the defendant in the defendant's cross-examination-evidence that you 'went to the shebeen; you followed him (i.e. the deceased); you knew he was there; you found him there and you started assaulting him.' The defendant had no real response to Mr. Denk's suggestions. All that the defendant said in response was, 'I cannot respond to that because I have nothing else than the information that I gave you already on my evidence, and I have nothing to tell you. … You are still trying now to dig from me.'

[7] Other findings of fact I make from the evidence are the following. I do not accept the defendant's evidence that he only slapped the deceased twice on his chest and kicked the deceased with his foot on the right side of the deceased's chin. The defendant, who is a trained soldier and also one trained in the art of unarmed close-quarters combat, kicked the deceased in his throat so hard that the kick immobilized the muscles of respiration by crushing. This conclusion is consistent with the evidence of Dr. Agnew who conducted a

post-mortem examination on the deceased and who compiled the 'Report on a Medico-Legal Post-Mortem Examination' and who also gave evidence for the plaintiff in these proceedings. Dr. Agnew wrote in his Report, 'There was a macroscopic fracture of the thyroid cartilage, with thyroid gland haemorrhage noted.' This is known as 'traumatic asphyxia'. (See J K Mason, *Forensic Medicine for Lawyers* (1995): p. 173) *A fortiori,* Dr. Agnew put the cause of death as 'neck trauma'.

[8] The reasonable and inevitable conclusion from all this is that the defendant, armed with his military training, unleashed a vicious attack with considerable force, unprovoked and unsolicited, on the defenceless deceased causing his death. Having so found, the next logical stop is to decide whether by so acting the defendant acted negligently. Thus, the next level of the enquiry is two-sided, as Mr. Denk correctly submitted; that is, whether the defendant acted negligently and whether the negligent conduct caused the death of the deceased.

[9] The defendant submitted that he had no intention of killing the deceased when he assaulted him. That may be so; but the plaintiff does not contend that the defendant had such intention. The plaintiff's claim is based on the negligence of the defendant in the assault of the deceased that caused the deceased's death.

[10] By agreement between the parties, I am asked to only decide on the issue of liability at this stage of the present litigation. In this regard, from the individual averments on the pleadings, my present burden is to decide whether the deceased died as a result of the said assault, which the defendant does not deny, as I have said more than once.

[11] The defendant contends that the assault he perpetrated against the deceased was not the cause of the death of the deceased. He says that 'he did not see that his kicking the deceased killed the deceased'. And why does the defendant so contend? The defendant submitted that after the assault (1) the deceased walked away with his wife from the bar where the assault occurred; (2) the deceased was able to smoke; and (3) there was no blood visible on the deceased. The defendant's submission stands to be rejected based on the reasoning and conclusion I have set out previously in my factual findings, primarily based on the medical evidence which I accept.

[12] In this regard, I accept Mr. Denk's submission on the point. I find that the defendant acted negligently; taking into account the fact that the defendant, being a trained soldier and one trained in the art of unarmed close-quarters combat, as aforesaid, foresaw or ought to have foreseen that the throat-chop he executed with his foot with considerable force could kill the deceased. Indeed, I have no double in my mind that the defendant aimed his hard kick at the throat of the deceased, knowing very well that he could crush the deceased's throat with such a hard kick. Accordingly, I find that the defendant, a trained soldier and one trained in the art of unarmed close-quarters combat, foresaw or should have foreseen the likelihood of risk of the throat-chop he executed on the deceased killing the deceased; that is, the deceased who, as I have previously found, was passive to the brutal attack on him. In sum, with the kind of powerful and hard kick directed at the throat of the deceased, the possibility of serious injury being reasonably foreseeable, the defendant 'ought also to have foreseen the possibility of death hovering in attendance: the two are sombrely familiar as cause and effect in the walks of human experience.' (*S v Bernardus* 1965 (3) SA 287 (A) at 307A, approved by

Viljoen AJA in *Minister of Police v Skosana* supra at 43A-C. See also *Vivier NO v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 at 743D-J.)

[13] Thus, on the facts and circumstances of this case and the aforegoing reasoning and conclusions, I hold that it has been proved on a preponderance of probabilities that the negligent conduct of the defendant caused the death of the deceased. That is to say, but for negligent on the part of the defendant directed at the deceased, the deceased would not have died in the way he did; that is, there was a causal connection between the act of the defendant and the death of the deceased. Thus, on the *causa (conditio) sine qua non* test, I find it established that the negligent act of the defendant, i.e. the assault, caused the death of the deceased. (See *Minister of Police v Skosana* 1977 (1) SA 31 at 35A-F.)

[14] It follows that the defendant must be held liable for the death of the deceased and he must pay; he must pay for the harm suffered by the plaintiff and her children by reason of the death of the family breadwinner, viz. the deceased; that is, the claim for loss of support.

[15] In these proceedings, Mr. Denk cross-examined the defendant on matters that are in the record (which was filed of record in these proceedings) of the criminal trial where the dependent was charged with culpable homicide for causing the death of the deceased and convicted on that charge. I have decided, for a good reason, not to rely on the evidence adduced in the defendant's criminal trial as proof of certain facts tending to establish the liability of the defendant in these civil proceedings. The rule in *Hollington v F. Hewthorn and Co. Ltd* [1943] 2 All ER 35 whereby a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he

has been convicted has been held to apply also to a civil judgment in subsequent civil proceedings between different parties. Thus, in *Land Securities plc v Westminster City Council* [1993] 4 All ER 124, Hofmann, J. (as he then was) stated at 126C: 'In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is *Hollington v. F. Hewthorn & Co* [1943] 2 All ER 35, [1943] KB 587 …'

[16] For all the aforegoing, I find for the plaintiff. As intimated previously, the matter of quantum of damages is held over for trial thereof in due course. As to the matter of costs; I hold that costs should follow the event.

[17] In the result, I make the following order:

(1) The plaintiff's claim succeeds.

(2) The defendant must pay the plaintiff's costs; such costs to include costs of one instructed counsel.

(3) By agreement between the parties, the issue of quantum of damages is held over for decision in due course.

PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:	Adv. Denk
Instructed by:	PF Koep & Partners
COUNSEL ON BEHALF OF THE DEFENDANT:	Mr Ambata
	In Person