Case No 577/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

INAMARIE VAN HEERDEN	First Appellant
MARK BOSHOFF	Second Appellant
and	
J J JOUBERT NO	First Respondent
MEIR GONEN	Second Respondent
MAUREEN ORA GONEN	Third Respondent

Coram: HEFER, F H GROSSKOPF, HARMS JJA, NICHOLAS et MAHOMED AJJA.

Heard: 13 May 1994

Delivered: 19 August 1994

J U D G M E N T

F H GROSSKOPF JA:

An inquest was held in terms of the Inquest Act 58 of 1959 ("the Act") arising out of the death of the baby of the second and third respondents. The baby had died at about the time of its birth on 2 April 1988 in the Flora Clinic, Florida, The inquest was conducted by the first respondent, an additional magistrate for the district of Roodepoort (hereinafter referred to as "the magistrate"). At the commencement of the proceedings on 6 December 1989 Dr Hawke, the specialist obstetrician and gynaecologist who had attended to the delivery of the baby, raised an objection to the magistrate's jurisdiction to hold the inquest. She contended that an inquest in terms of the Act could only be held into the death of a "person", and submitted that as the baby was stillborn it was not a "person" as contemplated in the

Act. The magistrate overruled the objection. Dr Hawke then instituted review proceedings in the Transvaal Provincial Division to set aside the decision of the magistrate. The matter came before Zulman J who refused the application and remitted the matter to the magistrate to enable him to determine as a matter of fact whether the baby was dead or alive at the time of its birth.

At the resumed inquest on 26 August 1991 the magistrate found on the evidence that the baby had indeed been stillborn, whereupon the appellants raised the same objection as to jurisdiction which had previously been raised by Dr Hawke. (Both appellants were registered nurses in the employ of the clinic where the baby had been delivered and the first appellant had assisted at the birth.) They contended that once it was found that the baby was stillborn, the magistrate had no jurisdiction to continue with the inquest as the enquiry would not concern the death of a "person". The magistrate however decided on 27 August 1991 that

notwithstanding his finding that the baby was stillborn he had jurisdiction to proceed with the matter. The appellants thereupon instituted proceedings in the Transvaal Provincial Division for reviewing and setting aside this decision of the magistrate. The matter was heard on 23 April 1992 by Heyns J, who refused the application with costs and ordered the magistrate to continue with the inquest until its final determination. The appellants now appeal with leave of the court a quo against the whole of the order and judgment of that court. The magistrate has intimated that he abides the decision of this court.

The purpose of the Act as set out in the preamble is the following:

> "To provide for the holding of inquests in cases of deaths or alleged deaths apparently occurring from other than natural causes and for matters incidental thereto, ..."

It is clear from its provisions that the Act is only concerned with the death or alleged death of a

"person". S 2 imposes a duty on any person who has reason to believe that any other "person" has died, and that death was due to other than natural causes, to report accordingly to a policeman. S 3 makes provision for an investigation of the circumstances of any death by a policeman who has reason to believe that any "person" has died and that such "person" has died from other than natural causes. S 4 requires the policeman investigating the circumstances of the death or alleged death of any "person" to submit a report thereon, together with all relevant statements, documents and information, to the public prosecutor.

The Afrikaans text, which is the signed one, uses the following corresponding words for "person", viz "iemand", "persoon" and "oorledene". The Act contains no definition of the word "person" or any of its Afrikaans equivalents. The Interpretation Act 33 of 1957 is of no assistance in this regard. The essential enquiry, therefore, is whether the word "person", as used in the

Act, includes a stillborn baby.

I shall first consider some of the other provisions of the Act in order to establish the purpose of holding an inquest.

S 5 sets out the circumstances in which an inquest is to be held. This section provides that where no criminal proceedings are instituted in connection with a death, the public prosecutor shall submit all the relevant statements, documents and information gathered in the course of the police investigation to a magistrate. Where it appears to the magistrate that such death was not due to natural causes he shall, subject to the directions of the Minister, take such steps as may be necessary to ensure that "an inquest as to the circumstances and cause of the death" is held by a judicial officer.

The judicial officer holding the inquest is obliged in terms of s 16(2) of the Act to record a finding as to the identity of the deceased, the cause or

likely cause of death, the date of death, and whether the death was brought about by any act or omission prima facie amounting to an offence on the part of any person.

The main objects of an inquest are therefore to determine the cause of death, the circumstances surrounding the death, whether any person was responsible for such death, and whether the death can be attributed to the commission of any offence. (See: Claassens en 'n Ander v Landdros, Bloemfontein en 'n Ander 1964(4) SA 4(0) at 10D-F; Timol and Another v Magistrate, Johannesburg and Another 1972(2) SA 281(T) at 287H-288A; Marais NO v Tiley 1990(2) SA 899(A) at 901E-F, 902A-B.)

In Marais NO v Tiley, supra, this Court also emphasised the important underlying purpose of an inquest at 901F-G:

> "The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice."

The State has an interest in the proper investigation of deaths due to other than natural causes. Even if nobody can be held responsible for a death in a particular case, it may still remain pertinent to determine the circumstances and cause of death in order that appropriate measures can be taken to prevent similar occurrences. There might therefore be reasons to proceed with an inquest in the present case. The question however remains whether the provisions of the Act are wide enough to confer jurisdiction upon the magistrate to do so. That in turn depends on the meaning of the word "person" in the context of the Act.

The general rule in the construction of statutes is that the ordinary grammatical meaning of the words used must be adhered to. (Union Government (Minister of Finance) v Mack 1917 AD 731 at 739; Du Plessis v Joubert 1968(1) SA 585(A) at 594H-595B; Ebrahim v Minister of the Interior 1977(1) SA 665(A) at

678A-G; Summit Industrial Corporation v Claimants against the Fund comprising the Proceeds of the Sale of the WV Jade Transporter 1987(2) SA 583(A) at 596G-597B; Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990(1) SA 925(A) at 942I-943A.) Where the language of a statute is unambiguous and its meaning clear the court may only depart from the ordinary meaning if it leads to absurdity so glaring that it could never have been contemplated by the legislature. (See: Venter v R 1907 TS 910 at 913-5, and the cases referred to above.) In my view this is not a case where it would lead to any absurdity if the court should give the word "person" its ordinary literal meaning. This court has often warned against the danger of speculating as to the intention of the legislature, thereby departing from the literal meaning of the words of a statute. (Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 554-5; Schenker v The Master and Another 1936 AD 136 at 143; Savage v

Commissioner for Inland Revenue 1951(4) SA 400(A) at ' 409A; Summit Industrial Corporation, supra, at 596J-597A.)

In the Public Carriers Association case, supra, at 943C-944F, this court adopted a "purposive construction" to resolve an ambiguity in a statute, but to my mind the word "person" is not ambiguous in the context of the Act, and a purposive construction would in any event not lead to a different conclusion in this case.

According to the Oxford English Dictionary (2nd ed, 1989) the word "person" has the following meanings (but excluding its meaning in law, theology, grammar and zoology):

> "1. A character sustained or assumed in a drama or the like, or in actual life;
> 2. An individual human being; a man, woman or child;
> 3. The living body of a human being."

The first meaning of the word "person" given in Webster's Third New International Dictionary of the English

Language (1966) is the following:

> "An individual human being .... as distinguished from an animal or thing."

Much to the same effect are the meanings of the word "person" set out in the American Heritage Dictionary of the English Language (1981):

> "1. A living human being, especially as distinguished from an animal or thing; ....
>
> 4. The living body of a human being."

HAT (Verklarende Handwoordeboek van die Afrikaanse Taal, 2nd ed, 1992) gives the following meanings of the Afrikaans word "persoon" (again excluding its meaning in law, grammar and theology):

> "1. Mens, individu, enkeling wat selfstandig handel, optree; 2 Iemand se liggaam; 3. Speler in 'n toneelstuk, figuur in 'n roman."

The meaning of the Afrikaans word "iemand" according to HAT is:

> "1. Die een of die ander persoon;
> 2. Enige mens, wie ook al;
> 3. 'n Persoon;
> 4. 'n Persoon van aansien, betekenis."

There is no suggestion in any of these dictionary meanings that the word "person" can also connote a stillborn child, an unborn child, a viable unborn child, an unborn human being, or a living foetus.

In Tlali v S 1964(1) PH H83(0) the full bench (Potgieter and Smuts JJ) had to construe the words "person" and "iemand" in a statute, and came to the following conclusion:

> "The legislature intended serious bodily injury to a living person. That was the ordinary connotation of the word 'person'. The Afrikaans text was signed by the Governor-General and there the word 'iemand' was used. There was no doubt, however, that in this section the word 'iemand' was synonymous with the word 'person'. Cf Bosman, v.d. Merwe en Hiemstra: Tweetaliqe Woordeboek, s.v, 'iemand'. It could never be used in connection with a corpse."

The word "iemand" could for the same reason not be used to describe an unborn child in the context of the Act.

I am conscious of the dangers inherent in placing any reliance on the meaning ascribed to a particular word in the context of another statute, and especially that of

a foreign country. Craies on Statute Law (7th ed, 1971) has sounded the following warning in this regard at 164:

> "In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts."

I shall nevertheless refer to the construction which the American Supreme Court and the Court of Appeal in England have placed on the word "person" in the context of different statutes. In the case of Roe v Wade 410 US 113 (1973) the Supreme Court was called upon to decide on the constitutionality of the Texas criminal abortion laws. In the course of the argument it was submitted that a foetus was a "person" within the language and meaning of the Fourteenth Amendment, but the majority of the court (at 156-8) was not persuaded that the word "person" also included the unborn. In R v Tait [1990] 1 Q B 290 (C A) the Court of Appeal held that a threat to a pregnant woman to kill her foetus was not a threat to kill a "person" under the Offences against the

Person Act 1861. I am likewise of the view that the word "person" in the context of the present Act does not include an unborn child.

Argument was addressed to us on the question of legal personality or legal subjectivity. Appellants' counsel submitted that until born alive a child has no legal personality according to the common law. Reliance was placed, inter alia, on D25.4.1.1 (partus enim antequam edatur, mulieris portio est vel viscerum, "for the child is a part of the woman, or of her entrails, before it is born"); and Voet 1.5.5 (Gane's translation: "As to those having their being in the womb, it may be that on account of the uncertainty of birth they cannot yet fall properly under the term 'human person'..."). See further: Boberg, Law of Persons and the Family (1977) at 8 (..."a child stillborn neither is, nor ever was, a person"); Olivier, The South African Law of persons and Family Law (2nd ed, 1980) 27-8; Van der Vyver & Joubert, Persone- en Familiereg (3rd ed, 1991)

59-60.

Counsel for the second and third respondents, on the other hand, relied on the judgment in Pinchin and Another NO v Santam Insurance (Co Ltd 1963(2) SA 254(W) where the court decided at 260B that a child has an action to recover delictual damages for prenatal injuries. The court based its finding on the nasciturus rule of the Roman law (nasciturus pro iam nato habetur quotiens de commodo eius agitur, "an unborn child is regarded as already born whenever it would be to its advantage"), and held that this "fiction" had been received into our law to the extent that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child whenever this is to its advantage. Counsel did not contend that the nasciturus rule can be applied in the present case inasmuch as the child was not born alive. There are, however, a growing number of jurists who hold the view that the application of the nasciturus rule amounts to predating the legal

subjectivity of the foetus and that there is no need for a fiction any more. They maintain that the decision in the Pinchin case, supra, lends strong support to this view, and that it leads to the conclusion that inasmuch as an unborn child can acquire subjective rights prior to its birth, the law regards it as a legal persona. See in this regard the conflicting views of N J van der Merwe and w A Joubert on the underlying principles and effect of the Pinchin decision in their respective discussions of the case in 1963 THRHR (vol 26) at 291 and 295. Joubert contended that it was not necessary to invoke the nasciturus rule to decide the Pinchin case. See further P J J Olivier, Legal Fictions : An Analysis and Evaluation (Doctoral Thesis Leiden, 1973), at 119-123, and more particularly at 121 where the learned author observes: "The truth is simply that the foetus is recognised as a legal persona and is protected as such; the nasciturus] fiction has become an empty shell". L M du Plessis, Jurisprudential reflections on the status of

 unborn life, 1990 TSAR 44, in dealing with the nasciturus

doctrine and the Pinchin case at 49-50, supports the view

of Olivier. At 51-52 he further criticises the decision in Christian League of Southern Africa v Rall 1981(2) SA 821(0) at 829H-830A where the court held, inter alia, that the "nasciturus fiction" confers no legal subjectivity on the nasciturus.

Be that as it may, the issue here is not whether a foetus should be regarded as a legal persona, or to what extent life before birth should be protected, but whether the Act applies to the present case. Even assuming that we have reached a stage in our legal development where the law recognises the foetus as a legal persona, I am nevertheless convinced that the legislature never had any such legal persona in mind when

it used the word "person" in the Act. Were it otherwise the legislature would surely have made an attempt to

address some of the obvious problems which such an extended meaning of the word "person" would entail. It

may for instance have a far reaching effect on the law relating to abortion. Medical practitioners performing legalized abortions, and the nursing staff assisting them, may find themselves involved in inquests if the meaning of the word "person" were to be extended. (At present s 3(1) of the Abortion and sterilization Act 2 of 1975 lists the grounds on which a lawful abortion may be procured.) Such an extended meaning may also have a material effect on the law relating to murder and culpable homicide. (See Hunt & Milton, South African Criminal Law and Procedure, Vol II, Common-Law Crimes (2nd ed, 1990) at 371-3; Snyman, Strafreg (3rd ed, 1992) at 435-6; s 239(1) of the Criminal Procedure Act 51 of 1977.) Further questions which would arise are where to draw the line, and how to resolve the difficult question of when life begins. When is a foetus viable, and is that the proper yardstick? (See in this regard the instructive article on The Legal Status of the Embryo by M L Lupton, 1988 Acta Juridica 197, and more

particularly his views at 208-215 on when a "human being" comes into existence. See also the article by Glanville Williams, The Fetus and the "Right to Life" in Vol 53 [1994] Cambridge Law Journal 71.)

In my opinion the Act does not make provision for an inquest into the death of a stillborn child, and it is not for us to extend the application of the Act by going beyond the ordinary meaning of the word "person".

In my judgment the appeal should accordingly be upheld.

The following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and there is substituted therefor the following:

"(a) An order declaring that the first respondent has no jurisdiction to continue with an inquest in terms of the Inquest Act 58 of 1959 into the death of the stillborn child to which the third respondent gave birth at the Flora Clinic on 2

April 1988;

(b) An order setting aside the decision of the first respondent on 27 August 1991 to the effect that he had jurisdiction to continue with the inquest into the death of the said stillborn child;

(c) An order that the second and third respondents pay the costs of the application jointly and severally, the one paying the other to be absolved."

F H GROSSKOPF JA

HEFER JA]
HARMS JA]
NICHOLAS AJA] CONCUR
MAHOMED AJA]