IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 3763/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

..... 09/02/2021

SIGNATURE **DATE**

In the matter between:

DUMISA, MOSIBUDI JUDITH	**First Applicant**
DUMISA, KARABO	**Second Applicant**
and	
DUMISA, SAM	**First Respondent**
MHLANGAVEZA FUNERALSERVIC CC	**Second Respondent**

Burial dispute between estranged spouse and relatives of the deceased

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JUDGMENT

DE VILLIERS, AJ:

[1] This matter came before me in urgent court. It is a bitter fight about who should determine where and how the deceased is to be buried. The facts, for the most part, are not contentious. Where there are conflicting versions (or the versions are unnecessarily bald), I comment on them as I record them:

[1.1] The first applicant and the deceased were married in October 1998 in a civil marriage;

[1.2] A child was born of the marriage in January 2000, who is now a major, and who is the second applicant;

[1.3] The marriage was not a happy marriage. As will appear later herein, the first applicant obtained a restraining order against her husband (which presumably would have terminated any contact between them). She gives no detail about this order and the facts that led to her obtaining it;

[1.4] The deceased left the matrimonial home in Brakpan in July 2016 or March 2017. The first applicant still resides in the matrimonial home;

[1.5] In July 2020 the deceased commenced divorce proceedings. As will appear later herein, the deceased's mother presented evidence that it was common cause that the marriage had irretrievably broken down. In reply, the first applicant alleged that her attorney and the attorney of the deceased were in negotiations and that for this reason, no plea had been delivered. In the next paragraph she avers "*I confirm that I have been involved in settlement negotiations with my late husband to settle our differences and to continue with our marriage relationship*". This seemingly, read in context, referred to the negotiations conducted by the attorneys, which would be an odd approach to saving a marriage under the known circumstances. Later in the "*replying*" affidavit the first applicant makes this statement which seems to conflict with a prolonged separation-

"*We had some marital problems which appeared periodically, which never lasted for a prolonged time*";

[1.6] The deceased passed away in January 2021;

[1.7] The first respondent is the deceased's oldest brother, with whom he resided in Tsakane prior to his death. The first respondent advised the first applicant of the death of her husband. It is not suggested in the papers that the first applicant had any contact with her husband at any recent time prior to his death;

[1.8] The first applicant baldly stated: "*The intention of the deceased was and is very clear that he wanted me to give him a dignified funeral*". No facts were stated about when, where or under what circumstances, this alleged wish had been expressed. As will appear later herein, conflicting evidence is presented in the answering affidavit;

[1.9] The first applicant, without explaining the marital problems, further stated: "*If I do not bury my deceased husband which I married and loved for all these years, his soul will never rest in peace*". A marriage where the relationship has broken down irretrievably, justifying even a protection order, points to the need explain this statement. No explanation was offered;

[1.10] The applicant did not, and probably could not address the question if the deceased died intestate or not. As such, there was no evidence of a burial wish in a will;

[1.11] The second respondent is a funeral services business where the deceased's body was held when the first applicant was informed of the death of her husband. The first applicant and her brother-in-law visited the second respondent's premises and she signed certain, unspecified documents;

[1.12] The first applicant made plans for a funeral on the East Rand on 30 January 2021, she avers, by agreement with her brother-in-law.

These arrangements included a Christian church service. It was not alleged that the deceased was a Christian or attended the attended the intended church;

[1.13] On 26 January 2021, the first respondent advised the first applicant that he had instructed the second respondent not to release the body to her for burial. She learnt on 27 January that the body had been released to her brother-in-law and then she learnt that the deceased would be buried on 30 January 2021 "*apparently in Limpopo, a place which is not known to me*", she stated;

[1.14] Later, in reply, the first applicant stated that her mother-in-law had never recognised her "*as the legal wife*" of the deceased and that she never recognised her marriage.

[2] It seems to me that the test in a normal application for an interdict does not find easy application in this matter (such as a right to a deceased's body). Due to the urgency of the matter, factual disputes should be resolved as best one could. The matter cannot wait for months or years. As will appear below, in matters such as this one, at least in this division of the High Court, an equitable finding must be made. That equitable approach and the urgency of a matter, in my view dictate a relaxation of *Plascon Evans*[1] and point as of necessity to a more robust approach. In my view, one should first have regard to the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and then to consider whether, having regard to the inherent probabilities, the applicant could, on those facts obtain final relief at a trial.[2] If need be, the remaining factual disputes must be assessed and resolved (if one can) by applying *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H:

> "*It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be*

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-365C
[2] As used in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 in dealing with factual disputes about a *prima facie* right in interim interdicts.

difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

[3] Having had this approach in mind, I commented on the applicants' version as I recorded it. I do the same when I record the version of the deceased's mother. I noted with interest that Flemming DJP suggested that the appropriate approach would be as one would approach to determine a costs argument in an opposed motion where the matter has become moot - another more robust approach. See *Trollip v Du Plessis en 'n Ander* 2002 (2) SA 242 (W) at 245G. I fully associate myself with the statement by the learned judge at 246I that a decision must be made on such facts as one has.

[4] The application was not opposed by the respondents, but the deceased's mother delivered an affidavit in the form of an answering affidavit. She did not seek to join the matter, but did take a point of her non-joinder. It was replied to by the applicant and I did consider this affidavit, despite the deponent not being a party to the proceedings. In the end, I do not decide the non-joinder point. I have heard the mother, I have considered her version, and it would be in no one's interest at this late stage not to decide the hard issue - who may bury the deceased?

[5] The following facts and averments emerge from the "answering" affidavit. Save for bald denials, these facts have not been (and in some instances could not have been addressed) in the "replying" affidavit:

[5.1] The first applicant knows the deponent and knows that she resides at Zava Village, Limpopo Province;

[5.2] The deceased was the deponent's oldest son;

[5.3] The deponent was married by customary law to her late husband. Her late husband and two of their five children are buried at Zava Village Cemetery, where she intended to have her deceased oldest son buried as well;

[5.4] After the death of her husband in 1996, her oldest son (the deceased) became the successor of the Mpheto family stand in an area which

falls *"under the headman Zava which falls within Dzumeri Traditional Authority under Mopani District in Limpopo Province*". The deponent's son (as such) is regarded as a permanent resident of the Zava Village. In reply, the first applicant would contest this, but it is a version reconcilable with someone having two places of residence;

[5.5] The deceased has a 29-year-old son, born from a customary marriage concluded in 1992. The son supports a burial at the Zava Village. It is not clear from the papers what transpired regarding this marriage;

[5.6] The deceased returned to the village in December 2020, sick. According to his mother:

> "*3.7 We had an opportunity to extend our conversation to his life in Johannesburg and circumstances surrounding his relationship with the Applicant. He informed that he had long separated with the Applicant and he had since instituted the divorce proceeding as their marriage had broken down irretrievable.*
>
> *3 .8 He had long left the matrimonial home since the Applicant had a protection order against him and he do not want anything to do with the Applicant other than to divorce.*
>
> *3.9 During our conversations, I was not alone however we were in company of EMMAH DUMISA, the sibling sister of the Deceased. He further informed me that he had committed mistakes in the pass for his life and should he die, he should be buried where his farther (…) had been buried*" (i.e. at the village)";

[5.7] The deponent's son returned to Johannesburg to seek medical help, as his health deteriorated. A few weeks later he would be dead;

[5.8] After the death of her son, the funeral arrangements were made for 30 January 2021, according to his wishes. She stated-

> "*All the payment were made and the tribal authority had already pointed the grave which community member have already dig and prepared the grave. The customary ritual had been performed, food, cow was slaughtered and other ancillary items such as blanket was purchased however, I am not in position to estimate the costs at this stage*."

[5.9] Later, the customary ritual is stated to be a ritual to ask ancestors to accept the deceased. The deponent fears that, should the deceased be buried in Gauteng against his wishes, the rest of the family would "*be followed by bad luck*". "*It would be also difficult for the family members to perform customary rituals such as "mphahlo" if the Deceased would be buried separate grave yard from where the family members are buried*";

[5.10] Evidence from the attorneys was put forward that at the time of the deceased's death, the parties were in the process of conducting settlement negotiations in respect of the division of joint estate only, and that the irretrievable break down of the marriage was common cause between the parties;

[5.11] The authority of the first respondent to have agreed to a burial in Gauteng (if he did), is disputed. Any such arrangement was without her knowledge and the first respondent did not consult the deceased's family;

[5.12] The heart of the dispute is stated to be:[3]

> "5.*4 The right to bury the remain body of the Deceased is not an absolute right to any spouse whether legal married or not. Any person nominated, such as me may have the right to bury the remain of the Deceased and in some instances our tsonga culture follows the principle of primogeniture, where the elder' s son is allowed to decide whether the body of the Deceased should be buried.*
>
> *5 .5 My son was only legal married to the Applicant on marriage certificate only however the Applicant and my son were in process of divorce which was pending even on the date of death*."

[6] The first applicant obtained an order in this court against the respondents on 29 January 2021, to interdict the funeral planned at the Zava Village.

[3] I quote verbatim.

[7] This factual background brings me to the law. No express reliance was placed on customary law in the papers, and the applicant's counsel would later argue that the deceased's mother relies on custom and not customary law (binding on the first applicant). Due to the approach in this division to matters such as the present, I could resolve the matter without having to address any conflict in this regard. Both parties accepted that fairness, based on the facts of each case, must determine the outcome of the matter.

[8] In *Finlay and Another v Kutoane* 1993 (4) SA 675 (W) Flemming DJP stated at 679J-680A that the proper approach, where there are competing burial claims, is that "*the law should ideally mirror what the community regards as proper and as fair*". That view would be influenced *inter alia* by views on social structures, views on family relationships and marriage, views on the impropriety of not complying with requests of the deceased, religious views, cultural values and traditions.

[9] The fairness approach is applied in our courts. I refer to three more recent cases next:

[9.1] Mantame J, in *W and Others v S and Others* [2016] ZAWCHC 49, ordered, in not dissimilar circumstances, that the estranged spouse should not determine where the deceased was to be buried, the deceased's family should do so. In that case (as in the present one), it was a marriage on paper only, and the estranged spouse had nothing to do with the deceased. The expectations of the community, fairness and reasonableness dictate that the deceased's relatives should determine where the burial must be, not the estranged spouse. Costs followed the result;

[9.2] Adams J in *T M v C M and Another* [2019] ZAGPJHC 412, came to a different conclusion in a case where the marriage could not be described as a marriage on paper only. He dealt with a case where the parties were experiencing marital problems, but the parties had not separated yet, and the surviving spouse (who had sued for divorce) did not proceed as she hoped to save the marriage. The parties were not estranged. They also had a 3-year-old child. There

was however evidence that the deceased intended to vacate the matrimonial home. Weighing up several factors listed in the judgment, the learned judge found that the fairest order (on the facts of that case) was that the surviving spouse should be allowed to bury the deceased. The judge made no costs order; and

[9.3] Mokgoathleng J in *Sengadi v Tsambo; In Re: Tsambo* [2019] 1 All SA 569 (GJ), dealt with a case where there was a dispute about a customary marriage. At some time, the spouse (or if not, companion) of the deceased left the home due to the deceased's infidelity and drug dependency, it appears not long before his death. The learned judge held that the customary marriage was valid, but found that (on the facts of that case) the family of the deceased should bury the deceased. No costs order was made.

[10] The applicants in two sets of heads of argument relied on "*Nzaba v Minister of Safety and Security and Others Case No: 0535/2005*". I could not find the case, and neither could the applicant provide it to me in time for this judgment.

[11] Against these cases, I considered, in no particular order, especially the following facts:

[11.1] The age of the second applicant, who is no longer a young child living with the deceased under one roof;

[11.2] The apparent, prolonged lack of contact between the deceased and his estranged spouse;

[11.3] The length of separation - it was for several years;

[11.4] The strength of the case (although disputed to some degree) that the marriage had irretrievably broken down. If I must resolve this dispute on paper, the first applicant's case is the less plausible, if read in the context of the common cause facts;

[11.5] The lack of evidence about any will. As such, there is no evidence of heirs at this stage. My acceptance of the last wishes of the deceased

would have trumped the powers of the heirs to determine burial arrangements;

[11.6] The lack of evidence of any reason why the deceased would have wanted the funeral planned by the first applicant;

[11.7] The strength of the case (although disputed to some degree) that the actual wishes of the deceased were to be buried at Zava Village. The latter is indeed hearsay evidence, but it is supported by the evidence of two witnesses and the statement was made in the context of an ill man discussing death with his family and wishing to be buried at Zava Village. This must be compared to the applicant's unconvincing bald statement;

[11.8] Family cultural traditions and a precedent of burials of family members at Zava Village;

[11.9] The greater detail given about the cultural beliefs of the deceased's family.

[12] In the end, it is my view that the applicants should not determine the deceased's burial arrangements, and the application stands to be dismissed. I make no costs order as the deceased's mother is not a party to the proceedings, and my overall impression is that burial arrangements were made to the exclusion of the applicants.

Accordingly, I make the following order:

1. The application is dismissed.

DP de Villiers AJ

Heard on: 4 February 2021

Delivered on: 9 February 2021 by uploading on CaseLines

On behalf of the Appellant:	Adv MT Khaba
Instructed by:	Chris Janeke Attorneys
On behalf of the Respondent:	Adv Khoza
Instructed by:	Mabasa CL Attorneys