

SOUTH AFRICA / JUDGMENT

Bukula and Another v Nkosi (41333/11) [2014] ZAGPJHC 298 (20 October 2014)

[2014] ZAGPJHC 298

COURT

South Gauteng High Court, Johannesburg

BEFORE

Modiba

CASE / FILE NUMBER

41333/11

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 41333/11

DATE: 20 OCTOBER 2014

In the matter between:

BUKULA, NOMVUSELELO CYNTHIA.....FIRST APPLICANT

NKOSI, JOYCE.....SECOND APPLICANT

And

NKOSI, MATLAKALA MABEL.....FIRST RESPONDENT

AND 9 OTHERS

Date heard: 2 October 2014

Date order granted: 2 October 2014

Date reasons furnished: 20 October 2014

REASONS

FOR JUDGMENT

MODIBA AJ:

- [1] This is an urgent application for the stay of exhumation of the remains of the late Butana Nkosi (the deceased). It came before me in urgent court on 2 October 2014. After reading the papers and hearing counsel, I granted the order that appears at the end of this judgment on the same day and deferred the reasons. The reasons are set out below.

THE PARTIES

- [2] The first applicant is Bukula Nomvuselelo Cynthia (Me Bukula). She was allegedly married to the deceased by African customary law. The second applicant is Joyce Nkosi (Joyce). She was born from the relationship between Me Bukula and the deceased.
- [3] The first respondent is Nkosi Matlaka Mabel (Me Nkosi). She was married to the deceased by civil law on 30 October 1968. The second to the sixth respondents are children born of the marriage between the Me Nkosi and the deceased. The eighth to the tenth respondents are the Government of the Province of Gauteng, the Ekurhuleni Metropolitan Municipality, the Council Executive Director: Health and Social Development in the Ekurhuleni Metropolitan Municipality, and the Cemetery Administrators in the Ekurhuleni Metropolitan

Municipality respectively. They are cited due to their role in the regulation and administration of cemeteries, and the execution of exhumation orders in the Ekurhuleni Metropolitan Municipality area.

BACKGROUND

- [4] The deceased passed away on 11 May 2014. Prior to his death, he was living with Me Bukula in Vosloorus. According to Me Bukula, the deceased lived with her for 37 years prior to his death. By implication, they started living together in 1977. According to Me Nkosi she lived with the deceased from the time they got married in 1968 until 1992 when the deceased relocated to Springs for business reasons. He visited their joint home regularly. He deserted their joint home in 2005. At the time of the deceased's death, their marriage was still in existence.
- [5] Following his death, a dispute arose between Me Bukula and Me Nkosi over the right to bury the deceased. On 16 May 2014, Me Nkosi obtained a rule nisi, restraining Me Bukula from proceeding with the burial of the deceased which was scheduled for 17 May 2014. The rule nisi was returnable on 22 May 2014, for Me Bukula to show cause why the rule nisi should not be made final. On 16 May 2014, the first to sixth respondents' attorney served the rule nisi on the applicants with the assistance of a member of the South African Police Services. On 17 May 2014, the applicants proceeded to bury the deceased in contempt of the rule nisi.
- [6] On 5 August 2014 the first to sixth respondents initiated proceedings for an order for the exhumation of the deceased's body, in order to bury the deceased in Soweto or at another place of their choice and other ancillary relief. Subsequently, the applicants filed a notice of intention to defend. The first to sixth respondents' attorney notified the applicants' attorney that the notice of intention to defend is an irregular step but that they were willing to

condone it. They called on the applicants to file their answering affidavit within 15 days. The applicants failed to file their answering affidavit within the stipulated period. The attorney for the first to sixth respondents proceeded to set the application down for hearing on the unopposed roll. He attempted to serve the notice of set down on the applicants' attorneys but could not do so as their premises were locked. He then served the notice of set down on the applicants' attorneys by email. The applicants' attorneys deny receiving the email. On 29 August 2014, the first to sixth respondents were granted the exhumation application by default. The first to sixth respondents' attorney did not serve the exhumation order on the applicants.

- [7] On 1 October 2014, the applicants brought this application and enrolled it for hearing in the urgent court on 2 October 2014.

URGENCY

- [8] The applicants allege that they did know that the first to sixth respondents had obtained an exhumation order and that the exhumation

was scheduled for 7am on 2 October 2014. Me Bukula alleges that she only became aware that the exhumation order had been granted when Joyce informed her telephonically that there are people digging the deceased's grave. However, she does not take the court into confidence regarding how Joyce became aware that there are people digging the deceased's grave.

- [9] I am of the view that this matter is not urgent and that the reasons for urgency relied on by the applicants are self-orchestrated. The applicants were aware of the exhumation application but took no further steps to oppose it after filing a notice of intention to defend. Their legal representatives ought to have known that if they failed to file an opposing affidavit within the time period allowed by the Uniform Rules of Court, the exhumation order would be granted to the first to six respondents on an unopposed basis without further notice to the applicants. Both the applicants and their attorneys adopted a supine attitude to the exhumation application.
- [10] Furthermore, the applicants have demonstrated disregard towards the authority of this court by burying the deceased in contempt of the rule nisi. On the eve of the exhumation, they bring an application for the stay of exhumation pending a rescission application which they are yet to bring. They have done nothing since the granting of the exhumation order to have the order rescinded. They have not taken the court into their confidence regarding the reasons why they did not bring the rescission application on time. In my view, this application is merely designed to undermine yet another order granted by this court for the exhumation of the remains of the

deceased.

- [11] Despite the lack of urgency, I am of the view that it is in the interests of justice to deal with the application on the merits.

APPLICABLE LEGAL PRINCIPLES

[12] To obtain an order for interim relief, the applicants have to show that:

12.1 they have a *prima facie* right. This requirement is based on the maxim *ubi ius ibi remedium* meaning ‘where there is a right there is a remedy’. Such a right must exist as a matter of law;

12.2 they have a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

12.3 a balance of convenience favours the granting of the interim relief;

12.4 there is no other satisfactory remedy available to the applicants. This consideration becomes important where an applicant has established that she has a *prima facie* right. The only discretion available to the court in such a case is to consider whether there is an alternative remedy at the applicant’s

disposal.[1]

[13] The granting of an interim interdict is at the discretion of the court. The court must exercise the discretion judicially by granting or refusing the application after considering all the facts, including the prospects of success, the potential injury, the balance of convenience and the availability of alternative remedies. All these issues must be considered together and not separately.[2]

A PRIMA FACIE RIGHT

[14] The applicants have failed to set out grounds they seek to rely on, to show that they have a *bona fide* defence against the granting of the exhumation order.

[15] The applicant alleges that she has a *prima facie* right to bury the deceased because he was her husband. A party who is married by civil law is not competent to conclude a marriage with another person.[3] The deceased could therefore not enter into a valid customary marriage with Me Bukula because when the alleged customary marriage was concluded the deceased was still married to Me Nkosi by civil law. That marriage was only dissolved by the deceased’s death on 11 May 2014. She has therefore failed to show that she has a *prima facie* right to bury the deceased.

[16] When she buried the deceased, Me Bukula was aware of the rule *nisi* granted by Monama J, interdicting her from burying the deceased. However, she contemptuously proceeded to bury the deceased. It is common cause that Joyce is the deceased’s daughter. Her right to bury the deceased does not supersede Me Nkosi’s right. In the absence of a right to bury the deceased, the applicants have not shown that they will suffer irreparable harm if the deceased is exhumed. Presumably, they incurred funeral costs to bury the deceased in May 2014. Those costs are in the past. They will not be avoided when this application is refused.

THE BALANCE OF CONVENIENCE

[17] The balance of convenience clearly favours the first to sixth respondents, particularly because Me Bukula does not have the right to bury the deceased and that Joyce's right to bury the deceased is subsidiary to Me Nkosi's. Staying the exhumation

order will unjustifiably delay its execution.

ALTERNATIVE REMEDY

[18] In the absence of a primary or secondary right to bury the deceased the applicants are not entitled to any remedy. Delaying the exhumation will not secure the applicants' rights they do not have.

COSTS

[19] Counsel for the first to sixth respondents submitted that costs de bonis popriis should be awarded against the applicants' attorneys. The first to six respondents' attorney forewarned him that he will seek a punitive cost order yet he still persisted with the application.

[20] In my view, not only does the application lack urgency, the applicants' attorneys and counsel's conduct fall short of acceptable professional standards, and calls for sharp criticism by this court. There are several factors that justify a punitive cost order against the applicant's legal representatives. This application is an abuse of the court process because it lacks

urgency.[4] It also lacks the requisite exigency to be heard on a Thursday in the light of the Practice Directive that all urgent applications should be enrolled on a Thursday for hearing the following Tuesday. The applicant's attorney adopted a supine attitude to the exhumation application. During argument, counsel for the applicants submitted that the real dispute between the parties is about the deceased's estate. In the light of that submission, the applicant's attorney and counsel should have advised their clients not to bring the application.

[21] Counsel for the applicants was not familiar with his papers. He submitted that the rule nisi had not been served on the applicants therefore Me Bukula was entitled to bury the applicant, when there is an affidavit attached to the court bundle in the exhumation application, where a member of the South African Police Service attested to have accompanied the respondent's attorney to serve the rule nisi on the applicants. He made the said court bundle available to the court without fully familiarizing himself with it.

ORDER

[22] I confirm the order that I granted on 2 October 2014 and have set it out below for ease of reference.

1. The application is dismissed.
2. The applicant's attorney shall pay the costs of this application de bonis popriis.
3. Counsel for the applicant shall not be entitled to the costs of this application.

MODIBA AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicants: Mr LL Nkosi

Instructed by: T Hadebe Attorneys

Counsel for the Respondents: Mr ZD Kela

Instructed by: Mabote & Gqwede Attorneys

- [1] Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W).
- [2] Limbala v Dwarka 1957 (3) SA 60 (N) at 62B-F.
- [3] Snyman v Snyman 1984 (4) SA 262 W.
- [4] See In re Several Matters on the Urgent Court Roll 2013 (1) SA 549 (GSJ) at para 18.

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