

SOUTH AFRICA / JUDGMENT

Lemaku v Simunye and Others (1887/2022) [2022] ZAFSHC 114 (25 May 2022) [2022] ZAFSHC 114

COURT

Free State High Court, Bloemfontein

BEFORE

N. Snellenburg

CASE / FILE NUMBER

1887/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: 1887/2022

Reportable:

Yes/No

Of

Interest to other Judges: Yes/No

Circulate

to Magistrates: Yes/No

In

the matter between:

RASEBOTSENG

LEMAKU

Applicant

and

ANNA

SIMUNYE

First

Respondent

MOLLY

FUNERAL HOME

Second Respondent

THE

SHERIFF FOR THE DISTRICT THABA NCHU

Third

Respondent

JUDGMENT

BY:

N. SNELLENBURG, AJ

HEARD:

21 APRIL 2022

REASONS

DELIVERED ON: 25 MAY 2022

- [1] Aggrieved by the first respondent undertaking the funeral arrangements, with the intended burial of the Late Johannes Masusu Lemako [the deceased], who passed away on 14 April 2022, to take place during the early morning hours of Friday, 22 April 2022, the applicant approached the Court on urgent ex parte basis on Thursday, 21 April 2022 at 20h30 (approximately 8½ hours before the ceremony and burial would take place), for final and interim relief[1] intended to stay the burial and declare that the applicant shall be entitled to bury the deceased. The applicant filed only a notice of motion and requested leave to lead viva voce evidence in substantiation of the urgency and the relief she sought.
- [2] The application was enrolled as urgent application and dismissed on 22 April 2022 at 00h30, save for the relief sought in prayer 6 of the notice of motion with regards to which an order of absolution of the instance was granted.
- [3] These are the reasons for the order.
- [4] The applicant is the estranged wife of the deceased. They have been separated for 14 years after she fled the marital home during 2007 to escape the deceased's continued abuse. The applicant and the deceased were separated since then although they were never divorced.
- [5] It is accepted for purposes hereof that the applicant and the deceased were married to each other in community of property in Lesotho during 1981 and that this marriage, at least on paper, still existed when the deceased passed away.
- [6] As far as can be discerned from the evidence, the applicant and deceased had three children, two of which are still alive i.e., a son and a daughter. The daughter, Mrs Nthabiseng Joyce Rakubutu (née Lemako) [Nthabiseng] testified on behalf of the applicant.
- [7] For his part, the deceased and the first respondent entered into a relationship and lived together at the first respondent's residence as husband and wife since 2007/2008. The relationship endured until the deceased's death.
- [8] The second respondent is the mortuary where the deceased's body is kept, and the third respondent is the Sheriff for the district of Thaba Nchu.

- [9] The right asserted by the applicant is premised on the common law principles that govern burial rights.
- [10] These principles, based on the statements of Voet, are well documented and entrenched in our law and provide that the court will give preference to the wishes of the deceased which may be expressed in the deceased's Will, any document or verbally.[2] In absence of instructions the burial rights vest in the testamentary heirs and if there are none then in the intestate heirs.[3]

[11] In Finlay[4], Flemming DJP explained that:

"Voet was, however, not dealing with choosing between competing parties. He spelled out the duty to bury. As is shown by s 11.7 and by his way of explaining and justifying the rules, it is a propriety with undertones of religious duties and regarding some aspects as hallowed."[5]

[12] Flemming DJP expressed the view that 'Voet is no authority on how our legal system should cope with demands which were unknown to him but are bona fide and real'.[6]

Earlier in the judgment, before dealing with the burial rights at common law, the Judge remarked-

"Also in deciding between competing persons, the law should ideally mirror what the community regards as proper and as fair. That perception will be partly the result of views on social structures, mainly of family relationships and marriage, and on the vesting of authority and the finality of decisions. There may be views about the impropriety of not complying with requests of the deceased. Religious views, cultural values and traditions may play a role."[7]

[13] Erasmus J, in dealing with competing claims of heirs for burial rights, said in Mahala v Nkombombini and Another 2006

(5) SA 524 (SE) para 14-

"Where a deceased leaves a will, but without explicit indication as to whom shall be responsible for the burial arrangements, it could well be the implicit intention of the testator that such arrangements be effected by those who inherit his earthly goods. The same would apply, presumably, where the deceased dies intestate. There can be little problem where there is a single heir. Problems however arise where - as in the present matter - there is a multiplicity of heirs. In such circumstances there should be no hard and fast rules. Each case is to be decided on its own particular circumstances. Common sense shall largely dictate the decision of the court. The court shall have regard to the family relationships of the deceased, as well as all other relevant circumstances. The court shall, for example, take account of the practical considerations. This reflects the approach adopted in the Transvaal in Trollip's case (supra)[8]. The learned judge stated that fairness in the particular circumstances of the case was decisive (245 I). He added that the claim could not be evaluated according to the mathematical proportions of heirship, as if there was a co-shareholding in the body of the deceased (245 J). To respect the wishes of the deceased it was both sensible and fair."

[14] In *W and Others v S and Others*[9] [*W v S*], a case with some commonalities to the matter at hand, Mantame J pointed out that the blanket approach to the heir's burial rights at common law failed to take into account the expectations of the community; the relationship between the deceased (whilst still alive) and the heir who has a right to decide the issue of burial of the deceased and fairness and reasonableness of such decision:

"This is evidenced by the fact that over the years, there has been a shift from the blanket approach originating from the Roman – Dutch law principle that the heir has the right to decide on the issue of burial of the deceased. This is the right that first respondent relied to in this matter. This approach did not take into account the expectations of the community; the relationship between the deceased (whilst still alive) and this heir who has a right to decide the issue of burial of the deceased and fairness and reasonableness of such decision."[10] [emphasis added]

Whilst the Court in *W v S* still appeared to deal with competing claims of persons who fell within the categories of persons who qualified for burial rights at common law, i.e., the blood relatives were preferred over the estranged husband on the facts of that matter, the facts of this matter do differ in that respect. That said, I agree fully with the astute observations in the passage above, more so where we live in enlightened times where our Constitutional values are infused in the public policy which has changed considerably from what it was when many of the older precedents, dealing with burial rights, were penned. The relevant common law principles have been developed so that notions of reasonableness and fairness have tempered the blanket application.

[15] In *W v S* at para 24 reference is made to the passage in *LAWSA*, ` Volume 32 (2nd edition) at para 221 'General', where it was stated:

"The right to bury a deceased is sometimes controversial and the courts did not always follow a similar approach in solving the problem

before the court. Some courts took customary law practice into account, while others applied the Roman – Dutch law principle

that the heir has the right to decide on the issue of burial of the deceased. The Transvaal courts on the other hand, followed the principle of fairness."

[16] The issue for consideration, which has to be determined solely on the applicant's case under the circumstances described above, is whether the mere fact that the applicant and deceased were still lawfully married in terms of a civil marriage when he passed away, vests her with the exclusive right to attend to his burial notwithstanding the fact that the applicant and deceased had been estranged for a period of 14 years and the deceased had until his death, for a period of approximately 14 years lived with the first respondent in a relationship as 'husband and wife', albeit an extra-marital relationship.

[17] Regarding the procedure the applicant elected to follow, Uniform rule 6(2) provides that when relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only. In casu although the notice of motion was addressed to the respondents, the application was made on ex parte basis.

[18] It is a foundation stone of our legal system that a person is entitled to notice of legal proceedings instituted against him.[11] It is well established that requesting and obtaining an order without notice to the person against whom the legal proceedings are

instituted and without affording the person an opportunity to be heard, regardless of whether it is provisional or final relief, is contrary to the rules of natural justice.

[19] The Supreme Court of Appeal succinctly summarized the principles applicable to ex parte applications in *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) paras 45 – 52:

“Disclosure — legal principles

[45] The principle of disclosure in ex parte proceedings is clear. In *NDPP v Basson*[12] this court said:

'Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E – 349B).'

[46] The duty of utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, *audi alteram partem*. The law sometimes allows a departure from this principle in the interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

[47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter

she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.[13]

[48] As Waller J said in *Arab Business Consortium*[14], points in favour of the absent party should not only be drawn to the judge's attention, but must be done clearly: 'There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough.'

[49] The ex parte litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the judge's attention from the force and substance of the absent respondent's known or likely stance on the matters at issue. Generally, this will require disclosure in the body of the affidavit. The judge who hears an ex parte application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party."

[20] Neither the applicant nor Nthabiseng disclosed whether they knew if the deceased had a Will or whether they made any reasonable enquiries in that regard.

[21] The following facts are relevant:

21.1 At midnight on 14 April 2022 the applicant's son, who resides in Cape Town, informed Nthabiseng's husband, not the applicant, that the deceased had passed away.

21.2 The applicant's son informed Nthabiseng that he would not attend the funeral.

21.3 The applicant and her daughter attended a 'family meeting' after learning of the deceased's death where she asserted the right to bury the deceased. The meeting consisted of aunts, uncles, and cousins. The family did not accept that the applicant had the right to bury the deceased. The family accepted instead that the memorial service would be held at the first respondent's house. During argument the applicant's counsel made much of the fact that this family meeting in fact consisted of extended family. Suffice to say, that the outcome did not please the applicant.

21.4 The applicant and Nthabiseng amongst other matters involved the police to obtain the documents from the first respondent which would be necessary to bury the deceased and demand release of the deceased's body to the applicant. To their surprise, the applicant's son – who informed Nthabiseng earlier that he would not attend the funeral - was present at the first respondent's house and spoke to the police. The applicant's son informed the

police that he did not know why they were asking "these things"; that the memorial ceremony would take place at the

first respondent's house and that 'they', the applicant and Nthabiseng, were cruel.

21.5 The reason for the urgency was explained to have its origin in a message send to the applicant by her son, presumably on 21 April 2022 informing her that the deceased would be buried 'early in the morning' and that first respondent had already collected the body from the mortuary.

21.6 The applicant, as an afterthought, claimed that the deceased had made attempts to reconcile with her before his passing. No meaningful details with any measure of credence were supplied in this regard.

[22] As stated, the applicant and the deceased were separated for at least the past 14 years. The applicant on her version fled from the marital home.

[23] The deceased cohabited with the first respondent and their relationship was akin to that of husband and wife. Although they were not formally married, because the deceased and applicant were never divorced, on the applicant's own version it can safely accepted that the first respondent and the deceased had lived together in the same home, had a common household which they maintained and to which they both contributed, and maintained an intimate relationship.[15] The deceased and first respondent lived 'together in a fixed and stable relationship in which they mutually regarded each other as a permanent partner'.[16]

[24] The right to bury one's dead is a matter within the ambit of the right to human dignity. Funeral and burial rituals serve to express final acknowledgment by the bereaved of the human dignity of the deceased. *Nkosi v Bührmann* 2002 (1) SA 372 (SCA) para 55.

[25] The applicant's argument is premised on the following: when the deceased passed away, a valid civil marriage between them existed. The marriage was dissolved by his death. The first respondent was not married to the deceased. They were engaged in an illicit extra marital relationship. As the deceased's lawful spouse, the right to bury vests in her and must have preference over any other competing rights, if it can be said that any competing rights do exist.

[26] The applicant's marriage was merely on paper for the past 14 years.

[27] The applicant's son's remarks to the police are telling. With exclusion of the applicant and her daughter, the family respects and supports the first respondent's right to dispose of the body of the deceased by burial.

[28] In *EH v SH*[17] supra the Court was called upon to consider whether public policy barred a wife claiming maintenance from her husband on divorce, where the wife was (and had been) living with and being maintained by another man. The court held that public policy no longer barred a claim solely on the ground of such cohabitation.[18]

"Relying upon judgments such as Dodo v Dodo 1990

(2) SA 77 (W) at 89G; *Carstens v Carstens* 1985 (2) SA 351 (SE) at 353F; and *SP v HP* 2009

- (5) SA 223 (O) para 10 it was argued, both in the high court and in the appellant's heads of argument, that it would be against public policy for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in the modern, more liberal (some may say more 'enlightened') age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming

maintenance from his or her spouse. Each case must be determined by its own facts, and counsel for the appellant (whom I must hasten to add had not been responsible for the preparation of the appellant's heads of argument) did not seek to persuade us to accept that the mere fact that the respondent was living with Mr Smith operated as an automatic bar to her recovering maintenance from the appellant.”

- [29] Admittedly the aforesaid case concerned a claim for maintenance in divorce proceedings, but the principles enunciated are equally apposite to this matter.

- [30] In *Jacobs v Road Accident Fund* 2019 (2) SA 275 (GP) [Jacobs] Collis J was called upon to consider whether the Road Accident Fund was liable for a claim by the surviving partner in a ‘live-in relationship’, for loss of maintenance and support, where the deceased was still married to someone else when he died. In considering the *boni mores* criteria Collis J *inter alia* held as follows:

“[16] It is so that our society recognises the sanctity of marriage and by extension the reciprocal duty spouses owe each other. In Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8) the court said the following regarding the institution of marriage:

'The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children.'

- [17] Furthermore the court said:

'Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.'

- [18] The matter, however, does not end there. There can be no doubt that our courts also have a duty to develop the common law. This is the power which they have always had.[19] Today the power must be exercised in accordance with the provisions of s 39(2) of the Constitution which requires that the common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. In *Du Plessis*[20] Kentridge AJ in para 61 quoted the case of *Salituro* with approval:

'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'[21]

[19] Having regard to our South African context, millions of South Africans live together without entering into any formal marriage. This is simply a fact of life, although as Mokgoro J and O'Regan J observed in *Volks*, their circumstances differ significantly:

'Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners.'

This, however, does not mean that our courts demean the value or importance that our society places on marriage as an institution."

[31] The Court further observed that:

"...Cohabitation outside a formal marriage, and dare I say, even where one of the parties is still married, is now widely practised and accepted by many communities, including our South African community. ..."[22]

[32] The reasoning articulated in *Jacobs* is similarly applicable to the matter at hand.

[33] The argument that the first respondent must be deprived of the right to undertake the funeral arrangements and burial of the deceased, based on the preference shown to spouses or heirs at common law, because the deceased cohabited with the first respondent whilst still being married to the applicant, on the basis that the relationship is 'illicit' (in other words in the context used by the applicant meaning 'disapproved of by society' or contrary to public policy) 'speaks of values from times past'.

[34] In the circumstances of this case, the fact that the deceased lived with the first respondent as 'husband and wife' for 14 years (until he passed away), whilst still being married to the applicant on paper, should not be an automatic bar from being entitled to undertake the deceased's funeral arrangements and burial.

[35] The threshold requirements for final and interim interdicts are trite. The applicant is required to establish:

35.1 a prima facie right, though it may be open to some doubt; a well-grounded apprehension of irreparable harm, if the interim relief is not granted and final relief is ultimately granted; the balance of convenience must favour the granting of interim relief; and there must be no alternative remedy available to give suitable redress to the applicant; and-

35.2 a clear right, an infringement of the right actually committed or reasonably apprehended, and the absence of an alternative remedy for a final interdict.

[36] The first issue that can be disposed of without further debate is the applicant's claim for final relief in motion proceedings on ex parte basis. Whilst there may be circumstances where a Court could make an order which may be final in effect without notice, such discretion would most certainly only be exercised in exceptional circumstances in the rarest of cases. This is not such a case.

[37] On the facts of this matter the applicant has not satisfied the threshold requirements for an interim interdict.

[38] The applicant sought the interdict hours before the funeral without notice to the first respondent or for that matter any of the family.

[39] The arrangements for the funeral were finalised.

[40] The society would not expect that the first respondent should be denied the right to bury the deceased on the facts of this matter.

[41] Considerations of fairness, reasonableness, logic and practicality dictate that the applicant had not established a prima facie right though open to only some doubt. In any event, the balance of convenience did not favour the grant of an interim interdict, even should the applicant establish the first requirement.

[42] The applicant may nonetheless be entitled, for other reasons, to all or some of the documents she requested in prayer 6[23] of the notice of motion. For that reason, the order of dismissal of the application was qualified as far as prayer 6 of the notice of motion is concerned, to be that of absolution from the instance.

[43] In the premises the following ORDER was made:

1. Condonation is granted to the applicant for her non-compliance with the Uniform rules regulating form, service of process and time periods relating thereto, and the application is enrolled for hearing as urgent application in terms of Uniform rule 6(12).
2. The application is dismissed subject to para 3 below.
3. The order of dismissal operates as order of absolution from the instance regarding the relief sought in prayer 6 of the notice of motion.

N. SNELLENBURG AJ

Appearance:

On behalf of the applicant: Adv. P Mphuloane

Instructed by:

Mphatswe Attorneys, Bloemfontein

- [1] The applicant sought the following final relief “Interdicting the First Respondent and/or any other person associated with her from burying Mr Johannes Masusu Lemako (“the deceased”); Interdicting the Second Respondent from delivery of or making the body of the deceased available to the First Respondent and/or any other person. Directing the First Respondent to hand over the identity document, drivers licence [sic], RSA passport and Burial order of the deceased to the Applicant. In term of the rule nisi the applicant sought an order that she shall be entitled to bury the deceased and make any and all arrangements that are associated with such burial.
- [2] *Finlay v Kutoane* 1993
- (4) SA 675 (W) at 679G–680E; *Sekeleni v Sekeleni and Another* 1986
- (2) SA 176 (Tk); *Mankahla v Matiwane* 1989
- (2) SA 920 (Ck).
- [3] *Finlay v Kutoane* 1993
- (4) SA 675 (W) at 679G–680E; *Mankahla v Matiwane* 1989
- (2) SA 920 (Ck); *Sekeleni v Sekeleni and Another* 1986
- (2) SA 176 (Tk).
- [4] See n2 above
- [5] At 680D-E.
- [6] *Finlay* above at p681G-H.
- [7] At p679I-680A.
- [8] *Trollip v Du Plessis en 'n Ander* 2002
- (2) SA 242 (W).
- [9] *W and Others v S and Others* (360/16) [2016] ZAWCHC 49 (4 May 2016).
- [10] Para 32.
- [11] *Steinberg v Cosmopolitan National Bank of Chicago* 1973
- (3) SA 885 (RA) at 892B – C; *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions)* 2012

- (5) SA 267 (GSJ) para 20.
- [12] National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 21.
- [13] See eg Thomas A Edison Ltd v Bullock
- [1912] HCA 72 ((1912) [1912] HCA 72; 15 CLR 679) at 681 – 682 per Isaacs J; Bank Mellat v Nikpour
- [1985] FSR 87 (CA) at 89 per Lord Denning MR, at 92 per Donaldson LJ, and at 93 per Slade LJ; Siporex Trade SA v Comdel Commodities Ltd
- [1986] 2 Lloyd's Rep 428 at 437 per Bingham J; Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne
- [1996] 1 Lloyd's Rep 485 (QB) at 489; Aristocrat Technologies Australia Pty Ltd v Allam
- [2016] HCA 3 para 15.
- [14] Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne n11 at 491.
- [15] EH v SH 2012
- (4) SA 164 (SCA) para 10; Drummond v Drummond 1979
- (1) SA 161 (A) at 167A – C.
- [16] EH v SH above, para 10.
- [17] EH v SH above fn 7.
- [18] EH v SH above fn 7, para 11.
- [19] Argus Printing and Publishing Co Ltd v Inkatha Freedom Party [1992] ZASCA 63; 1992
- (3) SA 579 (A) ([1992] ZASCA 63) at 590G – H.
- [20] Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) (1996 (5) BCLR 658; [1996] ZACC 10).
- [21] R v Salituro (1992) 8 CRR (2d) 173 (SCC) ([1991] 3 SCR 654) (Canada) at 666G – H and 670F – I (Salituro).
- [22] Jacobs v Road Accident Fund above at para 22.
- [23] Prayer 6 of the notice of motion provides “Directing the First Respondent to hand over the identity document, drivers licence, RSA passport and Burial order of the deceased to the Applicant.”

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