

SOUTH AFRICA / JUDGMENT

Mbalane v Mbalane and Others (02/2025)

[2025] ZAECMHC 14 (4 March 2025)

[2025] ZAECMHC 14**COURT**

Eastern Cape High Court, Mthatha

BEFORE

Cengani-Mbakaza

CASE / FILE NUMBER

02/2025

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, MTHATHA)****Case****No.: 02/2025****Reportable****Yes/No****In****the matter between:**

FUZILE

MBALANE

Applicant

and

NTOMBOMZI

MBALANE

1st

Respondent

ASILISI

FUNERAL SERVICES

2nd

Respondent

KING

SABATA DALINDYEBO

LOCAL

MUNICIPALITY

3rd

Respondent

MEC

FOR HEALTH, EASTERN CAPE PROVINCE

4th
Respondent

JUDGMENT

Cengani-Mbakaza AJ

Introduction

- [1] By way of notice of motion, filed of record and served to the respondents, on 06 January 2025 the applicant approached this court seeking an order in the following terms:
1. Condoning the applicant's non-compliance with Uniform Rules of the court relating to forms, time frames and matters relating to service and move the application as a matter of urgency;
 2. Allowing the applicant to exhume the deceased's body Siyamthemba Mbalane buried at the first respondent's home situated at Lower Ngqwarha Location in the district of Mqanduli, SZDZZ Eastern Cape Province.
 3. Authorizing the applicant to hire an undertaker of his choice to rebury the deceased and bear the costs of such burial.
 4. Directing the second respondent to bear the costs of the exhumation.
 5. Directing the respondents to pay the costs of this application only in the event that the respondents oppose the application.
 6. Directing the members of the South African Police Service to assist the applicant with protection during the exhumation and burial processes.
- [2] The application is opposed by the first respondent. Following the postponements, on 06 February 2025 the matter was allocated to me for hearing. The first respondent raised certain points of law relating to non-joinder and pre-emption; however, these were dissolved by agreement between the parties.
- [3] Before I delve into the main issues, a brief introduction and the nature of the dispute under consideration is significant. This is a family dispute emanating from the burial rights and exhumation of the deceased's body. The applicant and the first respondent are the deceased's parents. Siyamthemba Mbalane born on 13 March 1992, died intestate on 24 December 2024. He was buried at his maternal home on 2 January 2025.

Urgency

- [4] On the date of the hearing of the matter, there was a discord between the parties emanating on whether the issue of urgency was still relevant considering the lapse of time between the filing of the matter, the postponements and the subsequent date for the hearing. Mr

Mngunyana, counsel for the applicant argued that this matter was allocated an expeditious date and was not placed on the urgent court roll. Considering the absence of evidence to substantiate this proposition, counsel conceded that the court may consider the issue of urgency and make a finding. In his founding affidavit, the applicant asserts that the circumstances of this matter are such that he will not be afforded substantial redress in future if the matter

is not enrolled as a matter of urgency. He had planned to bury his son on 11 January 2025, the cattle had been brought and kept home and his spirit was wandering around without being accepted by his ancestors into the spiritual realm. Since the next available date in the motion court's roll falls within the next term, by the time the matter is heard his spirit will have long been lost.

[5] Furthermore, if the matter is delayed there is a possibility that the deceased's body will decompose making it impossible for it to be recognised by his ancestors. The delay in the exhumation of the body had caused his family great embarrassment and emotional turmoil. The applicant avers that after the death of the deceased, there was

an agreement that the deceased's body would be buried at his home and the funeral ceremony be held at his maternal home (the first respondent's place). His attorney wrote a letter to the funeral parlour, the second respondent, advising them not to release the body to the first respondent. The second respondent failed to adhere to the undertaking it made and released the body. When he approached the court for an interdict, there were minor obscurities that needed to be clarified by his attorneys in his application. By the time he approached the court for an interdict, the body was already buried rendering the application to halt the funeral moot.

[6] Referring to the case of *Oliver Reginald District Municipality and Independent Electoral Commission and Others*[1], counsel argued that even if a finding is made that the applicant has failed to demonstrate urgency in the proceedings, the court may still exercise its constitutional role in providing access to justice and find a speedy resolution to the issues raised.

[7] Conversely, Mr Mbiko, counsel for the first respondent, refuted the allegations of urgency and argued that this case does not meet the legal standards relating to urgency. He contended that the argument that the deceased's spirit will be lost if urgency is not considered is a myth that should be discarded by the court. Furthermore, so he submitted, since urgency is self-created the matter should summarily be dismissed for want of urgency.

[8] The legal framework governing the approach in dealing with urgent matters is well-settled. [2] The test is whether the applicant will be afforded substantial redress in due course.[3] Once the applicant has established that it will not obtain a substantial redress at a hearing in due course, the court concerns itself with the question of whether the abridgement of the time period from those ordinarily prescribed by the Rules is commensurate with the urgency with which the redress is required.[4]

- [9] It is worth noting that this dispute extends beyond legal issues. It is a case that is deeply rooted in family tensions. Both the applicant and the first respondent passionately protect their social and cultural beliefs, a factor that I must swiftly consider. Because there are family dynamics, the case requires a high level of sensitivity, empathy and a respectful approach. While the family dynamics and cultural beliefs in this case warrant urgent attention, I do not intend to set a precedent that all cases with the relevant specifics should be treated urgently. Urgency is evaluated on its own

unique circumstances, considering its context. I am of the view that there is no basis to summarily dismiss the matter for lack of urgency. In contrast, a prompt substantial redress is warranted. Therefore, in exercising my discretion I find that urgency is self-evident and the respondent will suffer no prejudice by an urgent hearing of the matter.

The merits of the case

- [10] In 1988 the applicant and the first respondent (hereinafter referred to as the parties) commenced an intimate relationship which was followed by the birth of four children, now adults. Tragically, on 2 May 2013, their second-born son whilst in the visit of the applicant passed on. He was subsequently buried at the applicant's place by agreement between the parties.
- [11] By reasons of the deterioration in their relationship, in 1995 the parties parted ways. Subsequently, the applicant married Ntombencinci Mbalane and registered their marriage at home affairs. The examination of the identity document attached to the affidavits filed exhibits that the first respondent although she is from Ntwanambi origin and was named Ntombosindiso, is documented as No-First Mbalane.

The applicant's case

- [12] The applicant contends that his son's body ought to have been buried at his home because: in 1988 he and the first respondent were engaged in a customary marriage hence the first respondent bears the name No-First Mbalane; her son Yanga was buried at his home; although the deceased grew up in his maternal home with his siblings, he underwent an initiation ceremony (ukwaluka) and performed all the rituals related thereto including ukuqatywa at his paternal home. In the applicant's view the fact that the deceased's ukwaluka custom was performed at his paternal home, inter alia, demonstrates his wishes to be buried there.

The first respondent's case

- [13] Regarding the allegations of the customary union between the parties, the respondent avers that at no stage was she ever married to the applicant except that they were occasionally cohabitating. In her answering affidavit, the first respondent explains how she raised her children without any financial or emotional support from the applicant. These averments are supported by a confirmatory affidavit of Maxalanga Sam Ntwanambi, the brother of the first respondent's late father (the first respondent's uncle) who refutes the allegations of the

customary union between the two parties. Mr Ntwanambi avers that the first respondent's children were raised by the first respondent singly. Except that he paid damages (ukuhlawula) in respect of the firstborn, the applicant never paid any damages for other children, never maintained the children and no lobola was ever paid by the applicant.

- [14] Further to her affidavit, the first respondent has attached a letter from the Tribal Authority which confirms that the first respondent originates from Ngqwarha Administrative Area. According to the information the Tribal Authority held at its disposal, at no stage did the first respondent enter into a customary union. In her explanation of how she acquired the names as documented in her identity document from the Department of Home Affairs, the first respondent stated the following: pre-1994, she possessed a document known as 'a book of life'. In 1994 in the midst of the rush to vote, she was accompanied by the applicant's sister, Vuyokazi Mbalane to obtain an identity document at the Department of Home Affairs. The officials informed her that her name was too lengthy and registered her name as No-First. Because she was in the company of the applicant's sister, she ended up being registered under the surname Mbalane. As a result, her children inherited the surname Mbalane.

The question of the exhumation of the deceased's body

- [15] As previously indicated, the facts of this case are grounded in customary law. In resolving customary issues, the courts are required to apply customary law when it is relevant, on condition that such application is consistent with the Constitution of the Republic of South Africa (the Constitution) and any legislation specifically governing customary law.[5] I subscribe to the views expressed by Wilson J in the unreported judgment of DM and B2P Funeral Services[6], where he stated that practical considerations and some sort of flexibility are all relevant and well-suited in cases involving

burial rights. Borrowing his words, in resolving this dispute, my aim is to do the least harm or less aggravation of the grief.

Furthermore, a careful consideration will be given to the parties' contentions, as well as the relevant case law cited in the heads of argument which are well appreciated by this court.

- [16] The question of the exhumation of the deceased's body and the burial rights are inextricably interconnected. Once the dispute regarding the burial rights is settled, the issue of exhumation of the body will be considered. As far back as 1972, the approach to be adopted by the courts in resolving burial disputes had already been well settled in a multitude of cases.[7]
- [17] A well-known principle has been reiterated that where there is no explicit indication as to who shall be responsible for the burial arrangements, as in the present case, the heir or heirs of the deceased shall be the persons responsible for the disposition of the deceased's body.[8] Moreover, where there are multiple heirs, the common-sense approach in deciding burial rights prevails.[9] For purposes of the decision-making process, the enquiry is fact-based. In the matter under consideration, both parties agree that they are the deceased's

heirs.

[18] There is a dispute on the question of the existence of the customary union between the parties. In my engagement with the applicant's counsel, I initially considered it insignificant to hunt through the question on whether the parties were married or not. However, in retrospect, I recognised this fact in relation to the applicant's case. It is apparent from the applicant's papers including his replying affidavit that regarding the question of the existence of the customary union, he seeks to establish that, in accordance with the customary law, as the spouse of the first respondent, their children or 'seeds' should be buried at their paternal home and hence Yanga (the late) was also buried there. Where there is a dispute of fact, our courts have developed a more robust and pragmatic approach in resolving factual disputes in urgent matters specifically in cases involving burial rights. This is so because in these cases time-sensitive decisions are required. In Mahala[10], Erasmus J held that:

'As appears from my summary of the affidavits, there is a dispute of facts on paper. But due to the urgency of the matter, there is clearly no time to refer these disputes to oral evidence for adjudication. The court must decide the matter on the affidavits

before the court. In this regard, the general rule as stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) 634 H operates.'

[19] Again the application of the Plascon-Evans rule[11] may in some instances, as in the present case, not be satisfactory. Under consideration, I am required to apply a thorough, rigorous and effective approach because there is sufficient clarity regarding the issues to be resolved. [12]

[20] Based on the papers filed, there is certainty that no customary union existed between the two parties. In contrast to Mr Ntwanambi's affidavit which provides comprehensive evidence refuting the existence of a customary union, the affidavit of Gedeon Goliyadi which was filed by the applicant lacks details in proving the existence of customary marriage between the parties. The non-existence of the customary marriage between the two parties is not only substantiated by Mr Ntwanambi but is also undoubtedly reinforced by the applicant's registered marriage to Ntombencinci Mbalane as officially recorded at the Department of Home Affairs.

[21] In my opinion, the allegations of the existence of a customary union cannot be substantiated solely by the inheritance of the applicant's surname. The first respondent's explanation of how she inherited the applicant's surname including the historical context of how the deceased came to inherit the applicant's surname makes logical sense.

[22] It is crucial to acknowledge that personal identity is protected through a range of statutes[13] and human rights laws. A person's personal choice of surname and identity reinforces his/her rights as entrenched by section 10 of the Constitution which provides:

‘Everyone has inherent dignity and the right to have their dignity respected and protected.’

While the applicant seems to link the deceased’s retention of his surname to his customary beliefs and burial rights, such beliefs must be aligned with the Constitution, which upholds the right to personal choice, particularly for adults. Therefore, the deceased’s decision to preserve the applicant’s surname is a matter of his personal choice and identity and therefore cannot be directly linked to his wishes with regard to the burial location. In my view, the two aspects are distinct and separate.

[23] A further consideration is that at no stage was the applicant sidelined in preparation for the deceased’s funeral. The undisputed message that was conveyed to the first respondent’s family was that the applicant was not financially prepared to bear the burial costs. According to the message, the applicant proposed that the funeral service be held at the first respondent’s place with the intention of later transporting the deceased’s body to his home for burial. In a meeting that was arranged at the deceased maternal home in preparation for the funeral, the applicant was invited. He never participated because he felt disrespected due to being invited to attend a meeting at the deceased’s maternal home. In my view, the applicant’s failure to participate in the meeting as invited was motivated by concerns over his ego, rather

than a genuine interest in ensuring that the deceased received a dignified funeral. In accordance with the undisputed customary

tradition, as averred by the first respondent in her answering affidavit, it was important to expedite the burial of the deceased’s

body, considering the fact that his death resulted from unnatural causes.

[24] I acknowledge the sound argument by the applicant’s counsel where he stated that the deceased’s wishes should be protected and respected. However, even if assuming I am incorrect in my finding regarding the non-existence of the customary union between the parties, the following consideration arises: a thorough assessment of the applicant’s affidavits demonstrates that the only wishes that are explicitly articulated are those of the applicant himself. Therefore, it would be illogical and unreasonable to exhume the deceased’s body on the basis of the applicant’s personal wishes in the absence of credible evidence displaying the deceased’s actual wishes.

[25] It is obvious from the facts of this case that there was a tumultuous relationship between the parties which persisted over a period of time. Despite the fact that the first respondent raised her children singly including the deceased, upon reaching adulthood the deceased maintained a strong bond with both parents. While he grew up in the care of his mother, he chose to perform ukwaluka custom at his paternal home thereby exhibiting his connection to both lineages. It is therefore reasonable to infer that he held his ancestors from both sides in high esteem. Therefore, the argument positing that the deceased would be unrecognised by his maternal

ancestors in death is illogical. Furthermore, there is no reasonable basis to conclude that his spirit would be wandering. Taking all these factors into account, it is logical and fair to cause less harm and grief by allowing the deceased's body and spirit to rest in peace at his maternal home. This is where he was cared for from infancy until he was ultimately laid to rest. Consequently, the application must fail.

Order

[26] The following order is issued:

1. The application for the exhumation of the deceased's body is hereby dismissed.
2. The applicant shall pay costs on scale "A" as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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Date Heard

: 06 February 2025

Date Delivered

: 04 March 2025

- [1] Unreported judgment, case number: 1995/2021 decided on 12 August 2021.
- [2] Uniform Rule 6(12) of the Uniform Rules of Court provides: '(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter as such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit. (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.'
- [3] *Chung-Fung (Pty) Ltd and Another v Mayfair Resident Association and others* (2023/080436) [2023] ZAGPJHC 1162 (13 October 2023) para 18-19; see also *Several matter on urgent roll* 2012 (1) SA 549 (GSJ).
- [4] *Luna Meubel* 1977 (4) SA 135 (W) at 137 (F).
- [5] Section 211 (3) of the Constitution Act 108 of 1996.
- [6] The case was delivered in Gauteng Division, Johannesburg on 03 August 2023.
- [7] In *Mankahla v Matiwane* 1989 (2) SA 920 (CK) at paragraphs F-H, the right or obligation to make arrangements for a person who has died were summarised as follows: (a) If someone is appointed in a will by the deceased then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes. (b) The deceased person can appoint somebody to attend to his burial in his will or in any other document or verbally, formally or informally, and in all these instances effect should be given thereto insofar as it is otherwise legally possible and permissible. (c) A deceased can die intestate but can appoint someone to attend to his burial in a document or verbally. (d) In the absence of a testamentary direction, the duty of, and the corresponding right, to see to the burial of the deceased is that of the heirs, i.e. those appointed as heirs in the will of a deceased. (e) The aforementioned principle that heirs (appointed as heirs), in the absence of any provision in the will as to the burial of the deceased, are entitled and obliged to attend to the burial of the deceased applies similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to his burial arrangements, the intestate heirs would be in the same position as testate heirs; there being no reason why the position should be different. (f) It also follows that persons obliged and entitled to see to the burial arrangements are also entitled to arrange where and when the deceased is to be buried; see also *Saiid v Schatz and Another* 1972 (1) SA 491 (T) at 494 B-C; *Human v Human and Others* 1975

- (2) SA 251 (E) at 254B.
- [7] In *Mankahla v Matiwane* 1989 (2) SA 920 (CK) at paragraphs F-H, the right or obligation to make arrangements for a person who has died were summarised as follows:
- (a) If someone is appointed in a will by the deceased then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes.
 - (b) The deceased person can appoint somebody to attend to his burial in his will or in any other document or verbally, formally or informally, and in all these instances effect should be given thereto insofar as it is otherwise legally possible and permissible.
 - (c) A deceased can die intestate but can appoint someone to attend to his burial in a document or verbally.
 - (d) In the absence of a testamentary direction, the duty of, and the corresponding right, to see to the burial of the deceased is that of the heirs, i.e. those appointed as heirs in the will of a deceased.
 - (e) The aforementioned principle that heirs (appointed as heirs), in the absence of any provision in the will as to the burial of the deceased, are entitled and obliged to attend to the burial of the deceased applies similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to his burial arrangements, the intestate heirs would be in the same position as testate heirs; there being no reason why the position should be different.
 - (f) It also follows that persons obliged and entitled to see to the burial arrangements are also entitled to arrange where and when the deceased is to be buried; see also *Saiid v Schatz and Another* 1972
- (1) SA 491 (T) at 494 B-C; *Human v Human and Others* 1975
- (2) SA 251 (E) at 254B.
- [8] In *Khumalo and Others v Khumalo and Another* 1984
- (2) SA 229 (D) Booysen J stated the following at 232E: It seems to me that it is now fairly well settled that it is the heir or heirs of a deceased person who are entitled to decide upon burial arrangements and in particular as to when and where the body is to be buried.'; see also *Mahala v Nkombombini and Another* 2006 (5) SA 524 (SE) at page 529 1.
- [9] *Mankahla* fn1.
- [10] *Mahala* (fn 6 supra) at para 9.

- [11] This rule entails that where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order may only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.
- [12] Trollip Du Plessis en ander 2002 (2) SA 242 (WLD)245 E-F.
- [13] The Births and Deaths Registration Act 51 of 1992 in particular sections 9(1) and 9(2) which deal with notices and registration of births acknowledges that in accordance with the concept of equality and equal rights, a notice of birth by either the father or the mother is given under the surname of either the father or the mother of the child concerned or the surname of the father and the mother joined together as a double barrel.

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