

SOUTH AFRICA / JUDGMENT

Mohasoa and Others v Mohasoa and Others (B3028/2024) [2024] ZAGPPHC 1149 (11 November 2024) [2024] ZAGPPHC 1149

COURT

North Gauteng High Court, Pretoria

BEFORE

MP Kumalo

CASE / FILE NUMBER

B3028/2024

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Source record

IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE

NO.: B3028/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: [N]

(3)

REVISED: [N]

(4)

Signature:

Date: 11/11/24

In

the matter between: DANIEL
MOHASOA
First Applicant
JANETTE
CELIA MOHASOA
Second
Applicant
THE
MOHASOA FAMILY
Third Applicant
and
ELSIE
MMADIPIWANA MOHASOA
First Respondent
SOLLY
MOHASOA
Second Respondent
KGOSI
E.P CHAANE
Third Respondent
ROYAL
UNDFERTAKERS
Fourth
Respondent
AVBOB
MABOPANE BRANCH
Fifth
Respondent
In

re: ELSIE
MMADIPIWANA MOHASOA
First Applicant
SOLLY
MOHASOA
Second Applicant
DANNYBOY
MOHASOA
First Respondent
JANNETTE
MOHASOA
Second Respondent
THE
MOHASOA FAMILY
Third Respondent
KGOSHI
E.P CHAANE
Fourth Respondent

JUDGMENT

Kumalo J

Introduction

- [1] This is an application to reconsider the order granted by my sister Mokose J on 19 October 2024 in an Ex parte application. The First and Second Respondent had sought and were granted an order interdicting the Applicants to bury the deceased the Late Ntobe Elias Mohasoa in Soshanguve without the participation of the First and Second Respondents. The burial was scheduled for the 19th of October 2024.
- [2] The main antagonists in this application are the First and Second Applicants who are the children of the deceased. The First Respondent is the customary wife of the deceased, and the Second Respondent is allegedly the son of the deceased.
- [3] More importantly, the Applicants allege that when the order granted by my sister Mokose J, was not aware of the wishes of the deceased that he wanted to be buried next to his wife in Soshanguve.
- [4] The applicants further the right of the First and Second Respondent to bury the deceased in terms of legislation, customary law and or common law.
- [5] The First and Second Applicant deny that their father ever married again after the passing of their mother to whom he was married by civil rights. A copy of the marriage certificate was handed up in court that indicated that the deceased married Ella Msiza on 18 June 1971 by civil rights.
- [6] The said marriage subsisted until the passing of Ella Mohosoa in 2013. Further, the death certificate of Ella Mohasoa issued by the Department of Home Affairs on 26 July 2017 indicated her marital status as married. The death certificate of the deceased in this matter issued on 10 October 2024 denoted the deceased marital status as widower.
- [7] The Applicants further denied that the Second Respondent was the son of their late father. The First Respondent deposed to the founding affidavit in the main application stating that the Second Respondent is the son of the deceased born of marriage to the deceased.
- [8] The identity number of the Second Respondent suggests that he was born on 16 December 1971. The First Respondent testified in these proceedings that she married the deceased in 1986 and had met him a year or two before they got married. If indeed the periods given by the Second Respondent are correct, it cannot be that the Second Respondent is the biological son of the deceased. The deceased children also state that their father never adopted him as his son and no evidence to the contrary was provided by the Respondents.

- [9] About the alleged customary marriage of the First Respondent to the deceased, the Applicants denied that their father married again after their mother passed on. Technically they are correct in that regard. However, their father, it would appear from the evidence led in these proceedings, lived a double life. He, unbeknown to them entered a customary marriage with the First Respondent in Seabe during the subsistence of his civil marriage.
- [10] Weddings photos were uploaded on Caselines depicting the celebration of the white wedding of the deceased to the First Respondent and that was during the subsistence of his marriage to their mother. There lies the difficulty for the First Respondent.
- [11] At the time that the First Respondent celebrated her customary marriage to the deceased, section 22 of the Black Administration Act, Act 38 of 1927 would have been applicable. However, the deceased at that time was already a party to a civil marriage which it was submitted is regulated in terms of the Marriages Act of 1961.
- [12] It was argued on behalf of the Applicants that the First Respondent's customary marriage to the deceased was invalid on the basis section 10(4) of the Recognition of Customary Marriages Act which made provision that no spouse of a marriage entered under the Marriage Act, 1961 is, during the subsistence of such marriage competent to enter into any other marriage.
- [13] Counsel for the First Respondent sought to rely on the decision of van der Byl AJ in *Mvunelo v Minister of Home Affairs* when he opined that the said provisions are prospective and not retrospective in effect. I do not believe that this court must decide this issue, but I am of the view that the legislature in so providing was restating the law as it was. It was not capable of a valid civil marriage which is monogamous in nature and a customary marriage with different partners when the other is polygamous in nature.
- [14] It was agreed between the parties that the real issue that this court had to decide was where the deceased resting place should be, either in Seabe or in Soshanguve where his civil marriage wife is rested.
- [15] I expressed my displeasure to the parties that the deceased to date has not been put to rest and I believe that the living owe it to him to give him a dignified farewell and that he must be rested according to his wishes. I offered the parties an opportunity to see if they can find each other and corporate with each other as family but this sadly was to no avail.
- [16] In *Mabulane v Mabulane and Others*[1], an unreported decision, the court expressed the views that the wishes of the deceased had to be respected. And relying on the decision in *Trollip v Du Plessis and Another*[2] it held that it was within the bounds of reasonableness to respect the wishes of the deceased, whether expressed in a testament or not, and if no such preference was expressed, resort could be had to the heirs.

- [17] Daniel Mohasoa, the son of the deceased deposed and testified viva voce before this court that the deceased spent his last days with him in Soshanguve at the house that the deceased shared with his late wife Ella who pre-deceased him.
- [18] He and his sister had gone to Seabe when they learnt that the deceased was not well. They took him to Soshanguve at his request that he wanted to visit the grave of his late wife which is in Soshanguve. He denied the allegations that they took the deceased to Soshanguve for him to consult a Medical General Practitioner when he had never visited one on Soshanguve and there were many such practitioners within the Seabe jurisdiction.
- [19] He further testified that on 28 September 2024, the deceased requested them to accompany him to the grave of his late wife and they informed him that they would only do so if he agrees to go to a doctor first. He begrudgingly agreed and was taken to a doctor whereafter, he requested that he be taken to a certain prophet that he knew but that would be after his visit to his late wife's grave.
- [20] After his visit to the said prophet, the deceased requested a family meeting with all his children and grandchildren. The meeting was held on 29 September 2024.
- [21] During this meeting, the deceased informed them that he wants to introduce them to the Seabe Tribal Council, and he was asked the reasons he would want to do that. His response was that he was not married to the First Respondent and would want them to deal with the Tribal Council when he passes on. He added that he must be buried in the same gravesite as his late wife. He was informed that the grave sites are full and they no longer allow burials he then requested that he be buried in adjacent gravesites at Zandfontein Cemetery.
- [22] On 10 October 2024, the deceased passed on and the Applicants proceeded to Seabe to report the demise of the deceased to the Tribal Council. They went to the Tribal Council accompanied by Mr. Keetse. They reported the death to two ladies and three gentlemen who introduced themselves with their surnames.
- [23] They produced the deceased documents including the death certificate of the deceased. They were queried about the endorsement that the deceased was a widower since they knew him to be married to the First Respondent.
- [24] They left and went to their uncle's place. When they went to inform the First Respondent about passing on of the deceased, Daniel alleges that she told them to leave and she would not deal with them and will deal with the Tribal council. It is for that reason that they did not return on Monday to meet with Council or the First Respondent to finalize the funeral arrangements of the deceased.
- [25] He denied that they told the Tribal Council members that their father's wish was that he be buried in the yard next to his father.

- [26] The first witness for the Respondents was the Senior Traditional Leader Mr. Edward Chaane. He testified that on the day in question, he was not present and received a report from his wife.
- [27] He was told that the children of the deceased had come to report his death and further conveyed his wishes that he be buried in his yard next to his father. He stated that this confused him since it is not how it would be done and the deceased knew the correct procedures. The deceased was his advisor on matters of this nature.
- [28] He explained that if the deceased wanted to be buried as alleged, he was required to call a family meeting, and they would then approach the Tribal Council for a letter to be issued in this regard and the South African Police Service would be involved and this would have had to have been done in the lifetime of the deceased.
- [29] He confirmed that on Monday they awaited the arrival of the Applicants, but they did not arrive. Later in the week he called Dannyboy, the First Applicant and spoke to him briefly and one of the sisters took the phone and spoke to him. He was told that they are going ahead with the preparations of the funeral and the deceased would be buried in Soshanguve on 19 October 2024.
- [30] The next witness was the wife of the Senior Traditional Leader who confirmed that the Applicant did come on 11 October and reported the passing on of the deceased and conveyed his wishes that he wanted to be buried in Seabe next to his father. She further told the court that they were told that the other wish of deceased was that the First Respondent should not mourn for him or occupy the chief mourner's sit.
- [31] Lastly, the First Respondent testified. She testified that she was customarily married to the deceased in 1986. She had met the deceased a year or two prior to their marriage. Lobola was paid for her in the amount of 80 pounds. She had never met the deceased former wife. When she got married to the deceased, she did not know that he was married or that he had children elsewhere. She discovered very late when she saw that there was money going out to support children and the deceased told him then that he was married previously but divorced and had children with his former wife. The money was for the support of those children.
- [32] She further told the court that on the day that he last saw her husband, the Applicants had come in possession of a document and told him that they had found a doctor to heal him, and he was to go with them.
- [33] What I found disturbing with this version is that the First Respondent did not tell her that these were his children who had come to take him but that "these people had come to fetch me".
- [34] According to her testimony, she knew the deceased children and they had in the past requested her to hold some functions at her homestead which she allowed.

- [35] This court is tasked to determine in this instance whether it is the wish of the deceased to be buried in Soshanguve in the gravesite that his late wife is buried or that he wished to be buried in his homestead next to his father.
- [36] There is also another wish that was disclosed by the First Respondent during cross-examination. She told this court that it was the wish of the deceased that he be buried in the general cemetery in Seabe and that he and the First Respondent be buried next to each other.
- [37] This application is for the reconsideration of the order made by my sister Mokose J on 19 October 2024 interdicting the Applicants from burying the deceased on 19 October 2024 and postponing same.
- [38] It was further ordered that the funeral will be arranged through the involvement of the First and Second Respondents the Applicants and the family of the late Ntobe Elias Mohasoa in accordance with the traditions and customs of the Seabe kingdom.
- [39] It was further ordered that the deceased's house should be utilized for all funeral related activities more particularly the procession of the cortege.
- [40] The First and Second Respondents had approached the court on an ex parte basis and the court did not have the benefit of hearing from the present Applicants.
- [41] There were serious contradictions between the founding affidavits in the main application for an interdict and the one filed by the Applicants in the reconsideration application.
- [42] I had initially opted to adopt a robust approach and proceed without calling viva voce evidence even though there were glaring contradictions in the versions of the litigants in this matter. Due to the importance of the decision that had to be made, I then called for oral evidence to deal with certain discrepancies I had noticed in the parties' respective affidavits.
- [43] It needs to be mentioned that the founding affidavit of the First and Second Respondents was not properly commissioned. As at the time that the order was granted, there was no evidence upon which the court could have relied upon to make its decision. The affidavit that was subsequently uploaded on Caselines was handwritten and differed in some instances from the one that was used in the interdict application.
- [44] The Applicants in the reconsideration application told this court that the deceased wish was that he be buried closer to his late wife. He called a family meeting in his last days and informed it of his wishes. There is no credible evidence put before this court that these were not his wishes. The evidence led on behalf of the First and Second Respondents was that the Applicants advised the Traditional Council members that his wishes were to be buried in his homestead and next to his father.

- [45] The senior traditional leader stated that he was shocked at this request since the deceased knew the procedure well what he had to do during his lifetime if he wanted to be buried in his homestead. It was not like one would simply make the wish and it would be granted. The deceased advised on such matters as the advisor to the senior traditional leader.
- [46] I therefore find on a balance of probabilities that he made his wish to his children that he be buried closer to his late wife. Whatever led him to this decision will remain a mystery. Only he and his god and ancestors would know the answer.
- [47] With regard to the other wish mentioned by the First Respondent that the deceased had expressed the wish that he be buried in the general cemetery and that they be buried next to each other, I am unable to attach any weight on it. This was never disclosed in any of the affidavits of the First and Second Respondent. It only came about during the First Respondent's cross-examination.
- [48] For the sake of completeness, there was an allegation that monies were withdrawn from the bank account of the deceased which was of concern to the First Respondent.
- [49] During her oral evidence, I understood her to be saying that monies were being withdrawn before the 10th of October 2024 and a withdrawal went through on the Friday of 11 October 2024. This court takes judicial notice of the fact that it would be impossible to draw monies from the bank account of a deceased person once a death certificate has been issued. Bank accounts would be frozen and only an executor of the estate would be able to deal with any of the funds available and it is a known fact that such appointment would take some time. It would not happen shortly after a person had passed on.
- [50] Taking all the above into consideration, it is this court's view that the application for consideration should succeed.
- [51] In the circumstances the following order is made:
1. The funeral of the late Ntobe Elias Mohasoa will be arranged with the involvement of all his family members including First Respondent were possible in accordance with the traditions and customs of the Seabe tribe;
 2. The deceased shall be buried at the cemetery where his wife the Late Ella Mohasoa (born Msiza) or any closest cemetery where the Late Ella Mohasoa was buried;
 3. Each party is to bear its own costs.

MP Kumalo

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicants: Adv LA Hlope Instructed by: Lengwale Attorneys For the respondents: Adv MS Tshabalala Instructed by: Mphela Attorneys Date of the hearing: 06 and 08 November 2024 Date of judgment: 11 November 2024

[1] (5040/21)

[2021] ZALPPHC 36 (26 July 2021).

[2] 2002

(2) SA 242 (W).

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