

SOUTH AFRICA / JUDGMENT

Ntshate and Another v Nqikela and Others (2420/2019) [2020] ZAECHGC 69 (25 June 2020)

[2020] ZAECHGC 69

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

2420/2019

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)

Case

No: 2420/2019

In

the matter

between:

ANATHI
NTSHATE
First
Applicant
GLADNESS
LUVUYO ZITSHU
Second Applicant
And
TUTU
NQIKELA
First Respondent
YOLISWA
NQIKELA
Second Respondent
PORTIA
NQIKELA
Third Respondent
MAKANA
MUNICIPALITY

Fourth Respondent
SHERIFF
OF THE HIGH COURT, GRAHAMSTOWN Fifth Respondent

JUDGMENT

BESHE J:

[1] Applicants seek an order in the following terms:

“1. That the First Applicant be and is hereby declared to be the only rightful person to bury the deceased, Sylvia Phindezwa Zitshu, at her family’s graveyard in Peddie, Eastern Cape Province;

2. That the Applicants (and any person acting on their instructions) and/or the Fifth Respondent, be authorised to exhume the body of the late Sylvia Phindezwa Zitshu from the grave where she is buried in the Waainek Municipal Graveyard;
 3. That the First and Second Respondents (and any persons acting on their instructions) be interdicted and restrained from preventing the Applicants from conducting such exhumation and from in any way interfering with and/or attempting to interfere with the funeral and burial of the body of the deceased, Sylvia Phindezwa Zitshu, in Peddie;
 4. That the First and/or Second and/or Third Respondents return to the applicants within 7 days of the granting of this Order, the death certificate of the deceased, Sylvia Phindezwa Zitshu, together with the deceased’s identity document;
 5. That failing compliance by the First, Second and Third Respondents (and any persons acting on their instructions) with paragraphs 2, 3 and 4 above, the Sheriff of this Honourable Court for the District of Grahamstown be and is hereby directed to do all things necessary (assisted by the South African Police Services if required) including but not limited to entering onto the premises of the Fourth Respondent’s Waainek Municipal Graveyard Grahamstown, or wheresoever the deceased’s body may be situated, to obtain the body of the deceased, Sylvia Phindezwa Zitshu, and the death certificate and identity document of the deceased, Sylvia Phindezwa Zitshu, and restore same to the Applicant and/or the Sheriff of the High Court, Grahamstown;
 6. That there be no order as to costs unless the application is opposed, in which case costs will be sought against such opposing Respondents, jointly and severally, the one paying the other to be absolved, pay the costs of this application on the scale as between attorney and client.”
- [2] The application is resisted by first, second and third respondents.
- [3] First applicant who is an adult male person states that he is the only rightful person to bury the deceased being her adoptive son.

- [4] Further that as a matter of custom, being a woman married to the Zitshu family she was supposed to have been buried at her marital home next to her husband who predeceased her, who was buried at their home in Peddie.
- [5] This is confirmed by the second applicant who is the deceased's late husband's cousin. He makes the point that in the African culture he is simply regarded as a brother to the deceased's husband as opposed to his cousin. Hence he described himself as deceased's husband's brother.
- [6] The deceased died intestate and without expressing a wish as to where she would prefer to be buried.
- [7] The first and second respondents are deceased's sisters and third respondent is her niece. It is common cause that third respondent was appointed as the Master' representative in respect of the deceased's estate.
- [8] It is common cause that deceased lies buried at the Waaainek Municipal Graveyard in Grahamstown (Makhanda). Grahamstown is where the deceased and her sisters originally come from. They are born of the Nqikela family with their family home being at Joza Location, Grahamstown.
- [9] First to third respondents agree that under normal circumstances deceased should have been buried at her marital home next to her husband. She should not have been buried by her biological family. That however due to the fact that the Zitshu family disowned deceased and told her biological family to bury her in Makhanda, they arranged to have her buried in Makhanda.
- [10] It is common cause that following the passing of the deceased on the 2 July 2019, a delegation comprising of the respondents as well as other members of their family visited the Zitshu family home in Peddie. It appears to be common cause that the purpose of the meeting was to discuss arrangements for the interment of the deceased. As could be expected, and in keeping with the Xhosa adage "ingcwaba lomfazi lisemzini" (the grave of a married woman is at her marriage home) all present at the meeting were on the same page as to where deceased should be buried, namely at Peddie. During the course of the discussions the Zitshu family required that deceased's bank card be handed over to them. This apparently did not go down

well with the Nqikela family who felt that the Zitshu's were only interested in deceased's money. That is when things came to a head. According to the respondents, it is at that stage that the Zitshu's suggested they should take "the daughter of Nqikela" and bury her in Makhanda.

- [11] This accords with what is stated by the first applicant in the founding affidavit, namely:

"At this point the Second Applicant became quite aggressive and said words to the effect that "we (referring to the Zitshu family) were only interested in the money and that we didn't care for the passing of the deceased and that we had not looked after her". This was of course not correct. At one point Mlimi Wellington Zitshu then left the house and went to speak to one of his brothers, Michael

Zitshu and on his return he said to those present that having spoken to Michael it was his view that if those present would not co-operate relating to money, then the deceased's extended family should do whatever they want. This then put an end to the meeting."[1]

- [12] According to the respondents, they felt that by referring to the deceased as "the daughter of Nqikela" and that they could bury her in Makhanda, the Zitshu family not only insulted them but the deceased as well. And that this was tantamount to disowning the deceased. Upon their arrival in Makhanda, they started making arrangements for deceased's funeral and ceremonies related thereto. This was done at a considerable expense to their family.
- [13] It is common cause that the Zitshu family tried to make amends. According to the first applicant, on the 6 July 2019, the second respondent contacted the third respondent telephonically to try and resolve the matter amicably. He followed this up with a WhatsApp message the following day. In the said message second applicant acknowledges his family having suggested that the deceased should be buried in Makhanda and further that it was a mistake.
- [14] The respondents suggest that by then they had made funeral arrangements. Those included buying a plot at the graveyard, buying a tombstone, paying an undertaker, hiring chairs, funeral venue, transport etc. That many of these expenses would not have been recoverable were the funeral to be cancelled or moved to Peddie.
- [15] I have already alluded to the fact that the respondents acknowledge that in accordance with the Xhosa custom or widely accepted practice, the deceased being a married woman, her funeral was supposed to take place at her marital home conducted by her family, the Zitshu's in this case. They however deny that first applicant was adopted in terms of customary law or otherwise by the deceased and her husband. In support of this assertion, they state that they were never invited or heard about a ceremony to mark the adoption of the first applicant. That deceased would have told them about the adoption during her life time it being alleged that the adoption took place as far back as 1995. Instead, she always referred to the first applicant

as the child who lives with her.

- [16] Respondents aver that the deceased appointed the third respondent as a sole beneficiary in respect of her funeral policy. They suggest that this is an indication that she was not averse to the respondents being actively involved in her funeral. I am not persuaded that this is sufficient to show that the deceased wanted the respondents to arrange her funeral and decide where she would be buried. In any event the respondents did not give that as the reason why they decided to bury the deceased in Makhanda. The reason they put forward is that it was due to the deceased and their family being insulted by the Zitshu family and deceased being "disowned" by the Zitshu family.

- [17] The process of the exhumation and reburial of the mortal remains of a person from their resting place is unusual, drastic and traumatic to the loved ones of the departed. And as far as I understand not uncomplicated.
- [18] The deceased lies buried at a Municipal Graveyard in Makhanda. During the hearing of this application, I enquired whether the local municipal council was served with the application papers. Although the municipality is cited as the fourth respondent, there is no indication that it was served with the papers. I asked this question because in my understanding a local municipality is responsible for the control and conduct of cemeteries in its area. In my view, it is important for the Makhanda Municipality to be part of the proceedings, not only by being cited as a party, but by being notified of these proceedings. Applicants' counsel's suggested solution to this shortcoming is for a rule nisi to be issued in addition to the exhumation order, calling upon the Makhanda Municipality to show cause or raise an objection as to why the exhumation should not take place.
- [19] The parties agree that the deceased was supposed to have been buried at her marital home next to her late husband. Had it not been for applicants' family – suggesting that deceased's biological family should bury deceased – “should do whatever they want” in the words of first applicant, she would have been buried at her marital home in Peddie. It could not have been expected of the deceased's biological family to let one of their own, a sister, aunt etc., their flesh and blood to remain in a mortuary indefinitely without a proper burial. Be that as it may, in my view the applicants have made out a case for the exhumation of the body of the deceased for purposes of reburial at Peddie.
- [20] The prayer that the applicants be authorised to exhume deceased's body is not the only one. Primarily, an order declaring first applicant to be the only rightful person to bury the deceased is sought.
- [21] There is clearly a dispute of fact in this regard. Respondents deny that first applicant was adopted by the deceased and her husband in terms of customary law. It appears to be common cause that the deceased and her biological family enjoyed a sound relationship. I am inclined to agree with the respondents that had she and her husband decided on formally adopting the first applicant as their son she would at least have made that known to her sisters. The applicants complain that the funeral policy in respect of which the respondents allege third respondent was appointed as a sole beneficiary was not annexed to their papers. But it does not appear as though the fact that she was appointed as such is seriously disputed. This in my view seems to lend some credence to respondents' assertion that deceased did not have any children of her own, adopted or otherwise. Third respondent is deceased's niece. In view of this dispute the declarator that first applicant is the only rightful person to bury the deceased cannot be granted.[2] Acknowledging the dispute of fact in this regard, applicants' counsel submitted that the dispute of fact is not determinative of the issue as to where the deceased should be buried. I agree.

- [22] Applicants also seek an order that third respondent be ordered to return the death certificate pertaining to the deceased together with deceased's identity document to the applicants.
- [23] It is common cause that third respondent holds an appointment as the Master's representative in respect of deceased's estate. If first applicant is not declared to be the only person who has a right to attend to the burial of the deceased, coupled with the fact that the estate of the deceased is in the hands of the Master of this court, I am not persuaded that a case has been made for the handing over of the said documents to the first applicant. I have already indicated that issuing a declaratory as sought by first applicant that he is the only rightful person to bury the deceased is not justified if regard is had to the facts averred by the applicants which have been admitted by the respondents and those that have been alleged by the respondents.[3]
- [24] From the foregoing, it is clear that the applicants will be successful only partially. The question is therefore – who should bear the costs of this application? I have already alluded to the circumstances that led to the respondents arranging for the deceased to be buried in Makhanda as opposed to Peddie, her marital home. It would not be appropriate in the circumstances to order the respondents to pay the costs of this application.
- [25] For all the reasons stated above, the following order will issue:
1. The applicants or any person acting on their instructions is authorised to arrange for the exhumation of the body of the late Sylvia Phindezwa Zitshu from the grave where she is buried in the Waainek Municipal Graveyard, Grahamstown. This should be subject to the applicable bye-laws and regulations pertaining to the exhumation and reburial of human remains.
 2. This order must be brought to the attention of the Local Municipality (Makhanda) within seven (7) days of the issuing thereof.
 3. Each party shall pay his own costs.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 19 March 2020

Date Reserved : 19 March 2020

Date Delivered : 25 June 2020

[1] Paragraph 21 of the founding affidavit, page 19 of the indexed papers.

[2] See the rule in Plascon-Evans Paints Ltd v Van Riebeeck (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 A at 634 H.

[3] See Plascon-Evans supra.

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