

SOUTH AFRICA / JUDGMENT

O.T.T v D.B.T and Another (UM 19/2021) [2021] ZANWHC 16 (17 February 2021)

[2021] ZANWHC 16

COURT

North West High Court, Mafikeng

BEFORE

A.H. Petersen

CASE / FILE NUMBER

UM 19/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

Reportable:

YES

/ NO

Circulate to Judges:

YES / NO

Circulate to Magistrates:

YES / NO

Circulate to Regional Magistrates: YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: UM 19/2021

In the matter between:

O[....] T[....] T[....]

APPLICANT

and

D[....] B[....] T[....]

FIRST RESPONDENT

THE STATION COMMANDER, NORTHAM

POLICE STATION

SECOND RESPONDENT

REASONS

FOR JUDGMENT

PETERSEN AJ:

Introduction

- [1] This application came before me on an urgent basis on 5 February 2021 at 22h50pm. The applicant sought an interim interdict on an ex parte basis and having heard Mr Ndungu for the applicant and having read the papers filed of record, I granted an order in the following terms:

“1. THAT: The application is enrolled as an urgent application and condonation is granted for non-compliance with the Court Rules pertaining to time limits and service in terms of Uniform Rule 6(12).

2. THAT: The First Respondent is interdicted and restrained from burying the late

R[....] E[....] T[....] (“the deceased”), Identity Card No: [....], who passed away after a motor vehicle accident on or about 29 January 2021.

3. THAT: The First Respondent is ordered forthwith to move the body of the deceased to the Rustenburg Government Mortuary for preservation until this is matter is heard and determined.

4. THAT: The Second Respondent is to ensure compliance with the provisions of paragraph 2 and 3 above.

5. THAT: This order operates as a rule nisi and the First Respondent is called upon to show cause to this Court on the 12th day of February 2021 at 10h00am or so soon thereafter as the matter can be heard, as to why the order should not be made final. The aforesaid date may be anticipated by the Respondent upon 24 hours’ notice to the Applicant.

6. THAT: The costs occasioned by this application be reserved for determination on the return date.”

- [2] The first respondent filed a notice of opposition on 11 February 2021, on the eve of the return date of the rule nisi, and filed an answering affidavit on the morning of the hearing, 12 February 2021.

- [3] The applicant sought a postponement of the application to file a replying affidavit. A postponement of the application would have entailed an unnecessary delay in an application of a very sensitive nature and was accordingly refused. The application was argued on the founding and answering affidavits in which the narrow issue for determination was clearly espoused.
- [4] The applicant is the brother of the deceased and the first respondent is the biological father of the applicant and the deceased.

Background

- [5] The following facts appear common cause on a reading of the papers. The former wife of the first respondent, the mother of the applicant and deceased, were married in community of property on 17 December
1997. The applicant and his brother were born on 07 December 1999 and 05 August 1996 respectively. The mother of the applicant and deceased and the former wife of the first respondent passed away on 10 February 2020.
- [6] On the applicant's undisputed version at paragraph 27 of the founding affidavit, his maternal aunt O[...] M[...], arranged a meeting with the first respondent on 29 January 2021. The first respondent attended at her home and intimated during the discussion that he did not want a "fight" as the deceased must be "allowed to sleep next to his mother." The applicant's evidence is further that the first respondent indicated that he would contribute groceries towards the funeral, but later called for a meeting to discuss the burial of the deceased, which meeting took place on 31 January 2021. The applicant's version is that no agreement could be reached on where the deceased would be buried. The
- first respondent disputes this version and maintains that it was the family's understanding, specifically the elders, being the maternal grandparents of the applicant that the responsibility of conducting the funeral vested with him as the head of the family.

The main issue in dispute

- [7] The main issue in dispute which this Court was called upon to determine was which party had the right to bury the deceased. The applicant's evidence in asserting a prima facie right to bury the deceased is premised on the alleged absence of the first respondent from his life and that of the deceased for the past ten years. The first respondent's opposition to the application is asserted on his authority and responsibility as the family head which he maintains is culturally entrenched, rendering the attempts by the applicant to bury his brother contra bonis mores.
- [8] The main issue calling for determination was therefore very narrow.

The requirements for an interdict

A clear right

- [9] The applicant as highlighted above asserts this right on the version that the first respondent has been absent from his life and that of the deceased for the past ten years. The first respondent's version in this regard is found at paragraph 7 of the answering affidavit where he states: "...I submit that upon finalisation of the divorce proceedings with my wife who is now deceased, I left the matrimonial house, including the household contents with my estranged wife for the benefit of the children. The applicant is currently staying and enjoying the benefit of the same property."
- [10] A decree of divorce was granted on 21 September 2007 in the Central Divorce Court at Mogwase incorporating a settlement agreement. The proprietary claims were settled with an order, amongst others, that there would be division of the joint estate. In the absence of any other agreement or arrangement between the first respondent and his former wife, nothing turns on the first respondent's evidence that he left the matrimonial house, including the household contents to his former wife. The first respondent's evidence is further that he was responsible for the school fees of the deceased and the applicant. Save to allege that he had a cordial relationship with the deceased, the first respondent has presented no evidence to demonstrate that he played an active role in the life of the deceased, not only from a financial perspective but also otherwise, either on an emotional level or in the development of the deceased as he traversed life until his death.
- [11] The applicant's evidence at paragraph 23 of the founding affidavit is premised on hearsay from the deceased and audio recordings which were never presented to this Court. The applicant had sufficient time to make same made available to this Court in the intervening period from the date the interim order was granted on 05 February 2021. In my view, no weight can be attached to this evidence.

Irreparable harm

- [12] The applicant's evidence is that if the deceased were buried by the first respondent, it would be inhumane and a violation of the dignity of the deceased if his body had to be exhumed after burial. In this regard, the first respondent denies the allegations and in a very broad statement maintains that the applicant failed to prove the existence of a real right, failed to present a prima facie case and failed to prove urgency.

No alternative remedy

- [13] The applicant submits that there is no alternative remedy considering the nature of the relief sought. In this regard the evidence is that the first respondent initially intimated that the deceased would be buried where his mother is laid to rest but later took an about turn and was intent on burying him rather at his homestead.

The legal position

- [14] Mr Ndunge relied on two cases as authority for the applicant's case by way of comparison. The facts of the first authority relied on, *Trollip v Du Plessis* 2002 (2) SA 242 (W), are as follows as extracted from the Headnote:

"The applicant, the surviving spouse of the deceased applied for an order terminating the involvement of the first respondent, the deceased eldest daughter and the applicant's stepchild in the deceased's funeral... The applicant's central contention was that he as the deceased's spouse had the 'paramount right' to decide on the funeral. The applicant in addition relied on the series of Eastern Cape decisions in which it was held that the heirs had the final say. It appeared that this approach differed from that followed in the Transvaal, where it was held that fairness in particular circumstances of the case was decisive, and that a claim could not be evaluated according to the mathematical proportions of heirship. It appeared from the evidence that an aunt of the deceased, and a brother, had been present at the time of the deceased's death, and that they had made the funeral arrangements without consulting the applicant, who had not been present at the time. The applicant intended to hold the funeral at his home and through a different church than the one to which the deceased and her family belonged. No last will was proved. The Court held that the approach adopted in the Transvaal had to be followed, which would have the effect of tilting the balance in the respondent's favour. The applicant had not been present when the deceased died. The respondents had incurred expenses in preparation for the funeral. The court held that it was within the bounds of reasonable fairness to respect the wishes of the deceased, whether expressed in a testament or not. If no such preference was expressed, resort could be had to the heirs. It was not necessary for the deceased to have expressed an instruction as opposed to a preference before it was decided what would have caused offence. In this context, it counted in respondent's favour that the deceased had been a member of the church from which they intended burying her. If applicant were to be successful the funeral would be held in an unfamiliar venue and church. The applicant also never averred that he would suffer emotional trauma in respect of the respondent's plans for the funeral. In the final analysis the court held that if regard were to be had to the numbers, it would become clear that the deceased's children were more numerous than the single person on the applicant's side. The application was accordingly dismissed."

- [15] The second authority relied on is *W and Others v S and Others* (360/16)

- [2016] ZAWCHC 49 (4 May 2016), where the introductory paragraph identifies the issue to be decided. The issue is analogous to the issue in the present application and reads as follows:

"[1] ...The applicants, that is, the blood relatives' of the deceased brought this application on the basis that they had a right to bury the deceased who was estranged from her husband and was virtually on the eve of her divorce. First respondent, the deceased's husband opposed this application on the basis that the decision to decide the burial of his family members rests with him, as the head of the family. This is in line with the respect for his dignity and his isiXhosa culture, as the head of the family."

- [16] In *Finlay and Another v Kutoane* 1993 (4) SA 675 (W), the court held that:

“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.”

[17] The Eastern Cape decisions and the approach adopted in burial disputes of this nature is succinctly encapsulated in the case of *Gabavana and Another v Mbete and Others* [2000] 3 ALL SA 561 (Tk). The ratio of these decisions is essentially that the heir of the deceased estate is ultimately the person who decides on the burial.

[18] Our courts have placed much reliance on the *Commentary on the Pandects* by Johannes Voet [1647 – 1713] in respect of the right to bury. Voet states as follows at 11.7.7 –

“Person chosen by deceased must bury: -

“A funeral besides must be carried out by him whom the person departing this life has chosen ... [but]...

Who may bury if non chosen?

If the deceased did not impose the duty of burial on anyone, the matter will affect those who have been named in the last will as heirs. If no one has been so named, it affects the legitimate children or the blood relations, each in their order of succession. If they are also wanting, it is the duty of the magistracy to take care that the deceased is buried out of his own money or property. Nay, indeed anybody to whom the funeral does not properly fall, however complete a stranger, can carry out the funeral, so that dead bodies may not lie unburied; and he will be able to reclaim his expenses in a funerary action, lest a person be buried out of the funds of another.”

[19] It is accepted that the decision in respect of the burial of the deceased would ordinarily rest with the first respondent as the head of the family in terms of the cultural practice of the parties. That right must be respected and enforced as a general rule to maintain the dignified customary practices of our diverse cultural heritage. However, courts are not to lose sight of the peculiar facts and circumstances of individual cases when considering the said right, which is not an absolute right and subject to limitation.

Points in limine

[20] The first respondent raised a number of points in limine encapsulated under *locus standi*, which merits attention before turning to an analysis of the peculiar facts of this application and the applicable authorities.

[21] The points in limine are set out as follows:

“The applicant has failed to show or establish locus standi in judicio in that:

- a) there is nothing authorising him to depose to the founding affidavit;
- b) the deceased did not leave a valid will conferring burial rights upon the applicant;

- c) the applicant has not been appointed to be the executor of the deceased estate by the Master of the High Court;
- d) the African Customary Law dictate that the father is the head of the family. In terms of the primogeniture principle, the head of the family can only be replaced once he is deceased or declared mentally incapacitated by the court.”

[22] In my view, the applicant having brought the application in his personal capacity and not any representative capacity, no authorisation was required to depose to the founding affidavit. Nothing therefore turns on point (a) above.

[23] In applying the principles set out by Voet, it is clear that the deceased did not identify any specific person to be responsible for his burial upon death; he left no valid will identifying specific heirs to his estate; and the right of burial, in the absence of children, falls to blood relations in order of succession. The first respondent, in addition to, the cultural right as head of the family which he asserts, would ordinarily have the right to bury. However, blood relations, which would include the applicant is not excluded from the right to bury. In this regard, I agree with the view of Mantame J in the W and S matter supra at paragraph [30] where it is said:

“...In my opinion, when the court is called upon to determine as to: who has the right to bury the deceased? The court should not confuse this point for determination with the law of succession, as it will end up determining issues not properly before it. In my view, when Voet referred to the “blood relations, each in their order of succession” he was only making reference to on the order of hierarchy on which they were born, hence the Succession Act cannot find application in this category of persons in a case involving: who has the right to bury the deceased.”

[24] The points in limine, insofar as points (a) to (c) above is concerned must be therefore dismissed. Insofar as point (d) is concerned, it forms the crux of the issue in dispute in this application and is dealt with infra.

Discussion

[25] In applications of this nature, the Court remains ever mindful of the sensitivity thereof, in circumstances where the parties are caught up in the atmosphere of grief and mourning, at the untimely and tragic loss of a loved one, whose memory should be respected and whose burial should be conducted with dignity.

[26] The opposing interests of the parties in the burial of the deceased asserted on the relationship with the deceased and the cultural right as the head of the family respectively must be carefully balanced, ultimately premised on fairness, having due regard to the peculiar or unique circumstances of the facts presented in evidence.

[27] I accordingly align myself with the Finlay decision insofar as it deals with the convictions of the community, the boni mores, which is underscored by what is fair and proper in the peculiar circumstances of this case. I further agree with the W v S decision and the approach

adopted in Trollip “...that a claim to bury the deceased cannot be evaluated according to the mathematical proportions of heirship. Hence reasonable fairness and common sense dictates that this Court should analyse the evidence before it in totality and reach a just and fair conclusion...”

- [28] The evidence of the applicant is to a great extent not assailed by the first respondent. In fact it is common cause and borne out by the evidence that the first respondent and his former wife and mother of the applicant and deceased, were divorced on 21 September 2007. The first respondent has not lived with the deceased and the applicant and until 2020 with their deceased mother, for a period of some thirteen (13) years. The extent of his involvement in the life of the deceased and the applicant was mainly financial and in terms of an order of Court upon divorce. The evidence of the applicant on the relationship between himself, the deceased and the first respondent, as an absent father must prevail.
- [29] The applicant shared a very close relationship with the deceased as compared to the first respondent. It is common cause that until his death the applicant resided with the deceased, engaged with him on an emotional and psychological level. He in fact was the deceased's closest living family. The respondent on his own version describes his relationship with the deceased only as cordial without elaboration.
- [30] The dictates of fairness and reasonableness and the convictions of the community favoured the applicant as the person best suited to bury the deceased, in circumstances where the deceased would be laid to rest with his mother, whom the deceased shared his life with until her death in 2020. The right of the first respondent premised solely on being the head of the family is far outweighed by the accepted evidence of the applicant.

Costs

- [31] Costs ordinarily follow suit. The applicant approached this Court to assert his right to bury the deceased in circumstances where the first respondent was initially amenable to the deceased being buried where his mother was laid to rest, contributing to the funeral arrangements, and later reneging on the arrangement. The application was opposed, carrying with it cost implications for the applicant.

Conclusion

- [32] It is for the reasons set out above that the order of 12 February 2021 was granted in the terms below.

Order

- [33] It is ordered that:

1. The rule nisi granted on 05 February 2021 is confirmed.

2. The body of the deceased R[....] E[....] T[....] (with Identity Number: [....]) is to be released into the custody of the applicant, O[....] T[....] T[....] from the funeral parlour where the body is currently kept pursuant to the order of this Court on 08 February 2021.
3. The first respondent is to deliver the death certificate and all other documents necessary for the burial of the deceased to the applicant forthwith.
4. The applicant is allowed to bury the deceased.
5. The first respondent is ordered to pay the costs of this application.
6. Reasons for the order will be furnished in due course.

A. H. PETERSEN

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

FOR THE APPLICANT: MR NDUNGU

ATTORNEYS FOR THE APPLICANT: NDUNGU ATTORNEYS

C/O MOLEFAKGOTLA ATTORNEYS

FOR THE FIRST RESPONDENT: MR MOGOTSI

ATTORNEYS FOR THE FIRST RESPONDENT: MAGABANE AKE

ATTORNEYS

C/O JM MOKOTO

DATES HEARD: 05 AND 12 FEBRUARY 2021

DATE REASONS HANDED DOWN: 17 FEBRUARY 2021 AT 16H00PM. BY ELECTRONIC DELIVERY TO THE EMAIL ADDRESSES OF THE ATTORNEYS OF RECORD.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2021/16.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ott-v-dbt-and-others-unknown-topic-anwhc-2021>

Prepared on 23 October 2026 · Esheria