

SOUTH AFRICA / JUDGMENT

Shai v Botlholo and Others (01091/2020) [2020] ZAGPJHC 156 (30 April 2020)

[2020] ZAGPJHC 156

COURT

South Gauteng High Court, Johannesburg

BEFORE

Senyatsi ML

CASE / FILE NUMBER

01091/2020

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 01091/2020

In the matter between:

SHAI M L Applicant

and

BOTLHOLO K A First Respondent

SEA TRADE 24/7 FUNERAL DIRECTORS Second Respondent

THE NATIONAL COMMISSIONER Third Respondent

SOUTH AFRICAN POLICE SERVICES Fourth Respondent

PREMIER OF GAUTENG Fifth Respondent

THE EXECUTIVE MAYOR, CITY OF JOHANNESBURG Sixth Respondent

METROPOLITAN MUNICIPALITY

THE MEC, GAUTENG DEPARTMENT OF HEALTH Seventh Respondent

THE CITY OF JOHANNESBURG MEDICAL Eighth Respondent

OFFICERS OF HEALTH

REASONS

- [1] This is an Application for exhumation of the remains of Mpota Abraham Shai (“the deceased”) who died on 9 April 2020. The Application came before me on 17 April 2020. After reading the papers and hearing counsels for the parties, I granted the order and deferred the reasons. The reasons are as set out below.
- [2] The Applicant, Ms. Maite Lena Shai, an adult female was married to the deceased by civil rights since 1995, having prior to that time, concluded a customary marriage in 1976. They had a house at stand number [...], Bokgaga village, Tzaneen, Limpopo province and had six children one of whom predeceased the parents. The surviving five children are all adults.
- [3] The first Respondent Ms. Kedibone Alena Botlholo, is an adult female. She lived with the deceased at house number [...] Green Village, Protea Glen Soweto, Johannesburg. The house was acquired by the deceased when he was still employed by the Erstwhile South African Railways.
- [4] After the death of the deceased there was a dispute between the parties about the right to bury the deceased.
- [5] The First Respondent had planned to bury the deceased on 17 April 2020 but was informed by both the Applicant and her attorney that burial should not take place until the determination of the burial rights by this Court.
- [6] Despite that knowledge, the first Respondent instructed the second respondent to bury the deceased on 15 April 2020, the day the papers were served on her. This was done as a way of frustrating the legal proceedings that were about to be launched by the deceased’s wife, the Applicant in this case.
- [7] The Applicant amended her application and cited in addition to the initial two respondents, six other respondents, namely the National

Commissioner; South African Police Services; Premier of Gauteng; the Executive Mayor of City of Johannesburg; the MEC Gauteng Department

of Health; the City of Johannesburg Administrator of Cemeteries and the City of Johannesburg Medical Officers of Health. This was done as they now added to the prayers, the main prayer of exhumation which from the regulatory perspective, will involve other interested parties as cited. None of the additional respondents had an opportunity to make any contribution to this dispute.

- [8] The first respondent’s defence in the application is that she derives her rights to bury the deceased as she is an heir in the will of the deceased. She does not dispute the marriage of the deceased to the Applicant save to state that they were not living as husband and wife for many years. I do not find any legal basis for such defences. The Applicant’s marriage to the deceased only came to an end upon the death of the deceased. The so called deceased’s

intention to divorce the applicant, which the first respondent sought to support by way of copies of summons commencing action for divorce, has no legal consequences.

- [9] The exhumation of mortal remains are governed by Regulations relating to the Management of Human Remains, R363 of 22 May 2013 (“the

Regulation”) read with the National Health Act 61 of 2003. Section 26 of the Regulation provides that no exhumation and reburial of human remains shall be done unless authorised by the relevant sphere of government and permitted by relevant local government in whose jurisdiction the exhumation and reburial will take place or through a court order and shall be permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place.

- [10] The first respondent attacked the application on the basis that it was not urgent and that the urgency was self-created. I do not agree with the contention. This application is urgent and the applicant has a clear right because she is the widow of the deceased. The fact that the first respondent lived with the deceased and she is mentioned as an heir in the deceased’s will does not in any view, create a right for the first respondent to bury the deceased.

- [11] Mr Zwane argued on behalf of the first respondent that as one of the heirs, the first respondent was entitled to bury the deceased as she did. He referred me to an unreported case of *Yona v Rakotsoane* (1177/2004) [2004] ZAFSHC 84 (5 August 2004) where Rampai J refused to confirm rule nisi on the burial right. That case is different from the current case before me because in *Yona*, the testator had spelt out in her Will, her wish to be laid to rest in her home town. The Will which has been made available by the first respondent in her answering papers, is silent about the deceased’s wish for his final resting place. Rampai J in *Yona v Rakotsoane* correctly refused to grant the widower of the deceased the right to bury the deceased as this was in accordance with the wish to the deceased who desired after succumbing to cancer to be buried at her home town and her surviving mother and brother fulfilled her wish.

- [12] Mr Zwane who referred me to *Tseola and Another v Maquntu and Another* 1976 (2) SA 419 at 422 where the court held that where the deceased had given no testemary directions; the heir had a duty and right to bury the deceased.

- [13] In *W and Others v S and Others* (360/16) [2016] ZAWCHC 49 (4 May 2016) Mantame J, had the following to say at [32]:

“When courts had to deal with burial matters and taking into account all the parties involved, it has to be cautious as the matters are sensitive in nature, because of grief, tragedy and loss of their loved one. This is evidenced 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 the first respondent relied on 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.” I concur with the approach adopted by Mantame J in this matter.

[14] The first respondent and the deceased cohabitated as partners whilst the deceased was alive. Out of their cohabitation two children were born. The first respondent, as already stated, claims her rights to bury the deceased by virtue of the Will, which has not been fully canvassed by the applicant as it was only made available on the date of the hearing of the application.

[15] The relationship the deceased had with the applicant was that of husband and wife by virtue of marriage. The marriage only came to an end upon his death. That relationship must be reconciled with the relationship the deceased had with the first respondent. I am of the view that the two relationships are reconcilable. As a consequence and absence of the deceased’s wishes from the Will about his burial desires, I hold the view that the applicant has the right to bury the mortal remains of the deceased.

[16] The first respondent was not willing to operate with the applicant and her attorney prior to the burial of the deceased. When it became evident that legal proceeding were implemented, the first respondent went out of her way to move the burial date from 17 April 2020 as she had planned to 15 April 2020. This was done on a 24 hour notice to the second respondent was a service provider for the burial. This was designed to frustrate the applicant and force the applicant to bring and even amend the papers at additional costs to the applicant. The conduct of the first respondent justifies an appropriate cost order against her on a punitive scale.

[17] ORDER:

The following order is made:

17.1. Non-compliance with normal rules of this court relating to service, filing and time limits is condoned and the matter is dealt with as one of urgency;

17.2. The second respondent is directed to exhume the mortal remains of Mpota Abraham Shai ID No: [...] and hand over same to the applicant for reburial;

17.3. The third to the eighth respondents are directed to oversee the exhumation process;

17.4 The first respondent is directed to pay the costs of the exhumation;

17.5 The applicant is authorised to transport the mortal remains of the deceased from Johannesburg to Bokgaga Village, Tzaneen, Limpopo province and to bury the deceased according to her customs and practices;

17.6. The first respondent is authorised to travel to Bokgaga Village, Tzaneen for the purpose of attending the funeral if she so wishes; and

17.7. The first respondent is ordered to pay the costs of this application on the scale as between attorney and client.

SENYATSI ML

Judge of the High Court

Gauteng Local Division, Johannesburg

Date urgent application heard: 17 April 2020

Date of Judgment: 30 April 2020

Applicant's Counsel: Adv T. Malatji

Instructed by: Raseasala Attorneys

Respondent's Counsel: Adv. Z. Madikane

Adv. Zwane

Instructed by: Mathopo Attorneys

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