

SOUTH AFRICA / JUDGMENT

Simakuhle v Simakuhle and Another (003632/2024) [2024] ZAGPPHC 33 (19 January 2024) [2024] ZAGPPHC 33

COURT

North Gauteng High Court, Pretoria

BEFORE

Phooko

CASE / FILE NUMBER

003632/2024

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Policy

FLYNOTES:

FAMILY – Burial – Choice of location –
Deceased's
elder brother seeking burial rights – Contending that in
terms of Xhosa tradition the deceased must
be buried in ancestral
home in Eastern Cape – Contending that wife occupying
low-ranking position and barred from decision
making on burial
matters – Discrimination based on sex and gender no longer
has place in our constitutional democracy
– Equality at the
core of Constitution – Wife has burial rights and may decide
where her late husband should
be buried – Application
dismissed.
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Case No: 003632/2024
(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 24/01/2024

SIGNATURE

In

the matter between:

MASIXOLE

SIMAKUHLE

Applicant

and

AMUKELANI

SIMAKUHLE

First Respondent

AVBOB

FUNERAL SERVICES CENTURION

Second Respondent

Delivered: This

judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically

by circulation to the

Parties/their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for

hand-down is deemed to be 19 January 2024.

JUDGMENT

PHOOKO AJ

Introduction

- [1] It is generally accepted that “the dead should be treated with dignity”^[1] and be given a dignified send-off. This is an opposed application that came before me sitting in an urgent court on 19 January 2024, seeking relief that the First Respondent to inter alia be interdicted from burying the deceased, Mkhululi Simakuhle in Centurion, Gauteng Province.
- [2] After considering the written and oral submissions of the parties, I delivered an ex tempore judgment in favour of the First Respondent on the same day. These are the detailed reasons for my

ruling.

The Parties

- [3] The Applicant is the eldest brother of the deceased, who resides in Emalahleni, Mpumalanga Province.
- [4] The First Respondent is Amukelani Simakuhle, the deceased's wife, who resides in Centurion, Gauteng Province.
- [5] The Second Respondent is Avbob Funeral Services Centurion whose main address of business is at 7[...] L[...] Road, Clubview, Centurion who is cited in these proceedings as a firm as envisaged in Rule 14 of the Uniform Rules of Court.

Background And Facts

- [6] The deceased was married to the First Respondent in terms of Xhosa customary law and later by civil rite on 4 June 2018, which marriage still subsisted at the time of the deceased death.
- [7] Upon the death of the deceased, on 12 January 2024, the Applicant sought burial rights of the deceased on the basis that he is the deceased elder brother and had the exclusive right to decide where the deceased is to be buried. This is regardless of whether the deceased was married to the First Respondent.
- [8] The Applicant stated that in terms of Xhosa tradition, the deceased had to be buried in his ancestral home at Zwide, Port Elizabeth, Eastern Cape.
- [9] The First Respondent disputed the Applicant's assertion on the ground that as the wife of the deceased, she has a right to bury the deceased.

The

Issues

- [10] The issues to be determined are:
- [10.1] whether the matter should be heard on an urgent basis, and
- [10.2] who has burial rights for the deceased.

Applicable Legal Law

Urgency

- [11] Rule 6(12) of the Uniform Rules deals with urgent applications. Wherein a case for urgency has been made out, a court may condone

non-compliance of the forms and services provided for in the Rules and hear the matter without delay if the applicant would not be afforded substantial redress at a later hearing. Rule 6(12) also confers a general judicial discretion on a court to hear a matter urgently.[2]

[12] The rules relating to urgency are well established in that the Applicant seeking urgent redress from the court must make out a case for urgency in its founding affidavit.[3] As was correctly held in *Luna Meubelvervaardigers (Edms) Bpk v Makin & Another t/a Makin Furniture Manufacturers*[4] that:

‘The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.’

[13] The test for urgency was eloquently formulated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[5] where Notshe AJ (as he was then) held that:

‘The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course’.

[14] It can be deduced from precedent that the issue of urgency is interconnected with the aspect of substantial redress. In other words, urgency must be considered together with the issue of whether there will be substantial redress at a later hearing if the matter is not heard on an urgent basis.

[15] Considering the above legal framework, I proceed to consider the Applicant’s submissions to ascertain whether this matter ought to be heard on an urgent basis and whether the Applicant would not be afforded substantial redress if the matter were to be enrolled in the normal court roll.

Applicant’s

Submissions

[16] In respect of urgency, the Applicant inter alia averred that the deceased had passed on 12 January 2024 and that the First Respondent sought to bury the deceased on 20 January 2024, contrary to the deceased’s Xhosa traditions, culture, customs, and the deceased’s wishes to return to the ancestral home in the Eastern Cape Province.

[17] The Applicant therefore contended that it was urgent that the deceased should be returned to the Eastern Cape and that the First Respondent should not be allowed to bury the deceased in Centurion as this would deny the family members and the community in the Eastern Cape an opportunity to mourn the deceased in line with the Xhosa customs.

[18] In addition, counsel contended that once the body was buried in Centurion, it cannot “be undone” except that there is a tedious and possible route of exhumation something that the Applicant sought to avoid.

[19] Counsel further contended that this Court as per the decision in *Dumisa v Dumisa and Another*[6] is required to make an equitable finding amongst other things.

[20] Furthermore, counsel submitted that what the court found to be relevant considerations in cases involving burial rights was highlighted in *Dumisa v Dumisa*[7] (citing *Finlay and Another v Kutoane*[8]) where the court said:

‘The proper approach, where there are competing burial claims, is that “the law should ideally mirror what the community regards as proper and as fair”. That view would be influenced inter alia by views on social structures, views on family relationships and marriage, views on the impropriety of not complying with requests of the deceased, religious views, cultural values and traditions’.

[21] Based on the above and other several cases such as *Sengadi v Tsambo; In re Tsambo* [9] (*Sengadi*), counsel contended that this Court should “mirror what the community regards as proper and fair”. To this end, counsel argued that the estranged wife should not decide where the deceased should be buried but the deceased family should do so.[10] The basis for this was that the deceased and the First Respondent were experiencing marital problems and that they were eventually going to divorce.

[22] To bolster their case, counsel further relied on *Sengadi* where the court had inter alia found that the customary marriage was valid but decided that the family of the deceased should bury the deceased.

[23] Furthermore, counsel submitted that when the lobola was fully paid and the First Respondent became a wife, she belonged to the family of the deceased and could not make decisions on the part of the family. According to counsel, the First Respondent became “the property” of the deceased family and occupied a “low-ranking position” that barred her from making decisions related to the burial related matters.

[24] The Applicant objected to the First Respondent’s supplementary affidavit on the basis that it was filed out of time and that the Applicant did not have an opportunity to respond to it. Additionally, counsel argued that there was no application made for

condonation of the late filing of the supplementary affidavit.

[25] Ultimately, counsel averred that the deceased cannot be buried anywhere save for the Eastern Cape because burying her elsewhere will cause the deceased’s family to suffer curses and bad luck in the future.

First Respondent’s

Submissions

- [26] The First Respondent's submissions were brief. Counsel contended that the Applicant had not met the requirements for the granting of an interdict such as showing a clear right and/or prejudice that he will suffer if the relief is not granted.
- [27] In addition, counsel submitted that the First Respondent was being discriminated against because of her gender and classified as someone incapable of arranging a funeral for her late husband.
- [28] Furthermore, counsel averred that the First Respondent as the wife to the deceased was entitled to decide where the deceased should be buried. According to counsel, the deceased and the First Respondent were in love and had spent holidays together when the deceased fell ill.
- [29] Ultimately, counsel asked this Court to condone the late filing of their supplementary affidavit given the limited time frames within which they had to respond to the application launched by the Applicant.

Evaluation Of Evidence And Submissions

- [30] Regarding urgency, I am satisfied that the Applicant has made out a case for urgency as the burial proceedings were on hold pending the finalisation of this matter.
- [31] Concerning the relief sought by the Applicant namely an interdict, counsel for the Applicant unfortunately spent his entire allocated time without dealing with the requirements for the relief sought.
- [32] An applicant who seeks a final interdict must show a clear right, an injury actually committed or reasonably apprehended; and that there is no other satisfactory remedy available to the Applicant.[11] The Applicant's case does not even try to deal with these aspects but focuses elsewhere. This alone, is fatal to the Applicant's case.
- [33] Concerning the late filing of the First Respondent's supplementary affidavit, there was no application whatsoever made for condonation. In my view, the First Respondent has not made out a case for condonation. Consequently, the late filing is not condoned.
- [34] I do not intend to comprehensively deal with other submissions by the Applicant save to say that the Applicant's case was largely premised on a wrong notion where "women were always subordinated to the authority of a patriarch" and regarded as perpetual minors under the disguise of cultural practices.[12] This is no longer the position under our new constitutional dispensation.
- [35] Discrimination based on sex and gender no longer has a place in our constitutional democracy. Equality is at the core of our Constitution.[13] In Sengadi, the court eloquently put the positions as follows:

‘Normally the right to bury a deceased customary law husband reposes on his customary wife (widow) who is normally the heiress to the deceased’s estate, See *Nzaba v Minister of Safety and Security and Others* an (unreported judgment delivered in case No: 0535/ 2005.) In customary law the male head of the family of the deceased is the person who decides the arrangements concerning the burial of the body of the deceased. This authority of the male head of the family or the father of the deceased was predicated on the principle of primogeniture. The Constitution has decreed that the principle of primogeniture regarding the law of intestacy violated the right of women to human dignity guaranteed in section 10 of the Constitution. In our new constitutional dispensation these traditional cultural customary law practices were reconsidered in the light of our constitutional development pursuant to section 39(2) and 111 (2) of the Constitution, Act 108 of 1996 and See *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole and Others* where the principle of primogeniture was abolished; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005

(1) SA 560 (cc) 2005 (1) BCRL (1)’.^[14]

[36] In my view, the First Respondent, as the wife to the deceased, has burial rights and may decide where her late husband should be buried. In *Sengadi*, the court, albeit in a different context, correctly held that:

‘The applicant as the customary law wife of the deceased ... pursuant to the customary law marriage concluded between herself and the deceased on the ... is entitled to bury her customary law marriage husband, the deceased’.^[15]

[37] The *Sengadi* decision settles the matter. Even in the present case, at some stage, the Applicant in so far as hospital-related decisions were about to be made about the deceased, he had stated as follows to the First Respondent:

‘Kindly note that, I spoke to my sisters and we decided that You were there from the inception of his illness. He is your legal husband and father of your child. We therefore decided it’s best you make the final decision’.

[38] It is thus surprising that all of a sudden, the First Respondent’s decision-making powers in the context of her marriage and her late husband are subject to cultural approval. This is unfortunate, to say the least.

[39] This matter requires parties to work together than before. Everyone needs each other at this moment. I conclude by borrowing the words of my brother, Kganyago J who once said:

‘Family feuds in relation to who has the right to bury a deceased person had the potential of permanently dividing the family. These are sensitive disputes which are best suited to be mediated and resolved by family elders rather than bring them to court where there is no winner, but divides a united family structure which end up being teared apart. It is the time when the family should be united more than ever, and preparing to give the loved one a dignified burial, rather than hang their dirty linen in court. It will therefore be the duty of the court to evaluate the evidence presented before it in its totality in order to arrive at a just and fair decision’.^[16]

[40] Consequently, the Applicant has not made out a case for the relief sought.

Costs

[41] The costs should follow the results on a party and party scale.[17]

Order

[42] I, therefore, make the following order:

- (a) The provisions of the Uniform Rules of Court relating to time and service are dispensed with and the matter is disposed of as one of urgency in accordance with the provisions of Uniform Rule 6(12).
- (b) The late filing of the supplementary affidavit is not condoned.
- (c) The application is dismissed with costs.

M R PHOOKO

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES:

Counsel for the Applicant: Adv JH Sullivan Instructed by: Harvey Nortje Wagner & Motimele

Attorneys Counsel for the Respondent: Adv K Mpenyana Instructed by: Ramalekana Incorporated

Date of Hearing: 19 January 2024 Date of Judgment: 24 January 2024

[1] M Slabbert “Burial or cremation – who decides” 2016 De Jure 241.

[2] Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others (2014) JOL 32103 (GP) at para 63.

[2] Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others (2014) JOL

32103 (GP) at para 63.

[3] Rule 6(12)(b) of the Uniform Rules of Court.

[4] 1977

(4) SA 135 (W) at 137E-F.

[5] (11133767)

[2011] ZAGPJHC 196 at paras 6.

[6] [2021] ZAGPJHC 21 at para 2.

[7] At para 8.

[8] 1993

- (4) SA 675 (W) at 679J-680A.
- [9] [2019] 1 All SA 569 (GJ).
- [10] See for example, *W and Others v S and Others* [2016] ZAWCHC 49.
- [11] See *Trustees for the time being of the Corneels Greyling Trust and Another v Minister of Water and Sanitation and Others* [2023] ZAGPJHC 898 at para 60. See also *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961
- (2) SA 505 (W) at 524C.
- [12] S Samuel “Women married in customary law: No longer permanent minors” 1999 Agenda: Empowering Women for Gender Equality 25.
- [13] Section 9 of the Constitution, 1996.
- [14] At para 40.
- [15] At para 40.
- [16] *Mabulana v Mabulana* [2021] ZALMPPHC 36 at para 13.
- [17] *Neuhoff v York Timbers Ltd* 1981
- (1) SA 666 (T).

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