

SOUTH AFRICA / JUDGMENT

Zilwana v Booï and Another (3476/2024) [2024] ZAECMKHC 133 (22 August 2024)

[2024] ZAECMKHC 133

COURT

Eastern Cape High Court, Makhanda

BEFORE

B B Brody

CASE / FILE NUMBER

3476/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION – MAKHANDA)

Reportable/Not

Reportable

Case

no.: 3476/2024

Matter

heard on: 21 August 2024

Judgment

delivered on: 22 August 2024

In

the matter between: NOYENA
 MABEL ZILWANA
 Applicant
 and
 NOPINKI
 BOOI
 First Respondent
 VON
 DER DECKEN FUNERALS
 Second Respondent

JUDGMENT

BRODY AJ

1. The late Mbuyiselo Graham Zilwana (“the deceased”) passed away on the 3rd of August 2024.
2. On the 16th of August 2024 a certificate of urgency was served and filed in terms of the rules of court and this indicated that the applicant, described by herself in her founding affidavit as “a mother to the deceased”, with the deceased’s children, became aware on the 15th of August 2024, in the evening, that a funeral would take place on the 17th of August 2024. The main reason given for the urgent application was that the first respondent, described by the applicant as “a girlfriend to the deceased” was disregarding the deceased’s last wishes and effectively was taking away the deceased’s children, the applicant’s “grandchildren” to bury the deceased according to his last wishes. The place of the funeral was the main issue in contention.
3. Based on the certificate of urgency Mullins AJ, as duty judge, issued a rule nisi interdicting the funeral and indicated that the matter would be postponed to 14h00 on Wednesday, the 21st of August 2024.
4. On Wednesday, the 21st of August 2024 the matter was called before 14h00 and Mullins AJ, in error, heard argument on behalf of the first respondent and dismissed the application, ordering costs on an attorney and client scale.
5. By arrangement with the parties the matter was then called again at 16h00 on the 21st of August 2024 and I withdrew the previous orders, which were clearly granted in error and heard argument in the matter.
6. The applicant, clearly describing herself as the “mother” of the deceased, and describing the first respondent as the deceased’s “girlfriend” requested an interdict against the first respondent from removing the body of the deceased and sought to prevent the burial of the deceased at No 2[...], Takalani Location, Fort Beaufort. The further order sought was that the body should be buried at No 5[...] M[...] Street, Group 5, Fort Beaufort. I shall refer to the first address as “Takalani”, and the second address as “Mtshizana”.

7. The main reason for the interdict was the following:

“18. The family of the deceased called a meeting and invited the first respondent to attend, and in that meeting the family of the deceased in tandem with the first respondent acquiesced that the deceased would be buried at his home, as it was his last wish that he be laid to rest at his house.”

8. In the first respondent’s answering affidavit she opposed the application on various grounds and these were the following:

8.1. The deceased and the first respondent were married to each other in community of property on the 10th of March 2020. A copy of the marriage certificate was attached to the papers

8.2. The deceased’s family and the first respondent’s family conducted lobola negotiations and the deceased paid lobola for the first respondent on the 4th of June 2021. The minute of that meeting was also attached to the papers.

8.3. The deceased and the first respondent had been living together since 2019 when their relationship started and had also lived together since then until the deceased’s passing on 3 August 2024.

8.4. On the 25th of May 2022, the deceased and the first respondent concluded a Joint Will and a copy of the Will was attached to the papers.

9. The aforesaid facts were common cause in argument as they could not be disputed given the corroborating evidence attached to the answering affidavits.

10. In addition, the Joint Will made it clear that the deceased and the first respondent both resided at Takalani.

11. The first respondent also wished to bury the deceased at Valley Christian Church as this was a mutual place where all who could attend to say their last goodbyes to the deceased.

12. In the applicant’s replying affidavit, the applicant accepted that the first respondent was married to the deceased, however, alleged that this fact was never divulged to any of the family.

13. The applicant also alleged that the Will was not valid as it was not signed before a Commissioner of Oaths as the testator had affixed “a mark to the will”. This is clearly wrong as the Will is not signed by a mark, however, is signed by the deceased in terms of the Wills Act. This eventually became common cause in argument.

14. I am in agreement with Mr Somandi that, in ex parte applications an applicant bears a duty of utmost good faith in disclosing all material facts in her knowledge.[1]

15. The applicant is also required to disclose all material facts which might affect the granting, or otherwise, of an ex parte order and the holding back of any material facts, either wilfully and male fide, or negligently, is to be deprecated.[2]

16. There can be no doubt that any applicant, on an ex parte basis, must be scrupulously fair in presenting the case, put forward all facts relevant to reasonably expected disputes. An applicant is also required to exercise due care and must not refrain from disclosing matter which is relevant to the dispute.[3]
17. I am in agreement with Mr Somandi that the applicant has made grave and material non-disclosures in her founding affidavit.
18. The patently false allegations are the following:
 - 18.1 That she is the deceased's "mother";
 - 18.2 That the first respondent was the deceased's "girlfriend" when in fact they were married;
 - 18.3 That the deceased and the first respondent did not live together, when in fact they did.
19. A further complicating factor is that in the Will there is a nominated executor, namely Mr Frederick Johannes Potgieter, an attorney of this court. He was not cited in the application, nor was reference made to him by the applicant.
20. I am satisfied that in terms of the Plascon-Evans[4] approach the apparent disputes raised by the founding affidavits are in fact not real disputes given the corroboratory evidence furnished by the first respondent.
21. I have no hesitation in dismissing the application primarily on the following material facts:
 - 21.1 Applicant is not the mother of the deceased and is in fact the aunt of the deceased;
 - 21.2 The first respondent and the deceased were married in community of property on 10 March 2020;
 - 21.3 The deceased lived as husband and wife with the first respondent at Takalani;
 - 21.4 The deceased paid lobola for the first respondent on 4 June 2021;
 - 21.5 The deceased and the first respondent completed a Joint Will on 25 May 2022;
 - 21.6 The applicant is the only party in the proceedings and her locus standi is accordingly questionable.
22. Having regard to the family relationship between the deceased and the first respondent, their marriage, the Will, and the absence of any clear indication of the deceased's wishes, I am satisfied that it is the first respondent that can decide where the funeral will occur and in what circumstances. This is in line with the well-known matter of Mahala vs Nkombombini and Another[5]
23. Not only was the first respondent and the deceased married according to civil marriage, they are also married in terms of customary law.

24. In view of the blatantly false allegations made by the applicant in her founding affidavit and the manner in which she approached this court, I have no hesitation in granting a costs order against the applicant on the scale as between attorney and client.

25. The following order is made:

25.1 The application is dismissed;

25.2 The applicant shall pay the costs of the application, including the costs incurred on the 21st of August 2024, on the scale as between attorney and client.

B B BRODY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : Adv. Ndinise

Instructed by

: L Mazaleni Attorneys Inc.

c/o Neville Borman & Botha

21 Hill Street

MAKHANDA

(REF.: CIV/XAL/143/LM)

Counsel for first Respondent : Adv. Somandi

Instructed by

: Loyiso Nqini Attorneys Inc.

c/o Mgangatho Attorneys

7 Somerset Street

(REF.: N BOOI 01/2024)

[1] Thint (Pty) Ltd vs NDPP and Others; Zuma and Another vs NDPP and Others [2008] JOL 22119(CC), paragraph 102

[2] Schlesinger vs Schlesinger ZAFSHC/2022/114 (SAFLII)

[3] Recycling and Economic Development Initiative of South Africa NPC vs Minister of Environmental Affairs and 2019 (3) SA 251(SCA), paragraphs 45 - 52

[4] Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634E - G

[5] 2006(5) SA 524 (SE), paragraph 14

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Prepared on 11 October 2026 · Esheria