IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT BHISHO

Case No: 389/13
Date heard: 11 July 2013
Judgment Delivered: 12 July 2013

In the matter between:

C[…] P[…] M[…]/K[…] Applicant

and

M[…] N[…] 1st Respondent

AVBOB FUNERAL PALOUR 2nd Respondent

JUDGMENT

DUKADA J:

[1] When a person passes on, it is usually expected that he would be respectfully buried and laid to rest within a reasonable time. That sometimes does not happen when conflicting claims crop up in respect of the right to arrange the burial, when and where to burry the deceased.

Such claims have regrettably come before the Courts of this country a number of times for resolution.[1]

[2] In the present case the applicant launched an urgent application seeking the following orders:-

1.1 That the first respondent be interdicted and restrained from removing the corpse of M[...] N[...] (the deceased) from the possession or premises of the second respondent:-

1.2 That the second respondent be interdicted and retrained from releasing the corpse of the deceased to the first respondent and/or any person acting under his instruction or any person not authorized by a valid Court order,

1.3 In the event of the corpse of the deceased having already been handed over to the first respondent by the second respondent and/or any person under their instruction

1.1.1 The sheriff of this Court be authorized to immediately seize the corpse of the deceased herein and hand over possession thereof to the applicant.

1.1.2 The first and second respondents and/or any person acting under their instruction be interdicted and restrained from buring the corpse of the deceased and be ordered to hand over possession of the corpse of the deceased to the applicant or the sheriff of this Court;

[1] See Human v Human 1975(2) SA 251 (E); Tseola and Another v Maqutu and Another 1976(2) SA 418 (TK);Khumalo and Others v Khumalo and Another 1984 (2) SA 229 (D); Sekeleni v Sekeleni and Another 1986 (2) SA 176 (TK) at 178; Gabavana and Another v Mbete and Others [2000]3 ALL SA 554 (TK) at 571 e-572g; and Sokoni and another v Sokoni and Another [2008] JOL 22085 (ck)

1.4 The applicant be allowed to take possession of the corpse of the deceased from anyone of the respondents and/or anyone acting on their instructions and/or the sheriff of this Court.

1.4 The applicant be entitled to bury the corpse of the deceased on any suitable date and venue,

1.5 The sheriff of this Court be authorized to seize from the possession of the first and second respondents all the goods, property and documents, including marriage certificate, the identity document of the deceased which were unlawfully taken by the first and second respondents from the applicant's matrimonial home and hand over same to the applicant.

1.7 That the first respondent pays costs of this application on a punitive scale.

APPLICANT'S CASE

[2] The facts relevant to the issue are as follows:-

Applicant states that she was married under customary law to the deceased on the 5 April 2012 at Cildara Administrative Area, Debe Nek, Middledrift and it subsisted until the death of the deceased on the 22 June 2013. Some marital rituals were performed in respect of their marriage at the deceased biological home at Cildara and thereafter the deceased went to stay with her at Rhabe since 2004 until his death on 22 June 2013. She annexed to her founding affidavit a copy of the minutes of a meeting at the

offices of the Master of the High Court and also a computer print- out from South African Police Services. (I will deal with these documents later in this judgment).

Applicant further states that the deceased parted ways with the N[…]i family as he was discriminated against by the first respondent because he was fathered outside the family.

The document annexed to applicant's founding affidavit has a heading. "*Minutes of a family meeting re-customary marriage."* On the side of the deceased family the persons who were in attendance are Abongile Matshikwe and Thandeka Eunice Mdayi, and on the side of the applicant were Mongameli Defender Dlabati and Phumele Majongo.

The minute records a decision about payment of lobola and an agreement that a customary marriage exists between the deceased and the applicant, and is signed by the facilitator, the Note keeper, the applicant and the afore-mentioned persons. The document does not reflect that any formal enquiry was conducted into the existence of the customary union between the applicant and the deceased. But even if a formal enquiry was conducted, this Court would not be bound per se by its decision. In my view, the said minute gives no weight to the issue in this matter.

The other document is the SAPS computer print-out. This document reflects the applicant as the next of kin of the deceased and her relationship to the deceased as "*Verloofde Vroulik"*.

The word "*verloofde"* is defined in Pharos Afrikaans Engels Woordeboeke as meaning "*engaged"*, "*affianced", "to be engaged to be married*". Following the primary rule of interpretation, in my view, this document reflects the applicant as engaged to the deceased. I found no basis for

her averments that this document confirms her to have been married to the deceased.

The thrust of her claim to be a customary law wife of the deceased in her founding affidavit lingers on the two afore-mentioned documents. (I will deal further with this aspect later in this judgment.) The other dimension on this point is that the applicant only mentions the words "*vroulike"* in her affidavits when describing her status as reflected on the said computer print-out. She omits the word "*verloofde*". It is trite law that in applications of this nature an applicant is obliged to be in good faith and to disclose all material relevant facts.[2] In her replying affidavit applicant states that the deceased had disassociated himself with the family of the first respondent and she annexed confirmatory affidavits from Zamekile Michael Notshe and Marshall Gcinuhlanga Lusithi who state that they were present when the deceased was welcomed into the K[…] family (the family of his biological father).

Mr Lusithi further states that the deceased is the son of his father's brother with whom he shased the same clan-name "*Dlamini"* and that he is the eldest in the family who administers and heads all the cultural rituals of the K[…] family. He welcomed the deceased into the K[…] family and that he also personally conducted the customary union rituals namely "*utsiki"* and "*ukutyisa amasi*". He further states that the applicant was given a customary union name "L*ikhaka*" by Thandeka Mdayi, deceased's sister.

FIRST RESPONDENT'S CASE

[3] First respondent states that the deceased was conceived by their mother out of wedlock after his father had passed away, but he grew up in his

[2] See Rosenberg v Mbanga & Others 1992 (4) SA 331 (E) at 336 H; Cubitt v Stannic [2000] 3 ALL SA 16 (E) at 18 f-g; Philiphs and Others v National Director of Public Prosecution 2003 (6) SA 447 (SCA); Hassan vs Berrange NO 2012 (6) 329 (SCA) at 335 G-H.

home as his brother using the same clan-name and surname. There was never any discrimination of the deceased in his home. He further states that the deceased divorced his wife N[…] G[…] N[…] with whom he got two children, S[…] and A[…]. He further states that none from the K[…] family ever came up claiming the deceased. He denied that any "*ukugoduswa"* ritual was ever performed in respect of the deceased.

He denies that the deceased was ever married by customary union to the applicant.

DISPUTE OF FACTS

[4] The dispute of relevant facts in this matter may be summarized as follows:-

It is denied that:-

(i) The deceased was married by customary union to the applicant at the time of his death.

(ii) The deceased was not a member of the family of the first respondent at the time of his death but of the K[…] family.

[5] The above-mentioned dispute of facts seems to be fundamental to the resolution of this matter. The Court has to decide this matter on affidavits. The rule in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary) Limited* [3] comes into play. That rule has it that where, in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order will generally speaking only be granted if those facts averred in the applicant's affidavits which have been admitted by the

[3] 1984 (3) SA 623 (AD) at 634 H

respondent, together with the facts alleged by the respondent, justify such an order.

This matter is of such an urgent nature that it needs as speedy resolution. To refer it to oral evidence or trial would, in my view, not be fair and just in the circumstances of this case.

The deceased passed away on the 22 June 2013 and today the 12 July 2013 it is his 20th day he lying cold in the mortuary of the second respondent. He could not be buried and laid to rest up to now as a result this dispute in respect of his burial between the applicant and the first respondent which has to be resolved by the order of this Court.

I, therefore prefer to adopt the approach pointed out in Trollip v Du Plessis en 'n Ander[4] which is more robust as such approach is sometimes required, and the Court should then grant the order if it is satisfied that there is sufficient clarity regarding the issues to be resolved for the Court to make the order prayed for [5] or to refuse the order prayed for if the contrary prevails.

ISSUES

[6] The real issue in this matter is whether the applicant has a right to arrange the burial of the deceased. Such a right depends on whether the applicant was married by customary union to the deceased at the time of his death. The latter aspect is an issue in a dispute for its resolution will result in the resolution of the real issue.

THE AUTHOROTIES ON THE ISSUES BEFORE THIS COURT

[4] 2002 (2) SA 242 (W) at 245 D-F
[5] This approach was endorsed by A.B Erasmus J in Mahala v Nkombombini and Another 2006 (5) SA 524 (SECLD) at 528 B-C

[7] Locke J in Gabavana and Another v Mbete and Others[6] collected together a number of relevant authorities. These decisions state the principle that in the absence of some special direction in the Will, it is the heir of the deceased estate who shall be the person who decides on the arrangements relating to the burial of the deceased body.[7]
Heath J usefully summarized the principles involved as follows.

(a) If someone is appointed in a Will by the deceased, then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes.

(b) The deceased person can appoint somebody to attend to his burial in his Will or in any other document or verbally, formally or informally, and in all these instances effect should be given thereto in so far as it is otherwise legally possible and permissible.

(c) A deceased can, in the third instance, die intestate, but can appoint someone to attend to his burial in a document or verbally.

(d) In the absence of a testamentary direction, the duty of and the corresponding right to see to the burial of the deceased is that of the heirs. The heirs appointed as heirs in the Will of a deceased.

(e) The afore-mentioned principle that heirs (appointed as heirs), in the absence of any provision in the Will as to the burial of the deceased are entitled and obliged to attend to the burial of the deceased applies in my view similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to

[6] Referred to in Note 1 above
[7] See also cases in Note 1 above

his burial arrangements, the intestate heirs would be in the same position as testate heirs. I can see no reason why the position should be different in the case of intestate heirs.

(f) It also follows that persons obliged and entitled to see to the burial arrangements are entitled to arrange where and when the deceased is to be buried.

[8] Turning to the present case, the applicant in his founding affidavit relies on the minute of the meeting in the office of the Master of the High Court and the computer print-out from the SAPS, (I have already commented on these documents). It is trite law that an applicant must make out her case in the founding affidavit. Diemount J put this point aptly as follows in *Director of Hospital Services v Mistry.* [8]:-

"*When as in this case, the proceedings are launched by way of a notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases: '……an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein because those are the facts which the respondent is called upon either to affirm or deny.' ''*

[8] 1979 (1) SA 626 (A) at 635 H-636A

It lies, of course in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case.[9]

In the present case, the applicant, in my view, has not succeeded in establishing that she was married by customary union to the deceased at the time of his death.

In case I am wrong in this conclusion I have considered also the contents of the replying affidavits. Applicant attempts to establish that she was lobolaed by the deceased, taken into customary union and customary union rituals performed in respect of her. She gets corroboration from the comfirmatory affidavits by Zamekile Michael Notshe and Marshall Gcinuhlanga Lusithi. Both men are not members of the K[…] family. There is no explanation whether, at the time the lobola negotiations were conducted, lobola paid and marriage rituals in terms of customary law performed, there were any brothers to the husband of the mother of the deceased alive or not. In fact no information is furnished to this Court as to the male family members of that family. In paragraph 5 (iv) and 5 (xiii) of the applicant's replying affidavit she stated that the deceased was born out of an "*ukungena*" custom which she describes as "*a practice which is performed after the death of the husband of the surviving female spouse*"

NJJ Olivier et al in their book with the title "*Indegenous Law*" comment as follows on "*ukungena"* custom "*the traditional position is that when the husband dies the marriage agreement between the two family groups continues to exist. The widow is expected to stay in the family group of the deceased husband and to be available for the procreation of children on behalf of the deceased.*" These eminent writers go on to summarize

[9] See also Titty 's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (7) at 369 A; Sheperd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (C) at 205 E; and Bowman NO v De Souza Poldeo 1988 (4)

the main principles underlying the "*ukungena*" custom. One of these principles is that "*normally the ukungena partner is a close relative of the deceased*."

In the present case the man who fathered the deceased has not been shown to be a close relative of the deceased. In the circumstances I am of the view that the deceased was not born out of an "*ukungena"* union.

It appears to me that in the present case the deceased was just a child of a widow, a child born by a married woman from another man after the death of her husband. NJJ Olivier et al, op cit, at page 156 paragraph 146 (c) remark that the general principle in customary law is that the death of the family head does not terminate the marriage relationship between the widow and her husband's family.

Children from the widow are regarded as legitimate children of the deceased.
Turning to this case, the deceased was born in the home of his mother's late husband, and used his surname up to his death.

There is no information in the papers that the deceased was ever disinherited by the N[…] family.

In customary law a family head may disinherit his son and exclude him from the right of succession by following two procedures which essentially include calling a meeting where the family head would publicly disinherit his son.[10]

In my view, the deceased could have been a member of the family of his biological father only if he was disinherited in terms of the customary law

[10] See NJJ Olivier et al, op cit, para 147

and that absent, he died still a member of the N[…] family. Consequently, in my view, any rituals performed by K[…] family had no legal consequences in African customary law. So is the position in respect of the alleged marriage rituals in respect of the applicant.

The other dimension in this matter is that two children of the deceased, who have shown up and also being the intestate heirs of the deceased, are deponents to confirmatory affidavits to first respondent's answering affidavit. These children also use the surname of the first respondent. They seem to me, as such, to be on the side of the first respondent in this matter. Even taking into account the practical considerations and the family relationships of the deceased, in my view, the pendulum of fairness and justice in the circumstances of this case swings against the applicant.

Adv R.M. Mantantana, Counsel for the applicant, has argued stremuously the case for the applicant in line with her allegations in her affidavits, but I am more inclined to agree with Adv Maseti, Counsel for the first respondent, that the applicant has failed to establish that she was married by customary union to the deceased at the time of his death. To put it in other words, she has failed to prove the issue in this dispute, and so it is in respect of the real issue. That is my finding.

[9] In the circumstances I conclude that the applicant has failed to establish that she has a right to arrange the burial of the deceased and that by virtue of that right she would have been entitled to the orders sought in this matter.

[10] In the circumstances this application must fail.

[11] As far as the costs are concerned it is clear to me that the circumstances which led to the present application were to a large extent brought about

by the deceased. After divorcing his wife N[…] G[…] N[…], he later proceeded again with a relationship with her while having another relationship with the applicant.

It appears from the documents annexed to applicant's founding affidavit that the deceased was a Warrant Officer in the South African Police Services at the time of his death and, in my view, he was in a position to formally marry the applicant, if he so wished, even by civil marriage for that matter for he had already divorced his wife. Instead he left the applicant with a status described as "*verloofde vroulik*" in the records of his employer.

In the circumstances I am of the view that a costs order which would be fair and just is one which obliges neither party to pay the costs of this application but that they be borne by the deceased estate.

[12] In the result the following order shall issue:-

(i) The application is dismissed;

(ii) It is ordered that costs of this application be borne by the estate of the deceased the late M[...] N[...].

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D.Z. DUKADA

JUDGE OF THE HIGH COURT

Appearances

For the applicant: Adv Mantantana Instructed by
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