FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4277/09

In the matter between:-

MASESI DOROTHY RAMONARE Applicant

and

MOLLY'S FUNERAL PARLOUR First Respondent

THATO ANNAH PHAHLAHLA Second Respondent

HEARD ON: 3 SEPTEMBER 2009

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 10 SEPTEMBER 2009

INTRODUCTION AND BACKGROUND:

[1] On 3 September 2009, noting that the dead are not meant to share space with the living and should, eventually, be allowed to rest in peace, I issued an order set out in paragraph [3] below accompanied by brief reasons therefor and undertook to give full reasons, if necessary, in due course.

[2] On 4 September 2009 the second respondent applied for the reasons for the said order in terms of Rule 49(1)(c) of the Uniform Rules of Court.

[3] The order in question, which was given on an urgent basis and with a view to ensuring that the deceased, like an actor who has just completed a splendid rendition on stage, takes his bow and exits in a graceful and dignified manner, was to the effect that:

3.1 the first and/or second respondent and/or any person acting under their instruction and/or authority is interdicted, prohibited and/or restrained from burying the corpse of the late **Phinias Ramonare Ramonare**;

3.2 the first respondent and/or any other person acting on its instruction or authority is interdicted, prohibited and/or restrained from releasing and/or handing over the corpse of the late **Phinias Ramonare Ramonare** to the second respondent and/or any other person.

3.3 the first respondent or any person(s) acting under its instruction or authority is directed to hand over the corpse of the late **Phinias Ramonare Ramonare** to the applicant or her nominated funeral undertaker;

3.4 in the event of non-compliance with paragraph 3.3 above that the Sheriff is authorised and directed to immediately seize the said corpse of the late **Phinias Ramonare Ramonare** and to deliver the same to the applicant or her nominated funeral undertaker;

3.5 no order as to costs is made.

[4] The aforegoing was preceded by an application made by the surviving spouse of the late **Phinias Ramonare Ramonare** (the deceased) who was married to him in community of property.

[5] The application was initially launched by way of a request for a rule *nisi* made on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court on 26 August 2009, but its hearing was postponed to 3 September 2009 per agreement between the

parties after the second respondent had delivered her opposing papers. It, therefore, proceeded before me on the said date as an opposed application for a final order with no opposing papers from the first respondent.

[6] No time-frames were agreed upon by the parties with regard to the filing of further documents when the matter was postponed. The applicant, thereafter, delivered her reply to the second respondent's answering affidavit on 1 September 2009. The aforegoing, apparently, happened after the second respondent had already filed her Heads of Argument.

[7] From the papers before me it was clear that the deceased passed away on 19 August 2009 in Bloemfontein following an illness which saw him first being admitted at a hospital in the Kingdom of Lesotho and later in Bloemfontein. His corpse was, thereafter, entrusted to the first respondent by his brother for safe keeping.

[8] The second respondent's relationship to the deceased was akin to a marriage insofar as she submitted a copy of a document which, *ex facie* its contents, appears to be a marriage certificate issued in the Kingdom of Lesotho on 24 August 2006.

[9] The second respondent, further, annexed to her answering affidavit copy of a document declaring to be a **Last Will and Testament** of the deceased dated 17 March 2008. In terms of the said document, the deceased *qua* the testator declared that:

> **5.**
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> "**AANSTELLING VAN ERFGENAAM:**
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> **Ek stel aan as my enigste erfgenaam my vrou, THATO AMMAH PHAHLAHLA (PERSONNEL NOMMER 221268A038219F) as die enigste erfgenaam van my boedel, niks uitgesonderd nie, roerend of onroerend onderhewig aan die voorwaardes hierna uiteengesit.**
>
> **6.**
>
> **ROEREND SOWEL AS ONROERENDE EIENDOM**

Die geheel van my boedel welke roerende sowel as onroerende eiendom word bemaak aan THATO AMMAH PHAHLAHLA met spesifieke verwysing na my voertuie te wete:

1. **Kombi Toyota 15 sitplek, met registrasie nommer TTC 615 GP 2006 model.**
2. **E20 Nissan voertuig, met registrasie PPT 925 GP 1987 model.**
3. **Mercedez Benz, sport model 280 CE met registrasie HZY 977 GP 1982 model.**
4. **Toyota Conquest-Wit, met registrasie KLP 613 GP 1991 model.**
5. **Can Inyathi, 2.2L, 2008 model met registrasie nommer WVX 255GP.**

<u>Vaste eiendom:</u>

geleë te 908 Orlando East, Soweto, Phielastraat 1804, titelakte nommer 13951/1986. Onroerende eiendomme, niks uit gesluit nie word bemaak aan my vrou Mev. Thato Ammah Phahlahla, personnel nommer 221268A038219F."

[10] Following the death of the deceased the applicant and the second respondent could not agree on who was entitled to dispose of the corpse of the deceased by way of a funeral and where the same was to take place.

SUMMARY OF DEPOSITIONS AND SUBMISSIONS:

[11] In her founding affidavit the applicant relies on her marriage to the deceased as conferring the right and duty on her to bury him. In her replying affidavit she challenges the validity of the Last Will and Testament of the deceased and, further, relies on the deceased's alleged wish to be buried by her in Soweto, Johannesburg, communicated to his (the deceased) mother. In this regard a confirmatory affidavit of the deceased's mother is submitted.

[12] On her part, the second respondent relies, in her claim to the corpse of the deceased, on her alleged marriage to the deceased. She does not stop there, she further relies on the deceased's alleged wish to be buried in Lesotho as well as her alleged appointment as the sole heiress to the deceased's estate. With regard to the deceased's alleged burial wish a confirmatory affidavit of one David Leita Mahloko is submitted.

[13] In the Heads of Argument delivered for the second respondent and verbal submissions made by her counsel, no further

reliance is made on the alleged marriage to the deceased and her right to the corpse is, effectively, based on the fact that she is the sole heiress of the deceased's estate in terms of the Will.

[14] On her part, the applicant, effectively, contends through her representative in the Heads of Argument as well as verbal submissions that:

14.1 there is a real dispute on the aspect relating to the deceased's wish and/or preference;

14.2 if it is found that the alleged Testament is indeed the deceased's last Will, then and only in that event, the deceased died partly testate and partly intestate insofar as he disposed only of some of his property in terms of the said Last Will and Testament;

14.3 the applicant, as his surviving spouse, is, thus, also an intestate heiress and has a word in when, how and where to bury the deceased;

14.4 in the light of the aforegoing reasonableness and fairness, and not heirship, should be the decisive

factor in accordance with the robust approach adopted by the courts in such circumstances.

ISSUES IN DISPUTE:

[15] When all was said and done, I was satisfied that the determination of the application herein depended on the answer to the question as to who is the heir or heiress to the estate of the deceased. The law, in this regard, is clear that the heir of the deceased shall be the person who decides on the arrangements surrounding the burial of the body in the absence of an explicit indication, as to who shall be responsible for the burial arrangements, in the Will. (See in this regard **MAHALA v NKOMBOMBINI AND ANOTHER** 2006 (5) SA 524 (SE) at p. 529 I.)

[16] In turn the question of heirship to the estate of the deceased depends on the proper construction of the Last Will and Testament attributed to the deceased.

[17] The gravamens of the parties' arguments in court revolved around whether or not the second respondent, as the testamentary heiress, was the sole heiress of the whole of the deceased's estate in terms of the Will.

[18] A finding that the second respondent is the sole heiress of the whole estate of the deceased would bring the matter to an end because, in law, she would be entitled to decide the issue exclusively.

[19] A finding that the second respondent is not the sole heiress, will lead to the next inquiry into whether or not reasonableness and fairness are in favour of the granting of the application. (See generally **TROLLIP v DU PLESSIS EN 'N ANDER** 2002 (2) SA 242 (W) and **MAHALA v NKOMBOMBINI AND ANOTHER**, *supra*.)

INTERPRETATION OF THE WILL:

[20] *Ante omnia* I must hasten to point out that the Will is silent on the deceased's wishes with regard to burial and, as such, heirship is the determinative factor in that regard.

[21] The golden rule in interpretation of testaments:

> "**... is to ascertain the wishes of the testator from the language used. And when those words are ascertained, the court is bound to give effect to them unless we are prevented by some rule or law from doing so.**"

(Per Innes ACJ in **ROBERTSON v ROBERTSON'S EXECUTORS** 1914 AD 503 at 507.)

[22] The testator's intention is determined by having regard to the actual words used by the testator and the courts' purpose is, thus, to ascertain the meaning of the words in which the testator's intention is couched and not what the testator actually intended.

> "**The Court is entitled to put itself in the position of the testator at the time of the making of the will in order to ascertain what the testator intended by the use of particular forms of words... the question is not what any words might mean apart from the testator's intention but what the testator meant by using them. That does not mean of course that effect can be given to an intention or possible intention on the part of the testator which has not been embodied in words employed by him in his will.**"

(Per Faure Williamson J in **LEIMAN v OSTROFF AND OTHERS** 1954 (4) SA 457 (W) at p. 461 D – F.)

[23] In the exercise of ascertaining the testator's intention the will

> "**... should be construed as an ordinary man would construe it, looking for its meaning rather in the actual words and sentences contained therein than in what was said or done by judges dealing with other wills.**"

(Per Van Zyl J in **LATEGAN v THE MASTER** 1931 CPD 193 at p. 195.)

[24] Common words must be given the normal everyday meaning that they would have had in the society in which the testator was living at the time when he executed his will unless the contrary intention appears from the will. Technical or scientific words are to be interpreted according to the generally understood technical or scientific meaning.

> "**... notwithstanding the allegations in the affidavits regarding what the testator intended to do, the Court must give effect to his expressed intentions as set out in the will. In this regard I would refer to the second of *Wigram's* propositions, set out by *Phipson*, 8th ed. at p. 618, *viz*:**
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> **'Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.'**

> **In the instant case the words of the will are, for the reasons I have given, 'sensible with reference to extrinsic circumstances' within the meaning of *Wigram's* proposition. They must therefore be interpreted in their strict and primary sense. In the words - not inapposite to the present case - of BLACKBURN, J. in *Allgood v Blake*, *supra* at p. 163:**
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> **'The Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean.'"**

(Per Ogilvie Thompson J in **EX PARTE FROY: IN RE ESTATE BRODIE** 1954 (2) SA 366 (C) at 375 D - G.)

[25] The full effect is to be accorded to the dominant clause in terms of which the testator bequeaths a legacy or names the heir and its effect. Such a clause

> "**should not be modified nor its meaning strained because there are other clauses in the will which apparently require this to be done, unless it is quite clear from those other clauses that the testator so intended.**"

(Per Watermeyer J in **IN RE: ESTATE VAN AARDT** 1925 CPD 250 at 255.)

[26] There is a presumption in favour of testacy and against partial intestacy to the effect that, except for those instances where it is clearly apparent from the language of the will that the testator has not dealt with dispositions relating to his whole estate, whether expressly or by implication, the court will presume that the testator had the intention of disposing of his entire estate. See **BRUNSDON'S ESTATE v BRUNSDON'S ESTATE** 1920 CPD 159 at 169 and **AUBREY-SMITH v HOFMEYR, NO** 1973 (1) SA 655 (C) at 664 E – F.)

[27] In the present matter the deceased, *qua* the testator, expressed himself unequivocally and there exists, in my view, no cause to depart from the primary sense in which he used the words. In clause 5 of the Will he emphatically appoints the second respondent as his sole heiress to be the sole heiress of his estate, nothing excluded, movable and immovable subject to the conditions set out in clause 6 thereof.

[28] In clause 6 the testator reiterates that the whole of his estate, movable and immovable, is bequeathed to the second respondent whose full names are once again repeated. The testator, thereafter, proceeds to qualify the appointment by limiting his generosity to items specified in that clause insofar as he uses the words "**met spesifieke verwysing na.**"

[29] In my view, by making the appointment of the second respondent "**onderhewig aan die voorwaardes hierna uiteengesit"** the deceased clearly intended to subject the appointment to the said conditions. He actually gives the second respondent full and exclusive ownership, as the sole heiress in respect thereof, of the movable and immovable property set out in clause 6 only.

[30] If the deceased intended to highlight, certain items of which he was not certain that the second respondent was aware, as forming part of his estate, as contended by Mr. Reinders for the second respondent, one would have reasonably expected the testator to have used words such as "**in particular**" or

"**particularly**" or "**including**" and not "**with specific reference to**". In such an event the deceased would, most probably, not have made the appointment conditional on what is contained in clause 6. Such a provision, in my view, would simply have been superfluous at the best and inconsistent with the appointment as a universal heiress at the worst.

[31] A reading of the will as a whole indicates that the deceased intended to use the words in their strict and primary sense and that they are sensible with reference to extrinsic circumstances contained in the affidavits filed by the parties. In this regard it should be noted that it is not disputed by the second respondent that the deceased had a daughter with the applicant. It was, further, clear during the hearing that the parties were, effectively, in agreement that the items set out in clause 6 of the Will are not the only items in the joint estate. The presumption of testacy was, thus, in my view rebutted insofar as there also exists a presumption against disinherison operating in favour of the deceased's daughter.

[32] It is clear, in my judgment, that the deceased died partly testate and party intestate because he so intended in his Will. He, effectively, made specific bequests in favour of the second respondent leaving the residue of his estate to devolve *ab intestato*. In this regard, it is important to note further that the requirement for the dominant clause not to be unduly modified or for its meaning not to be strained without clear cause therefor, was clearly not in favour of the interpretation contended for on behalf of the second respondent insofar as it is clear, in my view, that clause 6 was intended to limit the operation and effect of clause 5.

[33] The applicant, as the surviving spouse, is, therefore, one of the intestate heirs in terms of the law on intestate succession. (**Act No. 81 of 1987 which applies to intestate estates of persons who die intestate, either wholly or in part, after the commencement of the Act, *viz* 18 March 1988.**)

THE RIGHT TO BURY THE DECEASED:

[34] It follows from the aforegoing that both the applicant and the second respondent, as well as the deceased's biological daughter, are the heiresses to the estate. The applicant and her daughter by virtue of the operation of the law on intestate succession while the second respondent by virtue of the testator's Will.

[35] The deceased's daughter does not feature in this proceedings save for the fact that her name is mentioned and reference is made to her in the applicant's depositions.

[36] As pointed out and conceded by Mr. Majola, for the applicant, there exists a dispute of fact which cannot be resolved on papers with regard to the wishes of the deceased. Mr. Reinders effectively and eloquently submitted that, that issue should, in line with the rule in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A), be resolved in favour of the second respondent because the applicant bears the onus of proof and, where she chooses not

to refer the matter for oral evidence, she should live with the consequences.

[37] On behalf of the applicant, Mr. Majola effectively invited the court to adopt the robust approach enunciated in **TROLLIP v DU PLESSIS EN 'N ANDER**, *supra*, and followed in **MAHALA v NKOMBOMBINI AND ANOTHER**, *supra*.

[38] According to the said approach the rule in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** is possibly not entirely satisfactory for urgent matters such as applications concerning the right to dispose of bodies of deceased persons.

> "**... a more robust 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.**"

(Per A R Erasmus J in **MAHALA v NKOMBOMBINI AND ANOTHER**, *supra*, at 528 B.)

[39] I was satisfied that the issues involved are clear insofar as the determination of the dispute revolves mainly around the interpretation to be attached to the relevant clause of the deceased's Last Will and Testament as well as the requirements of fairness as the case was in **TROLLIP v DU PLESSIS EN 'N ANDER** and **MAHALA v NKOMBOMBINI AND ANOTHER**, *supra*.

[40] It was, thus, in my view possible to resolve the dispute without the need to hear oral evidence. In this regard it should be noted that the relevant conflicting assertions related to the alleged burial wishes attributed to the deceased. On her part, the second respondent and a deponent on her side made bold averments to the effect that the deceased intimated, in their presence, that he wished to be buried in Lesotho. On the other hand, the deceased's mother deposed that the deceased expressed the wish to be buried in Soweto and from his matrimonial home. The second respondent, indeed, as contended by Mr. Reinders, did not get an opportunity to traverse these assertions by the deceased's mother because

they were contained in the applicant's replying papers. Although Mr. Reinders argued that an adverse inference be drawn against the applicant for failing to disclose these assertions in her founding papers, in my view, fairness demands that recognition be taken of the fact that when the applicant launched the application that issue was, most probably, not part of the equation in her mind and probably came to light, as she deposes in her replying affidavit, when she consulted with the deceased's mother after becoming privy to the second respondent's answer to the application.

[41] "**Problems arise, however, where - as in the present matter - there is a multiplicity of heirs. In such circumstances, there should be no hard-and-fast rules. Each case is to be decided on its own particular circumstances... The Court shall have regard to the family relationships of the deceased, as well as all other relevant circumstances.**"

(Per A R Erasmus J in **MAHALA v NKOMBOMBINI AND ANOTHER**, *supra*, at p. 529 J – 530 A.)

[42] In the present matter there are conflicting claims to the body of the deceased by two women who had some intimate relationships with the deceased during his lifetime. The applicant, who was married to him and has a child with him, on the one hand and the second respondent, who appears to have had a special place in the deceased's heart and, apparently, entered into a putative marriage with him in Lesotho, on the other hand. Both are heiresses to the estate of the deceased. The circumstances of this matter are, in my view, such that customary law, to the extent that it is not in conflict with the South African Law of Succession, is applicable and has to be recognised where relevant. The aforegoing prevails because the parties referred, either expressly or by implication, to African culture and customs in their papers.

[43] The deceased had roots and was born into an African family which has culture and customs. In true African tradition and custom, his immediate and extended families have a word in matters concerning his burial, although their views may not be decisive and are secondary to those of the heirs. In the

generalised system that African Customary Law is, the inputs of the members of the deceased's clan cannot be simply ignored and count for something in the order of things. The aforegoing prevails because African law and traditions are mainly about the collective and not the individual. Customary Law is recognised in terms of section 2 of the Law of Evidence Amendment Act, No. 45 of 1988 and section 211(3) of the Constitution of South Africa, on its part, obliges the courts to apply customary law where applicable. Although the views and preferences of the deceased's daughter are not before me, I am satisfied that it can safely be accepted that, by reason of the filial relationship which she bears to the applicant, she is on the side of the applicant.

[47] The deceased's whole immediate family is on the applicant's side while the second respondent, on her part, is a lone voice and cuts a lonely figure which flies solo in her chartered plane.

[48] On the papers before me, it appears to be undisputed that the applicant had already taken steps and incurred some costs in

trying to take the body of the deceased back to Soweto as at the date of launching the application herein.

[49] In my view, the applicant represents the wishes of the deceased's immediate family or clan which, in true African custom, is regarded as the rightful custodian of his remains in the normal course of events. No matter how little regard for or association with his clan and/or family a deceased African person may have had in his lifetime, even where he may have abandoned his family and its values, in an appropriate case where there is no-one to claim his body after his death, only his family, in the practical African tradition, bears the duty to claim and pick up his bones, as its own, and to ensure their safe passage to the Higher Place from whence they came.

[50] Recognising the applicant's right and duty, in African custom, to bury the body of the deceased would, in my considered view, accord with the general views of his immediate family and the African tradition which requires the deceased's family to ensure his safe and dignified return to his ancestors. In African

tradition and belief only the deceased's family links him, like an umbilical cord, to his ancestors.

ORDER:

[51] I, therefore, granted the orders in terms of the Notice of Motion as set out in paragraph [3] above.

[52] With regard to costs I felt that it was necessary and fair to recognise the emotional relationship which the second respondent had with the deceased as well as the fact that she, as the *prima facie* testamentary heiress, would reasonably and generally have expected to have exclusive burial rights over his body. She was, thus, in my view, entitled, to some extent, to put up a fight.

[53] I, thus, made no order as to payment of costs with the result that each party remains liable for its own costs.

L.J. LEKALE, AJ

On behalf of applicant:	Mr. N.N. Majola Instructed by: Majola Attorneys 131 St Andrews Street BLOEMFONTEIN
On behalf of second respondent:	Adv. S.J. Reinders Instructed by: Giorgi & Gerber Attorneys 72 St Andrew Street BLOEMFONTEIN

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