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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022/117657

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
25/3/2022

In the matter between:

MKHIZE, QATIMBI SIDNEY

Applicant

and

MKHIZE, FANYANA MOSES

First Respondent

MKHIZE, NOMVULA PAMELA

Second Respondent

SFS FUNERAL UNDERTAKERS / PARLOUR

Third Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] This urgent application was heard on 24 March 2022 and I handed down the following order:

“1. Part A of the application is dismissed;

2. The applicant is ordered to pay the costs of the application.”

[2] The reasons relate only to Part A of a double-barrelled application but the dismissal of Part A renders Part B moot. The reasons for the order follow below.

Introduction:

[3] The applicant sought the following orders:

That a Rule Nisi is issued calling upon the first, second and third Respondents to show cause, if any, on 29 March 2022, as to why an order should not be granted in the following terms:-

1.1 Interdicting and / or preventing first and second Respondent and / or anyone acting on their behalf and / or through their instructions from removing the body of the Late Audrey Mkhize (with identity number [....]) from the third Respondent's possession and / or wherever the deceased body is presently stored and / or kept pending the hearing / the finalization of Part B of this application.

1.2 Interdicting and / or preventing the first, second and third Respondent from proceeding and from making arrangements for burial of the Late Audrey Mkhize (with identity number [....]) on 25 March 2022, pending the hearing / finalization of part B of this application.

1.3 Interdicting and / or preventing first and second Respondent and / or anyone acting on their behalf and / or through their instructions from preventing the Applicant and / or the Mkhize family from viewing the body of the Late Audrey Mkhize (with identity number [....]) aforementioned at the premises of the third Respondent and / or wherever it is presently stored and / or kept pending the hearing / finalization of this application.

1.4 That orders in para 1.1. to 1.3. of the Rule Nisi shall operate as an interim order pending the return date of the Rule Nisi.

1.5. That this order shall be served on the first, second and third Respondent.

1.6. Costs to be cost in Part B of this Application

[4] The orders sought by the applicant cumulatively have the effect of interdicting the funeral of the late Mrs Mkhize, who passed away on 17 March 2022, and whose funeral was scheduled to take place out of the home she occupied with the first and second respondents (“the respondents”), the children born of her marriage with the applicant, on 25 March 2022.

The urgent application:

[5] The application was served on the respondents at 11h04 on Thursday, 24 March 2022, requiring them to file an answering affidavit 56 minutes later at 12h00 and appear in court at 14h00, three hours later. The third respondent was also served by email but as expected did not participate in the proceedings.

[6] The answering affidavit was for obvious reasons not ready at 14h00 and the matter stood down to 16h00 when Mr Selepe appeared for the respondents and informed the Court that an answering affidavit was now ready and would be uploaded on CaseLines. I ruled that in the interest of finality and out of respect for the deceased and the bereaved the matter had to be finalised on the 24th. The matter was then stood down to 19h00 to enable the applicant to file a replying affidavit and the matter was then argued.

[7] I approached the matter bearing in mind the sentiments expressed by Kganyago J in *Mabulana v Mabulana*,¹ namely that

¹ *Mabulana v Mabulana and Others* [2021] ZALMPPHC 36 paragraphs 13 and 24. See also *W and Others v S and Others* [2016] ZAWCHC 49 paragraph 38 and *Mahala v Nkombombini and Another* 2006 (5) SA 524 (SE) paragraphs 16 and 17. See also section 30 of the Constitution that

7.1 the wishes of the deceased must be respected and

7.2 the Court must evaluate the evidence to arrive at a just and fair decision.

The marriage relationship:

[8] The applicant and the late Mrs Mkhize entered into a relationship in 1985 and were married in 2002, and the two children were born of the relationship in 1989 and 1994.

[9] The applicant was convicted of murder in 2007 and spent eight years in prison before he was released on parole in 2015. He states that when he returned home he found that his late wife and the children have lost their love and affection towards him, and his relationship with the first respondent was turbulent.

[10] The married couple had disagreements about the performance of traditional Zulu rituals in the matrimonial home and the late Mrs Mkhize discouraged him from performing and proceedings with these rituals on the basis that she was a born-again Christian. These disagreements contributed to the breakdown of the relationship.

[11] In 2015 he evicted his wife and children from the matrimonial home and obtained interdicts against all three of them to enforce the eviction. They relocated to family in Lenasia. During the same year he initiated divorce proceedings but these proceedings were never finalised.

[12] In the replying affidavit he states that the interdicts he obtained were obtained in order to comply with his parole conditions, a statement that is impossible to understand meaningfully.

provides that: *"Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."*

[13] Mrs Mkhize and the two respondents thus formed a family unit since 2007 until her passing in 2022, a period of fifteen years.

[14] The applicant states that as early as the 17th of March 2022 and after agreeing initially that the funeral be arranged by the applicant out of the former matrimonial home, it became apparent that the members of the late Mrs Mkhize's family were insisting that the funeral be conducted out of the Lenasia house and that the deceased be buried at Avalon Cemetery. This was not acceptable to the applicant.

[15] Having been informed of this reality, the applicant waited until 23 March 2022 before his attorney started writing letters to the first and second respondents. Some of the emails were sent to an incorrect email address.

[16] The respondents dispute the applicant's version of the facts. Their evidence is that he never demanded the right to arrange the funeral and he never communicated with them since the 17th of March 2022. He was informed of the intended date already on 21 March 2022.

[17] He had been unemployed for as long as they could remember and did not communicate with them for 7 years. In the weeks leading up to her death, the applicant never contacted them nor did he visit her. There was no family relationship.

[18] The respondents also stated that they had already spent R75 000.00 on the funeral scheduled for 25 March 2022.

[19] In the answering affidavit the respondents pointed out that the culmination of the divorce proceedings was the only outstanding issue in the marriage and that they had no objection to the applicant performing cultural rights provided that they not breach the provisions of the interdicts obtained by the applicant against them and these rites were done timeously before the funeral.

[20] The deceased was a born-again Christian who never practised or observed cultural practices. She was close to her children who naturally want to conduct the

funeral. The late Mrs Mhkize's express wishes were not before the Court but one must infer from the evidence that it would have been her wish that she be buried under the supervision of her children out of the house she shared with them, and not under the supervision of the applicant with whom she had cultural differences and with whom she last lived on a permanent basis in 2007, and for a brief period in 2015 when she was evicted and interdicts were obtained against her and the two children.

[21] Taking all the evidence into account I concluded that there was no merit in the application.

[22] I therefore made the order referred to above.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **28 March 2022**

COUNSEL FOR THE APPLICANT: MR TSHITEREKE

INSTRUCTED BY: OTTO KRAUSE INC.

ATTORNEY FOR 1st & 2nd RESPONDENTS: MR SELEPE

INSTRUCTED BY: SELEPE SELEKE ATTORNEYS

DATE OF THE HEARING:

24 March 2022

DATE OF ORDER:

24 March 2022

DATE OF JUDGMENT:

28 March 2022