IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT KIMBERLEY)

Case number: **2659/17**
Date heard: **10/11/2017**
Date delivered: **17/11/2017**

Reportable: YES / NO
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES /NO

In the matter of:

LENA ROMAN	Applicant
and	
LORRAINE ROMAN	First Respondent
FORENSIC DEPARTMENT, HARRY SURTIE PROVINCIAL HOSPITAL	Second Respondent
AVBOB, UPINGTON	Third Respondent

Coram: Snyders AJ

JUDGMENT

SNYDERS, AJ

1. This was an opposed motion argued on the return date for the confirmation or discharge of the *rule nisi* granted by myself on 06 November 2017, which reads:

> *"1. That a rule nisi is issued with a return date of **09:30 on Friday, 10 November 2017**, calling on the First Respondent to show cause, why the following order should not be granted, namely that-:*
>
> *1.1 The applicant be authorised to bury the corpse of Leon Albertus Roman (identity number [....]) at 77 Wolman Street, Wegdraai, Groblershoop, Northern Cape Province;*
>
> *1.2 The applicant be authorised to bury the corpse of Leon Albertus Roman (identity number [....]) on a date suitable to the Applicant; and*
>
> *1.3 The First Respondent pay the costs of this application only in the event of opposition."*

2. The *rule nisi* was confirmed on 10 November 2017 and the reasons for that order follow.

3. The applicant is Lena Roman and the mother of the late Leon Albertus Roman ("*the deceased*"). The first respondent is Lorraine Roman, the wife of the deceased. The second respondent is the Forensic Department: Harry Surtie Provincial Hospital, Upington and the third respondent is AVBOB Funerals, Upington. The second and third respondent was cited as interested parties and no relief was sought against them, nor did they oppose the application.

4. On 29 October 2017, the deceased passed away in a motor vehicle accident. The deceased was married to the first respondent in community of property at the time of his death. The deceased and first respondent did not have any children, nor did he father any children in any other relationship.

5. According to the applicant, the deceased and first respondent were estranged from each other since 2012. The deceased relocated to Wegdraai where he lived until his death. He did not have any contact with the first respondent since their estrangement. It is common cause that the deceased and first respondent's marriage was never dissolved.

6. It is further the applicant's version that the deceased was in a romantic relationship with Nontsikelelo Cynthia Ndlovu ("*Ndlovu*") from 2013 until his death. Ndlovu is a beneficiary on the deceased's life policy, a dependant on his medical aid and a signatory to his bank accounts. Documents to this effect, as well as a confirmatory affidavit by Ndlovu, were attached to the papers.

7. The applicant further states that the deceased died intestate. At various stages during his lifetime, and more specifically in the month leading up to his death, the deceased informed his grandfather, Dawid Ludick, that he wished to be buried out of his grandfather's house at 77 Wolman Street, Wegdraai. The deceased reiterated this request to his grandfather when the deceased's grandmother passed away during August 2017 and specifically requested that his funeral ceremony be conducted from the grandfather's home in Wegdraai. A confirmatory affidavit by the grandfather dated 03 November 2017 ("*the first affidavit*") was attached. To further support this contention, affidavits were attached by Majorietta Johanna Ludick, the deceased's maternal aunt and Pieter Floris Pretorius, his pastor in Wegdraai. In the replying affidavit, the applicant also attached an affidavit in support of this contention by Christo Van Der Westhuizen, the deceased's cousin and confidant. He also confirmed that the deceased and first respondent were unhappily married and that the deceased intended to divorce the first respondent.

8. The applicant contends that she informed the first respondent of the intended funeral arrangements but that she instead wanted the deceased released to her for burial in Kimberley. The applicant confirmed that she had made funeral arrangements, whilst the first respondent had taken no such steps. The applicant also offered to pay for the funeral and did not seek any financial contribution from the first respondent in respect thereof.

9. The first respondent opposed the application and relied on her rights as spouse and heir to his estate, as well as on the express wishes of the deceased as relayed to her regarding his burial.

10. The first respondent denied that there were any marital problems between herself and the deceased. The reason for having separate homes was as a result of his employment in Groblershoop. Since the deceased commenced working in Groblershoop, he went to visit the first respondent every second week-end. The first respondent alleged that the last time that the deceased was at home with her was 22 October 2017 in order to give her money for her birthday. The first respondent attached a confirmatory affidavit from her neighbour, Sandra Doyle, who confirmed that the deceased came to the first respondent every second week-end. The first respondent stated that she had no knowledge of Ndlovu and trusted the deceased while he worked in Groblershoop. In a replying affidavit, the applicant admits that the deceased had met the first respondent by chance when he was in Kimberley. A confirmatory affidavit by Ndlovu is attached. The circumstances of the meeting are set out in the two affidavits. On 21 and 22 October 2017, the deceased and Ndlovu went to Kimberley to visit her family, which they occasionally did. During these trips, the deceased was never away from Ndlovu for more than an hour. Hence, the deceased spent every week- end with her, never went to the first respondent every second week -end, nor did he visit her on 21 October 2017. On that day, the deceased went to run some errands and met the first respondent in a shop by chance. During this meeting, the deceased discussed finalising a divorce with the first respondent. The content of this discussion is confirmed by the deceased's aunt, Mrs MJ Ludick, as the deceased relayed the conversation to her. The conversation is further confirmed by Mr Rodgers, who was present at the time of the conversation.

11. The first respondent further states that the deceased had expressed a wish to her to be cremated. She was, however, not satisfied with this arrangement and intends to bury the deceased. She also denied that the deceased had ever expressed his intention to be buried from his grandfather's house. The first respondent attached an affidavit from the grandfather, Dawid Ludick, dated 03 November 2017 *("the second affidavit"*), wherein the grandfather expresses the wish to bury the deceased from his home in Wegdraai as follows:

"... Dit is my verlang dat hy uit die huis begrawe word omdat die hele familie in Wegdraai begrawe is. Ek verwittig ook dat hy voor sy heengaan gevra het dat ons hom uit die huis moet begrawe."

12. The grandfather, Dawid Ludick, deposed to a third affidavit attached to the replying papers, wherein he confirms that it is indeed his wish that the deceased be buried from his home, but that it was also the deceased's wish.

13. The first respondent states that the deceased did not have a meaningful relationship with the applicant. In her replying affidavit, the applicant denies this. The applicant intimated that, to the contrary, the deceased and Ndlovu cared for her when she was ill. The first respondent averred that she does not know the pastor, Mr Pretorius and denied that those were the deceased's wishes as relayed by the pastor.

14. The first respondent contends that, as the legally married spouse of the deceased, she had the right to bury him Kimberley at a date and venue of her choosing. The first respondent lodged a counter-application to this effect.

15. A brief mention needs to be made of an unsigned divorce summons dated February 2016 which was attached to the replying affidavit. Ndlovu had fortuitously discovered this summons on the deceased's computer on the day that the affidavit was to be filed. I do not intend to attach much weight to the summons or deal with it any further.

16. The issue to be determined is whether the first respondent is entitled to bury the deceased or whether the applicant has proven his express wishes to the contrary. Linked to this determination is whether the deceased and first respondents' marriage had deteriorated, as this will show whether the first respondent was privy to the deceased's wishes.

17. The case law has developed over the years regarding burial rights. Two main themes have developed, mainly that the heir has the right to decide on the issue of

burial, barring express wishes to the contrary; or the principles of fairness are to be followed. In my view, the first approach is correct but fairness is inextricably linked to the adjudication of such matters.

18. The leading authority on this matter is ***Voet***[1], who wrote that the right to bury should follow, first the deceased's preference (whether in a will or not); second, if there are no such instructions, the testamentary heirs have the right to bury; thirdly, if there is no will, the intestate heirs in order of succession have the right to bury the deceased; and fourthly, if there are no intestate heirs, the magistracy must decide.

19. The principles set out above were applied in a number of cases. A case in point is ***Mnyama v Gxalaba & Another***[2]. In that matter, the applicant alleged that it was his right as the intestate heir of the deceased to bury the deceased. The second respondent, however, maintained that she had the right to bury the deceased in terms of oral wishes expressed by the deceased. The Court held that evidence of a man's state of mind could be tendered by way of hearsay evidence[3]. The Court further held that the applicant is entitled to bury the deceased, as the second respondent's evidence of the alleged wish was not sufficiently cogent and the application could not succeed.

20. In ***Sekeleni v Sekeleni and Another***[4], the Court relied on the principles set out by ***Voet*** as above. In the ***Sekeleni*** matter, the deceased had been married in community of property to Mrs L Sekeleni. After the dissolution of his marriage until his death, he resided with Ms Ntlonze but was never formally married to her. The deceased died intestate. The deceased's children, as his intestate heirs, sought to bury the deceased. Shortly before his death, the deceased made his wishes known regarding his burial in a written document handed to Ntlonze. The court held that the deceased's express wishes are to be given effect to, irrespective of whether they are contained in a will or not. Such wishes may even be verbal.[5]

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[1] *Commentarius ad Pandectas (Gane's Translation) 11.7.7.*
[2] [1990] 3 All SA 1042 (C).
[3] Mnyama v Gxalaba supra at 1043 and 1045.
[4] 1986 (2) SA 176 (TkS).
[5] Sekeleni v Sekeleni *supra* at 179.

21. In ***Mahala v Nkombombini***[6], the Court held that when considering who should bury a deceased, there are no "*hard and fast rules*" and that each case should be decided on its own particular circumstances. Common sense should also dictate the decision of the Court, which includes practical considerations.

ANALYSIS

22. Ms Stanton, for the applicant urged the Court to confirm the interim order in light of the express wishes of the deceased conveyed to members of his family and Ndlovu. She argued that the marriage between the deceased and first respondent had disintegrated. Mr Jankowitz, for the first respondent, argued that ignorance on the part of the first respondent of the relationship between the deceased and Ndlovu, did not amount to the assumption that her marriage was in trouble. He was hard pressed to explain why Ndlovu was registered as a beneficiary on the deceased's medical aid and pension fund.

23. What swayed me, however that the deceased and first respondent's marriage had broken down was the deceased's answers filled in on a loan application form. On the form where he is to complete his marital status, he stated that he is married in community of property and in parentheses says "*separated*". Where he is to provide the details of his spouse, he inserts Ndlovu's name. I am satisfied that this is indicative that the deceased and first respondent's marriage had broken down. Under those circumstances, I am persuaded that the applicant and Ndlovu would have known the deceased's last wishes he expressed concerning his burial.

24. Although the first respondent, as the heir to the deceased's estate, has a strong claim, it was countered with affidavits from various people concerning the deceased's wishes. Even if one could find some ulterior motive in their allegations, no ulterior motive for the pastor making such statements is given. Ms Stanton argued that the grandfather, Dawid Ludick, expressly stated in his second and third affidavit that, although it was his wish for the deceased to be buried from his house, it was

[6] Mahala v Nkombombini 2006 (5) SA 524 (SE) at 528G-529G.

also the deceased's wish. This is evident from a plain reading of the second affidavit by the grandfather.

25. In the matter of ***Plascon Evans***[7], the Court held that where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. The Court further held that where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. The Court went on further to state at an extract of 634I to 635D:

> *"The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."*

26. I am satisfied to proceed on the correctness of the applicant's factual averments, as the deceased's wishes were express, cogent and supported by a number of confirmatory affidavits. In line with the above case law, I also accept these wishes, even though they were made verbally. The first respondent's version in the papers is implausible and untenable and stands to be rejected. She had not availed herself of the right to apply for the applicant to be subjected to cross-examination. By implication, the confirmation of the *rule nisi* disposed of the counterclaim.

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[7] Plascon – Evans Paints Ltd v Rieberck Paints (Pty) Ltd 1984(3) SA 623 at 634 D-F

27. The first respondent was aware that costs are sought against her in the event of opposition. She nevertheless proceeded with the opposition. There is no reason why costs should not follow the result.

For the reasons above, the following order was made on 10 November 2017:

1. The rule nisi granted on 06 November 2017 is confirmed.

J.A SNYDERS
ACTING JUDGE

On behalf of Applicant: Adv A Stanton (Elliot & Maris Attorneys.)

On behalf of Respondent: Adv D Jankowitz (Gary Botha Attorneys)