(13)

IN THE SUPREME COURT OF TRANSKEI
(GENERAL DIVISION)

In the matter between: Case No.:1420/92

GRACE PETER APPLICANT

and

NOMAWELE KATIYA FIRST RESPONDENT
CILIWE FUNERAL UNDERTAKERS SECOND RESPONDENTF

JUDGMENT

PICKERING, AJ. : One Samuel Peter died on 15 September 1992 at the age of 62 years. On 23 September 1992 the Applicant launched an urgent application before this Court for certain relief and a rule nisi was issued by Hancke J calling upon the Respondents to show cause why :

"1. the First Respondent and all persons acting under his authority should not be ordered to refrain from removing the deceased body of Samuel Peter from Ciliwe Funeral Undertakers, Butterworth;

2. the Second Respondent should not be interdicted and restrained from handing over the deceased body of the aforesaid Samuel Peter to First Respondent and all persons acting under his authority;

3. the Second Respondent should not be directed to hand over the deceased body of the aforesaid Samuel Peter to Applicant;

4. the First Respondent or all persons acting under his authority should not be ordered to return Applicant's Insurance Book and the death Certificate of the aforementioned Samuel Peter to Applicant;

5. the First Respondnt should not be ordered to pay the costs of this Application."

It was ordered that the order should operate as an interim interdict.

This is now the return date of the rule nisi and a decision is called for urgently as both the Applicant and the First Respondent intend to hold the funeral of the deceased tomorrow in the event of their being successful in this application.

Applicant's founding affidavit was somewhat sketchy. She alleged that on 12 January 1954 she married the aforesaid Samuel Peter (hereinafter referred to as "the deceased). After his death his body was taken to the premises of Second Respondent, although she does not state by whom this was done. She made arrangements for the funeral to be held on 4 October 1992 and has expended a considerable amount of money towards these arrangements.

She then states as follows :

> "At the time of his death the deceased had an affair with one Nomawele Katiya, whom he often visited."

In consequence of information received by her from Second Respondent and others to the effect that Nomawele Katiya, the First Respondent, was also making arrangements for burying the deceased and had in fact set 26 September 1992 as a date for the funeral, she approached this Court as a matter of urgency for the relief set out above as she wished to bury the deceased at her own home. She averred that First Respondent was in possession of the Insurance Book and the death certificate of the deceased and that she needed these documents in order to enable her to attend to the funeral.

First Respondent, in her answering affidavit, alleged that she had married the deceased according to customary law in December 1968 whereafter she had lived with him and his parents at their home. After the deceased had been allocated his own homestead allotment they had built a house thereon and had lived there together as man and wife from 1978 till his death. Whilst admitting that Applicant had married

deceased in 1954 she averred that "for all practical purposes that marriage was dissolved " when the deceased married her in 1968. She took issue with Applicant's averment that she had merely had an affair with the deceased and that he merely visited her and she alleged that they were in fact husband and wife and were known as such by the whole community. She attached to her affidavit an extract from her travel document reflecting her surname as "Peter" and not Katiya as well as her salary advice from her employer, Transkei Government, made out in the name of "Peter". She concluded by saying that she had looked after the deceased throughout his illness; had taken him to Frere Hospital in East London and had looked after him at home during his last days. Applicant, according to her, never came anywhere near him at that time and, in her words, "he died in my hands."

An affidavit by one Alice Mbeki, the sister of the deceased, was filed in support of First Respondent's opposition to the application. According to her the marriage between the deceased and Applicant had never been a happy one for various reasons including Applicant's level of education and they had lived apart for years before 1968 when the deceased married First Respondent and since that date as well. First Respondent's brother, Phalo Katiya, alleged in his affidavit that 8 head of cattle had been paid to his late father as lobola for First Respondent in 1968 and that from that date First Respondent and deceased had lived together as man and wife.

A somewhat different picture emerges from Applicant's replying affidavit to that drawn by her in her founding affidavit. Whereas the impression conveyed by her in the founding affidavit was that at the time of his death she was living with the deceased as husband and wife and that he would often visit the First Respondent with whom he was having an affair, it became clear from the replying affidavit that this impression is far from correct. The Applicant now conceded that deceased's relationship with First Respondent commenced in at least 1965. She conceded further that deceased built, what she termed a separate homestead, where he accommodated the First Respondent and by whom he in fact had 4 children. She also stated, significantly, that since 1980 "it became deceased's pattern of life to stay with the First Respondent but he would sleep at my homestead (built by him) frequently" and "I grew my children in a separate homestead until the deceased met his

death." Applicant denied further that her marriage had for all practical purposes dissolved in 1968 as alleged by First Respondent and pointed out that since then she had given birth to a further 3 children of whom deceased was the father, the last child being born in 1979. That deceased was the father of these children has not in any way been disputed by the First Respondent and it must accordingly be accepted that in making the allegation in her answering affidavit concerning the practical dissolution of deceased's civil marriage in 1968 the First Respondent was also being less than frank with the Court. Applicant also denied that the deceased and First Respondent had entered into a customary marriage, stating that she would have been aware thereof had any traditional ceremony occurred. She dismisses the travel document and salary advice of First Respondent as evidence of "clandestine attempts by First Respondent to pose to the public as a lawful wife of the deceased." An affidavit by her eldest son, Mbolekwa Peter, was filed in which he stated that as sole heir of the deceased he was entitled to make the funeral arrangements in respect of his father and that he supported the Applicant's application. Applicant relied also on an affidavit by Chief Sigcau who stated that although the deceased used to stay with First Respondent he was nevertheless married to Applicant who was regarded by the community and authorities at Idutywa as the only wife of the deceased.

First Respondent then sought and was granted leave to file a supplementary affidavit in which she referred to the fact that in 1961 deceased had instituted divorce proceedings against Applicant and had gone to the extent of obtaining a restitution order against her. The Particulars of Claim and Court Order dated 2 June 1961 were annexed. Although nothing was said in the affidavit as to what transpired after the granting of the restitution order it was common cause at the hearing of the application that for whatever reason the deceased had not persisted with his action for divorce and that his marriage to Applicant in fact still subsisted at the time of his death. It seems to me that these documents are in any event irrelevant. Whatever happened in 1961 and however strained the relationship between deceased and Applicant may then have been the fact remains that the divorce action was not proceeded with and the parties thereafter became reconciled to the extent that they had three further children. I will accordingly attach no weight thereto.

In the supplementary affidavit First Respondent referred also to the Insurance Policy mentioned in the rule nisi and explained that the Policy had been in the possession of the Funeral Undertakers hence the delay in submitting it to Court. This Insurance Policy was by consent handed into Court as an exhibit. The Policy, No. 5022094 taken out by the deceased during November 1980, is a "Metropolitan Home Service Funeral Policy." In terms thereof the assured lives were those of the deceased and his spouse named in the schedule. First Respondent's name appears in the schedule as deceased's spouse. The Policy provides, inter alia, that on the death of an assured life the Insurance Company would pay the costs of the funeral services to one of its undertakers up to a maximum of the sum assured. If the sum assured exceeded the costs of the funeral service the balance would be paid to the survivor of either the assured or his spouse.

At the hearing of the application Mr Dukada for Applicant submitted, with reference to the Marriage Act No.21 of 1978 (Transkei), that the relationship between the deceased and First Respondent was an unlawful relationship, not enjoying legislative recognition. His argument can be summarised as follows : At the time of the consummation of the alleged customary union between deceased and First Respondent in 1968 the Marriage Act No.25 of 1961 governed the law relating to marriages in Transkei. Polygamous marriages were prohibited as being contra bonos mores and no provision for such unions was made in the Act. The purported customary union between First Respondent and deceased was therefore nothing more than an adulterous relationship. Mr Dukada referred further to section 2(2) of the Marriage Act no.21 of 1978 which reads as follows :

> "Any conjugal relationship entered into before the commencement of this Act which in terms of any repealed law was an unlawful relationship but which in terms of this Act would have constituted a lawful customary marriage if this Act had applied, may, if such relationship subsisted immediately before the commencement of this Act, be registered as a customary marriage in terms of this Act and upon such registration such relationship shall be deemed to be a customary marriage and the children born of such relationship shall be deemed to be legitimate children."

He submitted that the First Respondent had never alleged that her unlawful customary union with deceased had been registered in terms of the Act and that it could not therefore be deemed to be a customary marriage. Accordingly the relationship remained an unlawful one and First Respondent had no locus standi to oppose these proceedings and no right in law to bury the deceased by virtue merely of that relationship with him.

In the course of argument Mr Koyana for the First Respondent was constrained to concede the correctness of this argument and to accept that the aforesaid relationship did not constitute a lawful customary marriage. It is therefore not necessary for me to deal with the various arguments raised by Applicant concerning, inter alia, the so-called clandestine attempts by First Respondent to pass herself off as a lawfully married woman. Suffice it to say that in my view the probabilities are overwhelming that the deceased and First Respondent did in fact genuinely, although erroneously, consider themselves to be partners to a lawful customary union. Mr Koyana submitted, however, that the application fell to be dismissed on a different basis. He referred to a number of judgments, which were also cited by Mr Dukada in his Heads of Argument, in which the principles that apply to an application such as the present one are set out. In particular he referred to a judgment of this court in Sekeleni vs Sekeleni 1986(2) SA 176 (TK) and to Mankahla vs Matiwane 1989(2) SA 920 Ciskei in which judgment HEATH J conveniently summarised the principles involved.

He submitted on the authority of these cases that the deceased person could appoint somebody to attend to his funeral in a document, not necessarily a will, formally or informally, and that effect should be given thereto insofar as is otherwise legally possible and permissible. He submitted that in the present case the deceased had in fact informally appointed the First Respondent to attend to his funeral and that this was evidenced by the Metropolitan Home Service Funeral Policy taken out by the deceased in November 1980 in which he named First Respondent as his spouse. He submitted that in the absence of an explicit written or verbal statement by the deceased there could hardly be better evidence of the deceased's wishes in this regard than the naming of First Respondent as his spouse in a Funeral Policy and therefore also as the person who would receive any excess amount payable

in terms of the Policy once the funeral expenses had been paid.

A Funeral Policy is not a light-hearted document and the Policy in this case is no exception. It is a sombre document, replete with lists of undertakers and references to death, funerals and cremations. It must have been a solemn reminder to the deceased of his mortality. One can imagine that at the time he initiated the policy his mind would have been concentrated as never before on the inevitable prospect of his death and the arrangements for his funeral. It is in this light that his insertion of the First Respondent's name on the policy as his spouse must be seen. It seems to me that the inference is inescapable that in so naming her he wished her also to be the person to attend to his funeral. Furthermore, when the Funeral Policy is looked at against the background of the evidence as a whole it seems in my opinion, despite Mr Dukada's strenuous argument to the contrary, that the only reasonable inference to be drawn therefrom is that the deceased did in fact wish the First Respondent to attend to his funeral arrangements. As mentioned above, the Applicant made the significant statement that since 1980 the deceased's pattern of life was to stay with the First Respondent whilst she, the applicant, raised her children in a separate homestead. Applicant's own witness, Chief Sigcau, confirms this. It was at this time, when on the Applicant's own evidence the deceased was living with First Respondent, that the deceased took out the Funeral Policy aforesaid. It does not appear either that the situation changed at all after 1980. The deceased continued living with First Respondent until his death and according to First Respondent, she was the one who looked after him throughout his terminal illness and at home during his last days. Although the Applicant in her replying affidavit states that she denies these latter allegations, that denial in my view does not bear closer scrutiny. She states that when the deceased was facing his death she was "very close" to him. She does not, however, state in what manner she was close to him. She does not state that she looked after the deceased at all during his ilness other than to mention that she went with deceased's younger brother and his wife to East London to look for herbs for him. She does not state that, contrary to what First Respondent says, it was she the Applicant and not First Respondent who attended on the deceased during his last days. Had Applicant in fact looked after the deceased during his illness and tended to him at his home during his last days it would have been a simple matter for her to

have said so instead of merely contenting herself with a bare denial of First Respondent's allegations buttressed by vague averments of the role played by her during that tragic time.

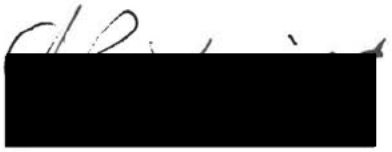
I am therefore satisfied that the Funeral Policy does constitute a clear manifestation of the deceased's wish and intention that First Respondent should be the person to attend to his funeral and I am further satisfied that deceased did not change that wish and intention in the years leading up to his death after the issuing of the policy.

That being so, effect should be given to the wish of the deceased. In the circumstances the rule nisi issued on 23 September 1992 must be discharged.

Both counsel were agreed that in the circumstances of this case it would be fair and equitable if no order as to costs were made and it seems to me that in adopting this course both counsel have acted properly. It is accordingly ordered :

"1. that the rule nisi be discharged; and

2. that each party will pay her own costs of the application."



ACTING JUDGE OF THE SUPREME COURT

Delivered this 9th day of October, 1992.

COUNSEL FOR APPLICANT : ADV N.K. DUKADA

COUNSEL FOR RESPONDENT : ADV D.S. KOYANA