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Republic of South Africa  
In the High Court of South Africa  
(Western Cape Division, Cape Town)

**[REPORTABLE]**

CASE NO. 360/16

In the matter between:

[S.....] [E.....] [W.....]

**First Applicant**

[M.....] [W.....]

**Second Applicant**

[A....] [W.....]

**Third Applicant**

**And**

[Z.....] [P.....] [S.....]

**First Respondent**

**CASLYN BAILIE N.O.**

**Second Respondent**

**WESTERN CAPE DEPARTMENT OF  
HEALTH**

**Third Respondent**

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**JUDGMENT DELIVERED ON 4 MAY 2016**

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**MANTAME, J**

## **A     INTRODUCTION**

[1]     This application for an interdict came on an urgent basis before me on 4 February 2016. The applicants, that is, the blood relatives' of the deceased brought this application on the basis that they had a right to bury the deceased who was estranged from her husband and was virtually on the eve of her divorce. First respondent, the deceased's husband opposed this application on the basis that the decision to decide the burial of his family member rests with him, as the head of the family. This is in line with the respect for his dignity and his *isiXhosa* culture, as the head of the family.

[2]     First to third applicants were represented by Mr Newton and first respondent was represented by Mr Abaas. Second and third respondents did not oppose this application.

## **B     BACKGROUND FACTS**

[3]     The deceased [N.....] [C....] [S.....] and the first respondent [Z....] [P.....] [S.....] were married to each other in community of property at Nyanga, Cape Town on 27 August 2005. They were later on blessed with two (2) children, [E.....] [S.....], a boy, who was born on 10 November 2005 and [S.....] [S.....], a boy, who was born on 17 August 2010. The deceased worked as an executive secretary at Cape Winelands District Municipality, Stellenbosch and first respondent as driver supervisor at the City of Cape Town, Solid Waste Department, Woodstock.

[4]     First to third applicants are the deceased's brothers, together with [N....] [W.....], who is the deceased's sister. This sister did not formally form part of these proceedings due to the fact that she resides in the remote part of Alice, Eastern Cape, where she was not accessible through electronic media. As a result it was not possible to cite her in these proceedings nor obtain a confirmatory affidavit from her timeously. Otherwise, it was said that [N.....] [W.....] supported this application and that was contained in a short message system (sms) she attached to the application. Since the deceased biological parents had both passed away, first to third applicants

contended that they have *locus standi* to bring these proceedings as they are the deceased's only surviving "blood relations".

[5] The deceased tragically passed away together with her two (2) children aforementioned and other two (2) relatives in a motor vehicle collision whilst travelling from her blood relatives homestead in Alice to Cape Town. This accident occurred on Saturday, 9 January 2016 near Beaufort West.

[6] As stated above, second and third respondents did not oppose these proceedings. Second respondent is the Facility Manager of the Beaufort West Forensic Services, where the deceased body was kept. This facility falls under the control of the third respondent. So the body of the deceased which formed part of these proceedings was stored by second and third respondents.

[7] The deceased and first respondent had become estranged on or about 2014. When the deceased met her death she was no longer staying with first respondent. As a result thereof, deceased had instituted a divorce action against first respondent in the Mitchell's Plain Regional Court on 6 October 2014 under Case Number: 1125/2014, as it is evident from the attached summons. First respondent initially entered an appearance to defend the divorce action, but failed to file a plea. After various efforts were made to settle the divorce action, the deceased instructed her attorney to enrol the matter on an unopposed roll for hearing on Monday, 11 January 2016, exactly two (2) days after the deceased died. That was evident on the attached notice of set down. It was stated under oath that at the time of the accident, she was travelling back to Cape Town to finalise the divorce process.

[8] First respondent denied that he and deceased had become estranged when she met her death. He stated that they had some marital problems which appeared periodically, which were not of a serious nature and never lasted for a prolonged time. He did not file a plea as there were negotiations between the two (2) of them to settle their differences and continue with their marriage. He was aware of the date of set down of the divorce proceedings on 11 January 2016 and intended to oppose the action.

[9] In fact, preceding the civil union, he and the deceased entered into a customary law union on or about 2003 in Gugulethu. This union was confirmed and celebrated by the observance of various rituals and ceremonies in accordance with the *isiXhosa* tradition. According to first respondent, he paid *ilobola* to the deceased family in instalments of R8000, R12000, R4000 and R3000 respectively. It was after the initial payment of *ilobola* that “*Kwenziwa u Tsiki*” – (“handing over a girl”). This ceremony was performed by the elder women of his family. This entails that a bride in *isiXhosa* tradition will leave her family and will be introduced to the groom’s family and his ancestors – and become part of this new family. Also this ceremony is signified by a name change. The woman remains part of the man’s family until death, even if there would be a separation between the parties. In this ceremony, the deceased’s name changed from “N.....” to “N.....”. This was the name in which the man’s family and the ancestors will recognise as she assumed her new identity.

[10] The existence of this customary law union was vehemently denied by applicants. Applicants denied further that this purported marriage was ever confirmed and celebrated by the observance of various rituals and ceremonies in accordance with *isiXhosa* tradition. What they alleged to have occurred was that, first respondent expressed an interest in marrying the deceased in accordance with customary law. As a result thereof, first respondent’s delegation approached the deceased’s family with a view to obtain the deceased’s family consent to the marriage and reaching an agreement regarding payment of *ilobola*. The negotiations were introductory in nature. Their purpose was to gauge whether the deceased’s family was amenable “in principle” to the contemplated customary union. According to the customary practice, in order to initiate the negotiations for *ilobola* the man’s family has to pay a certain token amount which is referred to as “*imvulamlomo*” – (“opening of the mouth of the bride’s family”). Likewise, first respondent paid an *imvulamlomo* of an amount of R9000.00, which according to the culture or custom is not intended or accepted to be part of any subsequent *ilobola* that may be agreed upon and paid. Its acceptance merely signifies that the deceased’s family were willing to enter into negotiations regarding payment of *ilobola*. Then the *ilobola* negotiations will then resume thereafter.

[11] Applicants asserted that after the payment of this R9000.00 as *imvulamlo*, they never heard anything from the first respondent's family. Further, there was no agreement that was ever reached regarding the payment of *ilobola*; nor any amount in respect of the actual *ilobola* was ever paid; no traditional wedding ever took place between the parties; nor was there any "*u Tsiki*" – ("handing over of the girl") that took place; and the deceased name was never changed from "N....." to "N.....". It was stated in no uncertain terms that first respondent and the deceased were never validly married in accordance with customary law. Due to the breakdown in the initial negotiations between their respective families, the two (2) parties decided on their own to get married civilly, which marriage applicants do not dispute.

[12] The deceased's attorney, David Allan John Sauls also filed an affidavit confirming that he was instructed by the deceased to prosecute her divorce action to finality as soon as possible in order to obtain the relief she sought in the prayers to her particulars of claim. Mr Sauls stated that on 8 January 2016, he telephoned the deceased in order to confirm if she will be able to attend court on 11 January 2016 to finalise her divorce. The deceased advised him that she was travelling back to Cape Town on the same weekend specifically to attend court on Monday, 11 January 2016. The relevant page of his itemised billing account was attached as proof of such conversation having taken place from his cellphone to the deceased's cellphone. Further, he confirmed that the deceased was anxious to finalise her divorce and she sent him various inquiring messages, amongst others:

"12.1 An sms on 11 November 2015 at 15H42 which read:

*"Hi D..... I tried to call u and your office : i wanted to know which date did your secretary got from court she didn't call me yesterday to inform me. Pls ask her to call me"; and*

12.2 An sms on 22 December 2015 at 05H50 which read:

*"Morning D..... did you manage to send the letter to my husband re the court date in January the 11<sup>th</sup>".*

Mr Sauls pointed out that the "letter" referred to was the Notice of Set Down of the divorce action.

[13] First applicant stated in the founding papers that when he first heard about the death of his sister, he travelled to Beaufort West Forensic Services on Monday, 11 January 2016. When he arrived at the mortuary, he met first respondent whom he was advised had already identified the body of the deceased and their two (2) children. They, together had a brief conversation where he indicated that he was amenable to the deceased's body being handed over to an undertaker or funeral service designated by first applicant and his siblings in order for them to arrange for her burial in Alice. They then agreed to meet in Cape Town the next day (Tuesday, 12 January 2016) in order to finalise the necessary arrangements in this regard.

[14] To first applicant and his siblings' great dismay, first respondent failed to attend the contemplated meeting on 12 January 2016. Instead, he sent him an sms on the same day in the evening where he informed him that he had decided the deceased and their two (2) sons' bodies would all be buried in first respondent's family burial grounds in Steynsburg in the Eastern Cape. After this sms, it appears that all mediation efforts failed, hence applicant's approached this Court for an interdict.

[15] First respondent denied that when they met at the state mortuary, applicants ever stated their intention to remove the deceased's body and bury her in Alice was based on deceased's wishes.

[16] The urgency of the matter was not contested, as all parties agreed that the body of the deceased has been lying at the mortuary for too long and has to be buried.

## **C     ISSUES IN DISPUTE**

[17] This Court was called upon to decide this urgent interdict in the circumstances of this matter, and further based on which party had a right to bury the remains of the deceased.

## **D     ARGUMENTS BY BOTH PARTIES**

### *Clear right*

[18] Applicants submitted that they have a clear right to be authorised to bury the deceased as on numerous occasions whilst she was still alive, she informed first applicant and her siblings that she wished to be buried in Alice and further that her siblings should attend to her funeral arrangements should she die. In addition, she was in the process of severing all ties with her husband, as she was only two (2) days away from the decree of divorce being granted by a competent court when she met her death. In any event she was long estranged from her husband and taken up residence with her uncle in Macassar, where she continued to reside until she met her death. She was only legally married on paper and was left with obtaining a decree of divorce in order to sever all ties with her husband completely. Given these circumstances the applicants and the deceased's sister are the sole surviving "blood relations" of the deceased, who have a right to bury the deceased and carry their sister's wishes through, and inter her remains in their family burial ground in Alice, in the Eastern Cape.

[19] First respondent argued that the evidence regarding the deceased's wishes amounts to hearsay, and he was never informed by the deceased of such wishes.

[20] It is therefore common knowledge and accepted practice that the decision to bury a family member is a family decision that is made by the head of the family. First respondent stressed that he is the head of the family. Even if they were to separate or were separated, the deceased would have to be buried next to him, as long as she had not married. According to first respondent's culture, if a deceased is not buried in the correct place, this will have an impact to those who are still alive. He had already had a dream wherein the deceased asked him "*Why is he leaving her and that she is tired and she wants his sister to come and get her.*" Further, in *isiXhosa* culture, it is bad luck and evil omen that ancestors are buried in different places. One should visit the graveyard in order to give respect and honour to the

ancestors. This requires all of them to be buried in the same burial grounds to ensure good luck and prosperity to those who honour the ancestors.

Reasonable apprehension of irreparable harm

[21] It was applicant's argument that there is a reasonable apprehension that the first respondent would bury the deceased in his family grounds in Steynsburg, against her wishes should the relief sought not be granted. If such were to happen, the deceased's wishes will in all probability be negated; since it would be very difficult for the first applicant and his siblings to procure the exhumation and reburial of her remains in Alice.

[22] First respondent contended that it would be undignified for him to have his children buried in one place and his wife at another, when they all died together – and this all happened whilst he is still the husband of the deceased. The period after the death of a family member would set into motion a mourning period of one (1) year called “*ukuzila*”, and this mourning period culminates in the ceremony of the slaughtering of a sacrificial animal for the deceased and the cleansing of the kraal. The ceremony cannot be performed if the deceased is buried in grounds other than first respondent's family grounds. Part of first respondent's culture is that the husband must be buried next to the wife and that the children be buried along the same line in the burial grounds. If applicants would be successful that would mean that their children will not be buried next to their mother. It is first respondent's belief that the deceased will never rest, and that will affect the living if she is not buried in his family ground and next to her children.

No alternative remedy

[23] First applicant and his siblings were then left with no option or alternative remedy but to approach this Court for relief, in light of first respondent's assertion aforementioned, and having unilaterally and despite his earlier assurances to the contrary, he decided to arrange for the deceased to be buried in his own ancestral grounds in Steynsburg against her express wishes.



## E LEGAL FRAMEWORK

[24] Mr Newton for the applicants submitted that according to LAWSA, Volume 32 (2<sup>nd</sup> edition) at paragraph 221 General, it was stated:

*“The right to bury a deceased is sometimes controversial and the courts did not always follow a similar approach in solving the problem before the court. Some courts took customary law practice into account, while others applied the Roman – Dutch law principle that the heir has the right to decide on the issue of burial of the deceased. The Transvaal courts on the other hand, followed the principle of fairness.”*

It was submitted that the relevant authority in this matter is **Trollip v Du Plessis 2002 (2) SA 242 (W)**, where the circumstances are similar. Applicant, the surviving spouse of the deceased applied to Court for an order terminating the involvement of the first respondent, the deceased eldest daughter and the applicant’s stepchild in the deceased’s funeral. The applicant’s contention was that he as the deceased’s spouse had the ‘paramount right’ to decide on the funeral. The applicant relied on the series of Eastern Cape decisions in which it was held that the heirs had the final say. This approach differed from the one that was followed in the Transvaal, where it was held that fairness in particular circumstances of the case was decisive, and that a claim could not be evaluated according to the mathematical proportions of heirship. It appeared from the evidence that an aunt of the deceased, and a brother, had been present at the time of the deceased’s death, and that they had made the funeral arrangements without consulting the applicant, who had not been present at the time. The applicant intended to hold the funeral at his home and through a different church than the one to which the deceased and her family belonged. No last will was proved. The Court held that the approach adopted in the Transvaal had to be followed, which would have the effect of tilting the balance in the respondent’s favour, since the applicant had not been present when the deceased died. Respondents had incurred expenses in preparation for the funeral. The court held that it was within the bounds of reasonable fairness to respect the wishes of the

deceased, whether expressed in a testament or not. If no such preference was expressed, resort could be had to the heirs. It was not necessary for the deceased to have expressed an instruction as opposed to a preference before it was decided what would have caused offence. In this context, it counted in respondent's favour that the deceased had been a member of the church from which they intended burying her. If applicant were to be successful the funeral would be held in an unfamiliar venue and church. The applicant also never averred that he would suffer emotional trauma in respect of the respondent's plans for the funeral. In the final analysis the court held that if regard were to be had to the numbers, it would become clear that the deceased's children were more numerous than the single person on the applicant's side. The application was accordingly dismissed.

[25] So, according to applicants, given the set of circumstances in Trollip (*supra*) and the instant matter, the Transvaal approach which looks at common sense and fairness should be adopted and the right to bury the deceased be afforded to the applicants. In **Finlay and Another v Kutoane 1993 (4) SA 675 (W)**, it was held that:

*“Also in deciding between competing persons, the law should ideally mirror what the community regards as proper and as fair. That perception will be partly the result of views on social structures, mainly of family relationships and marriage, and on the vesting of authority and the finality of decisions. There may be views about the impropriety of not complying with requests of the deceased. Religious views, cultural values and traditions may play a role.”*

Besides, many of our courts have relied on Voet's approach when dealing with the right to bury which is directly linked to the Transvaal approach. Applicants referred this Court to an extract from “The Selective Voet being the Commentary on the Pandects [Paris Edition of 1829] by Johannes Voet [1647 – 1713] et al Translated by Percival Gane Volume Two, 1955” where it was stated in Section 7 –

**Person chosen by deceased must bury:-**

*“A funeral besides must be carried out by him whom the person departing this life has chosen ... [but]...*

**Who may bury if non chosen?**

*If the deceased did not impose the duty of burial on anyone, the matter will affect those who have been named in the last will as heirs. If no one has been so named, it affects the legitimate children or the blood relations, each in their order of succession. If they are also wanting, it is the duty of the magistracy to take care that the deceased is buried out of his own money or property. Nay, indeed anybody to whom the funeral does not properly fall, however complete a stranger, can carry out the funeral, so that dead bodies may not lie unburied; and he will be able to reclaim his expenses in a funerary action, lest a person be buried out of the funds of another.”*

It was therefore applicant's argument that the deceased in this matter had no will or testament on how she intended to be buried. She only expressed her wishes to her siblings that she wished to be buried in Alice in her family burial grounds. That is evidenced by the fact that shortly after she filed her divorce summons, she started building a house in her rural village in Eastern Cape. Even by the time she met her death, she was travelling from the same rural village. Also, she was no longer living with her husband as they were estranged. She was residing with her uncle in Macassar when in Cape Town. The deceased's other intention of wanting to sever ties completely with her husband can be seen in her particulars of claim (divorce summons) where she sought to divide their joint estate on the basis that first respondent would keep their property in Steynsburg (where he is from, and where he wishes to bury her) and the deceased would keep their property in Macassar, Khayelitsha as she was paying the bond. Each party was to keep the car he / she were driving and their respective pensions and so on. It was therefore submitted that the willingness on the part of the deceased to relinquish the property in Steynsburg admits no interpretation other than that she wished to sever her ties with the first respondent and his family in Steynsburg.

[26] It was applicants further submission that, it might be so that first respondent is the husband and heir that has a right to decide on the issue of burial of the

deceased, but the facts of this case should be distinguishable from others. The marriage was only on paper. The deceased was on the doorstep of divorce when she met her death and her wishes were expressed in the divorce summons and to her siblings. The deceased had nothing to do with first respondent. She had reverted back to her birth family. In all fairness and common sense the deceased's sole surviving "blood relations" should be entitled to bury her remains in her own family grounds.

[27] Mr Abaas for the first respondent submitted that the deceased's wishes are hearsay, and that was conceded by the applicants. When first respondent met with the first applicant at the state mortuary, at no stage did any of the applicants ever state that their intention was to remove the body of the deceased and bury her in Alice, based on the deceased's wishes. The reliance on unproven wishes was dismissed in several cases involving the right to bury – See **Human v Human 1975 (2) SA 251 (ECD); Saiid v Schats 1972 (1) SA 491 TPD et al.** It was respondents' argument that this Court should consider the allegations of the deceased's wishes and accept that it can be followed, but first, it should meet the test of being accepted as admissible hearsay evidence. In the current circumstances there is no way that this hearsay evidence should be declared admissible. Even if this Court were to accept that this hearsay evidence is admissible, the deceased equally expressed wishes to the first respondent to be buried in his family next to her children and husband. This therefore creates a dispute of fact regarding the deceased's wishes.

[28] Be that as it may, it was argued by Mr Abaas that the deceased died intestate and left no descendants other than first respondent who is the sole heir of the deceased estate. If a deceased died intestate, she is survived by the spouse. For instance in **Tseola and Another v Maqutu and Another 1976 (2) SA 419 at 422**, the court held that where the deceased had given no testamentary directions, the heir had a duty and right to bury the deceased. Further, as the first respondent has alleged that there was a customary union, which the applicants deny, if this Court find that there was such union would have customary law consequences that would be instructive in deciding where the deceased should be buried in the absence of directives. It was argued further that in **Mabulu v Thys and Another 1993 (4) SA 701 (SEC) at 702**, where the court recognised that an heir to an estate in terms of

*isiXhosa* tradition would be entitled to decide where the body of the deceased should be buried in the absence of specific instructions by the deceased.

[29] It was also disputed by the first respondent that applicants have *locus standi* to bring these proceedings, based on the Free State Provincial Division authority **Yona v Rakotsane (unreported) Case No: 1177/2004**, where Rampai J when discussing the three part rules espoused by Voet stated “*the third rule only refers to the blood relations of the deceased as the intestate heirs.*” It was submitted that the understanding is further supported in that the learned Judge when commenting on the third rule of Voet relies on the provisions of the Intestate law. Based on this argument applicants lack *locus standi* as they are not heirs of the deceased and they have therefore failed to establish a clear right, and this application should fail.

## **F      ANALYSIS OF EVIDENCE AND THE APPLICABLE LEGISLATION**

[30] Since applicants *locus standi* to bring these proceedings before this Court has been challenged by the first respondent, it is therefore necessary to first deal with this point. Applicants brought this application on the basis that they are the deceased “blood relations.” Voet was the authority to found *locus standi* by applicants. First respondent disputed the assertion by applicants based on the interpretation that was employed in **Yona** (*supra*) by Rampai J. I turn to respectfully disagree with the interpretation employed by Rampai J of the Voet approach in relation to the “blood relations” as expressed in that matter. The interpretation employed in that judgment related to the intestate succession heir and the learned Judge even made reference to the Section 1(1)(c)(i) of the Succession Act. In my opinion, when the court is called upon to determine as to: who has the right to bury the deceased? The court should not confuse this point for determination with the law of succession, as it will end up determining issues not properly before it. In my view when Voet referred to the “*blood relations, each in their order of succession*”. He was only making reference on the order of hierarchy on which they were born, hence the Succession Act cannot find application in this category of persons in a case involving: who has the right to bury the deceased.

[31] For instance, in this matter, if this Court were to adopt the guideline as stipulated in **Voet** (*supra*), the first person who has a right to bury the deceased

would be the one mentioned in the last will as heirs. In the current matter there is no will, this scenario falls away. But due to the fact that in terms of the Intestate Succession Act, first respondent would qualify as heir. Nevertheless the intestate succession law is not mentioned in Voet's category. The second category is the legitimate children. Also this category falls away as the deceased died with her children – who in any event were minors at the time. The third category of persons is the "blood relations", each in their order of succession. If regard is had to the correct interpretation of Voet with respect to who is the deceased "blood relation" – applicants qualify as the deceased blood relations. The online Free English dictionary by Farlex describes "blood relations" as a plural noun – meaning "*a person who is related to another by birth rather than marriage*". First respondent does not at all fall in this category – hence this Court cannot find that **Yona** (*supra*) to be in application regarding the interpretation of "blood relations." So, in light of this analysis, applicants do have the necessary *locus standi* to bring these proceedings.

[32] When courts had to deal with burial matters and taking into account all the parties involved, it has to be cautious as these matters are sensitive in nature, because of grief, tragedy and loss of their loved one. This is evidenced by the fact that over the years, there has been a shift from the blanket approach originating from the Roman – Dutch law principle that the heir has the right to decide on the issue of burial of the deceased. This is the right that first respondent relied to in this matter. This approach did not take into account the expectations of the community; the relationship between the deceased (whilst still alive) and this heir who has a right to decide the issue of burial of the deceased and fairness and reasonableness of such decision.

[33] I turn to agree with applicants' approach as espoused in **Trollip** (*supra*) that a claim to bury the deceased cannot be evaluated according to the mathematical proportions of heirship. Hence reasonable fairness and common sense dictates that this Court should analyse the evidence before it in totality and reach a just and fair conclusion. It is common cause that first respondent was legally married to the deceased when the deceased died. That is not disputed by any of the parties. Even if he wanted to argue the principle (which I strongly disagree with) in **Mabulu** (*supra*) that *isiXhosa* tradition is applicable in the absence of any instructions to the burial,

the heir to the estate has a right to decide the issue of burial of the deceased. First respondent tried to bolster his case with the fact that he is an heir and also has an entitlement to the burial of the deceased by the mere fact that he was married to the deceased in terms of customary law. The process that first respondent took towards the conclusion of his customary union is very vague, lacks integrity and by its tone very much commercialised. It further lacks the dignity and decorum that these celebrations are accorded to this culture. The correct procedure in my view is the one that was narrated by the applicants. According to the *isiXhosa* culture, one does not readily pay instalments of “*ilobola*” without the preliminary procedures which are preceded by “*imvulamlomo*”, and also some small tokens of appreciations normally given to the elderly women for raising the child until she attained the marriage stage are concluded. Besides, even if the stage was reached when *ilobola* negotiations had resumed – and the money was paid, such money is never referred to as “instalments”, such money is traditionally referred to as “cows” or “*iinkomo*” – the whole process by first respondent lacks cultural dignity, hence I turned to refer to it as commercialised. The way applicants narrated the fact that first respondent only showed an interest and his intention to marry the deceased and thereby paid an “*imvulamlomo*” and never returned, made sense to this Court, as is normally the preliminary procedure. After the preliminary procedure aborted, they went to marry civilly where there would not be so many traditional formalities. Also, the process as referred to by first respondent of “handing over of the girl” is totally flawed and inconceivable, as the girl is never handed over without the groom being welcomed by the girl’s family. First respondent seemed to have little or no understanding of the *isiXhosa* culture. In his explanation he was vague, mixed up the customary law processes, and this does not give credence to his claim of his conclusion of a customary union with the deceased. This contention that he concluded a customary union with the deceased has to be rejected outrightly.

[34] First respondent rejected the contentions by the first applicant that when the deceased died, she was no longer living with him as husband and wife; the parties had been estranged for more than a year; and the deceased had taken up residence with her uncle in Macassar; the deceased was in the process of reverting back to her birth family permanently and as a result thereof, she was in the process of building a house for herself in Alice where she wanted to be buried should she die; and that the

deceased was so anxious to see the divorce being finalised and further that she was travelling to Cape Town to have her divorce finalised when she met her death. In rejecting these contentions, first respondent did not furnish evidence to the contrary, other than a bare denial.

[35] Applicants on the other hand, furnished proof in the form of divorce summons, sms's between the deceased and her attorney facilitating the process of divorce; notice of set down showing that indeed the deceased was travelling from the Eastern Cape on Saturday 9 January 2016 to be on time for the divorce proceedings on 11 January 2016. Judging from the totality of this evidence, the deceased was in the process of severing ties with the first respondent. If for instance, they were staying together as husband and wife all the time, and with minor conflicts why would the deceased send an sms to her attorney on 22 December 2015 asking if the "letter" (notice of set down) was sent to her husband notifying him about the court date in January 11. That on its own is a true indication that the deceased did not know about the everyday affairs of the first respondent. If at all they were all living together, had minor conflicts and talking to each other, the deceased would have asked him personally if he received the letter. Besides if all was well in their household, there would have been no reason for the deceased to proceed and be anxious to finalise the divorce action.

[36] Also, it does not make sense for first respondent to state that the deceased wished to be buried in Steynsburg next to her children and husband, whereas she stated in her particulars of claim in the section dealing with the division of assets that first respondent should keep the Steynsburg house and she will keep the Macassar house as she is paying the bond. This division of joint assets that was prayed for by the deceased does not suggest that she has intention to later on be laid to rest in Steynsburg.

[37] Besides, how could the deceased have known that she would die on the same day with her children, for her to leave a wish that she wishes to be buried next to her children. This assertion by first respondent cannot hold. On the other hand, the deceased's actions prior to her death points to one direction, that she wanted to revert back to her birth family. That was also confirmed by the deceased's siblings



that she was also building a house in her rural village in Alice, so as to be buried there. The inference to be drawn by this Court is that the deceased wanted to be with her birth family. It might be so that there were no specific instructions or wishes that were reduced into writing by the deceased in the form of a will or testament, therefore all this information is hearsay evidence. I agree that this is hearsay evidence. The actions of the deceased when she was alive at least give credence to this hearsay evidence. In any event, African people in general, are well-known for not writing down their last wills and testament. They always believe in their expressed dying wishes. This burial wish is not abstract from the members of this population – the dying wishes are said sometimes in gest all the time. But in this scenario, this Court will therefore accept this hearsay evidence as admissible, given the totality of evidence presented to this Court supporting the said hearsay evidence.

[38] Besides, the deceased, by her actions disassociated herself from first respondent whilst she was still alive. It is unheard of that a person who was severing her ties with her husband would now be claimed to be the husband's ancestor when she is no-more. In fact, the fact that first respondent agreed that applicants could bury the deceased when they met for the first time at the mortuary on 11 January 2016, was a realisation from his side that in any event, nothing was left from his civil union with the deceased, as they were two (2) days away from divorce when the deceased met her death. It appears that he reneged from this stance after consultation with other members of his family.

[39] Even if first respondent could be said to be the heir according to the Roman-Dutch principle, in my view, he failed to act like one. He failed to protect the interests of the deceased whilst still alive and she ended up fleeing her marital home. Due to the status accorded to the heir, his rights must not only come into fore when he or she stands to benefit, his rights must also come with responsibility. First respondent has not demonstrated sufficiently that he is responsible enough to be the heir to decide on the issue of the burial of the deceased. In any event, first respondent was only left with two (2) days as "heir to the deceased estate" before she met her death. In my view, despite their marriage regime, and the consequences flowing from the Intestate Succession Act – the scales tilt heavily to the deceased "blood relations."

[40] I re-iterate that in all probabilities, the scales tilt to the Voet's third approach that "blood relations" may bury the deceased if none is chosen. Applicants have demonstrated that the expectations of the community, fairness and reasonableness dictate that they should bury the deceased. The heir, who had no relationship with the deceased, cannot be expected to give the deceased a decent funeral as it would be the case with her "blood relations". If the deceased wanted to be rid of her from the first respondent whilst he was still alive – what would then convince this Court that she wanted to be laid closer to him when he is no more. Judging from the past two (2) years in which first respondent lived with the deceased, fairness is decisive that applicant's case succeed.

[41] This Court is satisfied that applicants have made a proper case for the grant of an interdict.

[42] In the result, I therefore grant this order:

- 42.1 First, second and third respondent are directed to release the body of NOSIPHO CYNTHIA SILWANA (with ID No: 79.....), the deceased into the custody of the first applicant or such funeral parlour or service, subject to all of the second and third respondent's further requirements having been met (including payment of any storage or any other fees that may be due to it) at the time of such release;
- 42.2 First applicant is directed to arrange for the deceased's remains to be interred at Alice in the Eastern Cape;
- 42.3 First respondent is ordered to deliver the deceased's identity document, together with any further documents that may be relevant to her funeral, such as funeral insurance policies and schedules to the first applicant forthwith;

42.4 First respondent is ordered to pay costs of this application.

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**MANTAME, J**  
**WESTERN CAPE HIGH COURT**