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

**CASE NO: 025138/2023
NOT REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED**

In the matter between:

MAPHETHI MARIA KEKANA

Applicant

and

PUMZA NONTOMBEZO ALINA KEKANA

First Respondent

VUYO FUNERAL SERVICES

Second Respondent

**ANY PERSON ALLEGING HIMSELF/HERSELF
WITH THE RESPONDENT**

Third Respondent

Neutral Citation: *Maphethi Maria Kekana v Pumza Nontombezo Alina Keka and Others* (Case No: 025138/2023) [2023] ZAGPJHC 327 (11 April 2023)

JUDGMENT

MAKUME J:

- [1] This matter served before my brother Randera AJ on the 17th March 2023 in the urgent court on which day it was stood down by agreement between the parties to Thursday the 23rd March 2023 to enable the Respondents to file their Answering Affidavit.
- [2] In the application the Applicant seeks the following relief:
- 2.1 That the customary marriage entered into between Maphethi Mariam Kekana and the late Lesiba Piet Kekana on the 7th June 1966 at Makhutji Section Ga-Sekororo Village, Limpopo Province be declared legally valid and enforceable.
 - 2.2 That the marriage relationship allegedly entered into between first Respondent and the late Lesiba Piet Kekana during 1992 be declared null and void.
 - 2.3 That the second Respondent be interdicted from releasing the body of the deceased Lesiba Piet Kekana to anybody except to the Applicant.
 - 2.4 That the Applicant be authorised to take possession of the body of the deceased wherever it may be.
- [3] At the commencement of the hearing before me I indicated to Counsel on both sides that in view of the dispute of fact concerning the two marriages I will not be able to make any ruling or findings as which of the two marriages is valid as that will have to be decided at another forum. I directed the parties to address themselves on the issue of the right to bury on the presumption that both marriages exist side by side.

- [4] The deceased Lesiba Piet Kekana born on the 25th May 1944 concluded a marriage by customary rights with the Applicant on the 7th June 1966. She had eight children with the deceased.
- [5] During or about the 17th August 1992 he concluded a marriage by civil rights with the first Respondent in Johannesburg. She had 3 children with the deceased.
- [6] The deceased worked as a bus driver firstly for Johannesburg Sun and later at Megabus Tourist Tours. He and the first Respondent lived together as husband and wife at [...], Freedom Park, Soweto.
- [7] On the 10th March 2023 the deceased died in a car accident. The version of the Applicant as to what happened thereafter is simply being denied by the first Respondent without proffering a version of the events.
- [8] The Applicant says that because she is the wife of the deceased she has the right to bury him at her home in Mokopane Village where the deceased parents are also buried.
- [9] She says the following at paragraph 7.17:
“Regarding the funeral arrangements we held a telephonic conversation with the first Respondent on the 11th March 2023 and we agreed that on the 13th March 2023 they shall release the body of the deceased to be buried in Mokopane. To my surprise, I was told on the 13th March 2023 that the first Respondent intends to bury the deceased in Gauteng Province.”
- [10] In response to that direct and factual averment by the Applicant the first Respondent simply replies as follows: “The contents hereof are denied.”

- [11] De Villiers JP in **SA Railways and Harbours vs Landau & Co 1917 TPD 485 at 487** said the following:

“It is not always sufficient merely to deny any allegation of fact as it stands because the denial may involve an ambiguity. Sometimes in order to obey the rules and to deal specifically with every allegation of fact of which he does not admit the truth it is necessary for him to place on the record two or more distinct traverses of one and the same allegations.”

- [12] I must accept that the two women knew about each other despite their indifferences to this aspect. The first Respondent says that the Applicant’s children used to visit their father in Johannesburg and they knew their half brothers and sisters. In the same breath though being denied there is no way that the first Respondent can deny that she knew that the deceased had a customary law wife back home in Limpopo.

- [13] The issue of burial rights has long been a burning issue in our Courts more especially where a man had decided to get married to more than one woman. The deceased was such a person. There is no evidence that when he got married by civil rights to the first Respondent he terminated his marriage with the Applicant.

- [14] In the matter of **Thembisile and Another v Thembisile and Another 2002 (2) 209** the Court was faced with a matter on all fours with the present and concluded that the customary wife who was the Applicant in that matter retained the right to bury the deceased. At paragraph 33 of that matter Bertelsman J concluded as follows:

[33] It was common cause that if the deceased did indeed enter into a customary union with the first Respondent (an allegation which I doubt as there is no suggestion that any bride wealth was transferred to the family of the first

Respondent when this union was purportedly entered into, the existence of which is in any event in dispute upon the papers) the first Applicant rights as the first wife, and the right of her son as the first born male heir, to bury the deceased are stronger than any claims the first Respondent might have”

[15] In the result I am satisfied that the Applicant has made out a convincing case to be granted the right to bury the remains of the deceased at his ancestral place in Limpopo.

[16] I accordingly confirm the order that I granted on the 23 March 2023 which is repeated hereunder.

ORDER

1. The Respondent is hereby interdicted from burying the deceased Lesiba Piet Kekana in Soweto.
2. It is further ordered that on receipt of this order Vuyo's Funeral Services the second Respondent shall release the body of the deceased Lesiba Piet Kekana to the Applicant or to persons nominated and authorised by the Applicant.
3. The Applicant is hereby authorised to bury the body of the deceased at the family burial site in Mokopane, Limpopo Province.
4. The first Respondent and her children have the right to attend the funeral of the deceased at Mokopane, Limpopo.
5. The Applicant is further ordered to bury the deceased soon after being placed in possession of the body of the deceased.
6. Each party shall pay own costs.

DATED at JOHANNESBURG this the 11th day of APRIL 2023.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : 23 MARCH 2023
DATE OF JUDGMENT : 11 APRIL 2023
FOR APPLICANT : ADV TD LEDWABA
INSTRUCTED BY : MESSRS LEKAKA ATTORNEYS
FOR RESPONDENT : ADV GOVENDER
INSTRUCTED BY : MESSRS SMIT VN DER WATT INC.