



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 3 August 2023

Case No. 2023/071479

In the matter between:

DM

Applicant

and

B2P FUNERAL SERVICES

First Respondent

NN

Second Respondent

SN

Third Respondent

JUDGMENT

WILSON J:

1 The applicant, DM, says that he was the customary law husband of ZN. ZN died of breast cancer on 15 July 2023. She was just forty years old. No doubt numbed by grief, DM fell into a dispute with ZN's family about whether his committed and loving relationship with ZN was in fact a marriage, and about

where ZN should be buried. These are the issues that DM placed before me for determination in my urgent court during the week of 24 July 2023.

2 DM asked that I declare that he was married to ZN at customary law. He also asked that I interdict and restrain the second and third respondents, NN and SN, from removing ZN's body from the custody of the first respondent, B2P, and taking it to be buried in the Eastern Cape. It was DM's wish that ZN be laid to rest in Johannesburg, in a cemetery within what he said was easy reach of the five children he had with ZN. B2P abided my decision.

3 NN was ZN's mother. SN was ZN's sister. They strongly disputed both that DM was married to ZN, and that ZN should be buried in Johannesburg. They wished to return ZN to the family gravesite in the Eastern Cape. By the time the matter came before me, the parties were in the process of arranging two funerals – one in the Eastern Cape and one in Johannesburg. Both funerals were scheduled to proceed on 29 July 2023. Counsel for both parties agreed that, although DM claimed no more than an interdict restraining the transportation of ZN's body to the Eastern Cape, and although there was no counter-application for leave to remove ZN's body there, what I was being asked to determine was which funeral should go ahead, and where ZN's final resting place should be.

4 That the parties should have felt compelled to decide matters in this way could only have compounded their pain and grief, and that of those who knew and loved ZN. I am not one of those people, and it is, in my view, profoundly sad that it should have fallen to me to issue the decision I was called upon to make.

5 Be that as it may, on 26 July 2023, I ordered that ZN's body be returned to the Eastern Cape and buried there. I also made orders, to which NN and SN consented, directing NN and SN to take the necessary steps to ensure that DM and his children with ZN are given full and unfettered access to the funeral and to ZN's grave site, for so long as they live. I directed that the funeral in the Eastern Cape be conducted as if DM was ZN's customary law husband. I postponed DM's application for an order declaring him to be ZN's husband *sine die*. Each party paid their own costs. I indicated that my reasons would follow in due course. These are my reasons.

The law

6 Sometimes, people make detailed provision for the manner and location of their funeral in their wills. When they do not, and do not otherwise make their wishes clear, the common law provides that the right to bury accrues to their testate or intestate heirs, or, failing that, to what have been called "legitimate children or blood relations" (see *Finlay v Kutoane* 1993 (4) SA 675 (W) at 680D-I).

7 However, Judges of this Division have long been reluctant to apply this set of priorities rigidly (see *Trollip v Du Plessis* 2002 (2) SA 242 (W)). They have also, quite rightly, recognised that the common law ought not to be applied in disputes concerning a deceased individual who has arranged their affairs according to customary law, and who expects customary law to apply after their death. In the context of burial litigation, however, there are real problems with ascertaining what customary law is in any particular case, since the content of that law will generally have to be proved, sometimes by way of oral

evidence. That sort of evidence is unlikely to make its way before a court in an urgent application, which is the type of proceeding in which the right to bury is most often contested.

- 8 It appears from some of the reported cases that litigants seeking to assert burial rights often rush to court to obtain orders dealing with the deceased person's marital status at the time of their death (see, for example, *Thembisile v Thembisile* 2002 (2) SA 209 (T)). They then argue that the right to bury accrues to the customary law spouse if the marriage is proved, and to the deceased person's family if it is not.
- 9 That seems to have been the approach in *LS v RL* 2019 (4) SA 50 (GJ). However, in that matter, Mokgoathleng J declined to tie the status of the applicant's relationship with the deceased person to the right to bury them. Despite concluding that the applicant had demonstrated the existence of a customary law marriage, Mokgoathleng J found that, on the facts of that particular case, the wishes of the deceased person's spouse had to yield to a broader public and communal interest in laying to rest an individual who was apparently an important public figure. On the strength of that broader communal interest, and on the basis of a number of practical considerations he set out, Mokgoathleng J refused the spouse's application to declare that they had the exclusive right to bury the deceased.
- 10 It follows from all of this that, if there ever was a strictly enforced common law approach to the question of the right to bury a deceased person, that approach has yielded to a much supplier jurisdiction, which takes into account the wishes of the deceased person where these are known, the relationships between the

parties concerned, those parties' relationships to the deceased, broader communal and familial expectations of the grieving and funereal process, and such practical considerations as are relevant at the time the dispute about burial rights arises and is adjudicated.

- 11 It seems to me that this sort of flexibility is well-suited to decision-making in these types of cases, the aim of which must be to try to do the least harm. Ideally, a Judge should not be making decisions about how a deceased person is buried and memorialised. That is primarily a decision for those who knew and loved that person. But where a Judge must decide, it seems to me that the law ought to do no more than take into account the right sorts of considerations, and come to a decision that is likely to cause the least aggravation of grief. This approach is, I think, consistent with the constitutional requirement that the law promote the inherent dignity of all persons. In this context, that means the dignity of the living and the dead (see section 10 of the Constitution, 1996).

The facts of this case

- 12 The rules applicable to the ascertainment of relevant facts in applications for final relief are, though, a good deal less accommodating than the flexible and dignity-sensitive approach I have sketched out. This being an application for final relief, I am bound to decide the matter substantially on NN and SN's version (see *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I).
- 13 In this case, whether DM was ZN's customary law husband is hotly disputed both factually and legally. It was not disputed, however, that DM and ZN were

in a loving relationship for many years, and that they had children together. That relationship ended when ZN died. There is also strong evidence on the papers that, whatever they now say the legal situation is, ZN's family routinely referred to themselves as DM's "in-laws", and conducted themselves as if DM was ZN's husband. Against that factual background, and for the purposes of this case, I do not think that it matters whether their relationship can be recognised as a customary law marriage. DM was as close to ZN as any husband, and his wishes about where ZN should be laid to rest received as much weight in my decision-making as they would have done had I been able to conclude on the papers that he was ZN's customary law spouse.

- 14 There are two further facts that weighed with me, however. The first was ZN's wish, stated 8 days before she died, that she wanted NN and SN to take her home with them to the Eastern Cape. Both NN and SN understood that utterance, in the context, to mean that she wished to return to her familial home in the Eastern Cape to be buried. ZN was so close to death she could not have thought that visiting the familial home while she was still alive was a realistic prospect. ZN must have been referring to where she wanted her final resting place to be. In reply, DM relied on the hearsay allegation, made under oath by an employee of B2P, that one of DM and ZN's children had heard ZN say that she wanted to be buried in Johannesburg. It is not clear where, when or in what circumstances this wish was apparently expressed. Critically, DM offered no evidence of his direct knowledge ZN's wishes at all.
- 15 The second fact is that NN and SN both alleged that, after three meetings with DM to discuss the arrangements for the funeral, DM agreed that the funeral

could take place in the Eastern Cape. In reply, DM did not address that allegation, save to issue a bare denial.

16 It follows that I must accept that ZN expressed a wish to be taken home to the Eastern Cape, that this was understood to mean that she wanted to be buried in the Eastern Cape, and that DM had agreed that the funeral could take place in the Eastern Cape, after engagement with ZN's other immediate family.

17 The papers also disclose ZN's strong connections to the Eastern Cape, and her broader family's expectation that she would be buried there. There is a family plot which will accommodate her. It stood to reason that ZN's broader family would more easily be able to attend and participate in her funeral if it took place in the Eastern Cape. For his part DM did not say that he would have any practical difficulty travelling to the Eastern Cape with his and ZN's children to attend the funeral. His only concern was that ZN's family would try to exclude him. NN and SN denied this. They tendered DM's full participation in the funeral, and his full and unfettered access to ZN's gravesite.

18 On a conspectus of all these facts, I found that the balance of fairness tilted towards requiring the funeral to proceed in the Eastern Cape. I appreciate that this may have caused DM further grief and pain. However, in a case like this, my duty was to detect where the balance of fairness lay, applying the ordinary evidentiary tests. It seemed to me that NN and SN had developed sincere and keenly-held expectations that ZN's funeral would proceed in the Eastern Cape, and that they genuinely believed that this was her wish. DM presented no real evidence to the contrary. I made orders requiring that DM and his children with ZN be given full access to that funeral and to the gravesite

afterwards. I required that the funeral be conducted as if DM were ZN's customary law husband. This was, in my view, the fairest outcome possible on these facts. But I accept that "fair" does not imply "perfect".

19 For the reasons I have given, it was not ultimately necessary to determine the validity of the customary law marriage that DM alleged. This is why DM's application for relief declaring that he was married to ZN at customary law was postponed *sine die*.

20 It was for these reasons that I made the orders relating to ZN's funeral that I handed down on 26 July 2023. May she rest in peace.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 3 August 2023.

HEARD ON: 26 July 2023

DECIDED ON: 26 July 2023

REASONS: 3 August 2023

For the Applicant: M Shakung
Instructed by Ndlovu Lebethe Attorneys

For the Second and Third Respondents: F Ngqele
Instructed by Gardee Godrich Attorneys