

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

Case No: 86457/2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 7/09/2023

In the matter between:

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

First Applicant

J] M[...] M[...]

Second Applicant

T[...] R[...]

Third Applicant

D[...] K[...] M[...]

Fourth Applicant

T[...] J[...] M[...]

Fifth Applicant

and

ADVOCATE L[...] N[...] M[...]

First Respondent

BATHO BATSHO BAKOPANE (B3)

Second Respondent

SOUTH AFRICAN POLICE SERVICE

Third Respondent

MAKHUDUTAMAGA LOCAL MUNICIPALITY

Fourth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 September 2023.

JUDGMENT

CARRIM AJ

Introduction

[1] The First Applicant's daughter, Dr M[...] Y[...] M[...] - M[...], an educational psychologist died of natural causes on 16 August 2023.

[2] The Second to Fifth Applicants are members of the deceased's family or origin.

[3] The First Respondent was the deceased's spouse. The First Respondent is an officer of the court as indicated by the title of Advocate. For ease of reference, I will refer to him at times as the husband. The couple's matrimonial home is in Midrand, Gauteng. The couples' minor daughter attends school in the area. The deceased had lived and practised in Johannesburg for more than 20 years.

[4] The deceased's body was placed in the custody of the Second Respondent (B3) at its Benoni mortuary because the first applicant has had a funeral policy with B3 for the last 30 years. The husband did not have a funeral policy for the deceased.

[5] A family meeting was convened on 17 August 2023 at the matrimonial home between the families of the Applicants and First Respondent to discuss when and where the deceased would be buried. It appears that the differences between the families emerged here with the husband and his family insisting that the deceased be buried in Limpopo province and the Applicants insisting that she be buried in Johannesburg.

[6] The First Applicant alleges that the deceased had expressed to her (mother) when she was ill in hospital prior to her demise that she wished to be buried in Johannesburg. First Respondent disputes that these were the dying wishes of his wife.

[7] The discussions between the Applicants and the husband continued with what seemed to be an escalation of tensions amongst threats by him to bring an urgent application to Court.¹

[8] The Applicant's family planned to host a memorial service for the deceased on 24 August 2023 and a funeral service on 27 August 2023. The memorial service was held on 24 August 2023 in Midrand.

[9] The First Respondent maintains that at the memorial service it was announced to everyone by representatives of his family that the deceased would be buried at Ga-Marishane in Limpopo on 26 August 2023

[10] He avers that it was clear to everyone that he, the First Respondent, wished to bury his wife at his family's ancestral home in Ga-Marishane.

[11] The Applicants do not deny that this announcement was made but dispute that the representative was authorised to do so.

[12] On 24 August 2023, the Second Applicant sent a WhatsApp text to the husband in which he notes that his mother (First Applicant) had advised him that the husband had threatened to take her and the family to court. He expresses his regret that things had to come to this and asks the husband that they need to know urgently whether he was taking the matter to court. In the event that they did not receive indications from him by 8h00 on 25 August 2023, they (the Applicants) will proceed with the burial.

[13] On 25 August 2023, the First Respondent's attorneys, Makhubu Inc, directed a letter to the Second Respondent in which they state that the First Respondent is the person vested with rights to arrange and conduct the funeral of the deceased. The

¹ See CaseLines section 01-15, 01-49.

letter further states that they hold instructions to launch an urgent application to obtain an interdict against the burial of the deceased. The Second Respondent was ordered not to release the body of the deceased to anyone '*pending the outcome of the pending court proceedings*.'²

[14] The Second Respondent shared this letter with the Second Applicant and stated that their policy when there is a dispute over the corpse provides that they cannot release the body to anyone and thus stated that they will not release the body to anyone in light of the letter.

[15] However, later the same day of 25 August 2023, around 16h00, the Second Respondent contacted the first and second Applicants stating that the First Respondent together with several other people were in their offices demanding the release of the body of the deceased.

[16] From all accounts it appears that the First Respondent, together with a SAPS officer had pressured B3 to release the body.

[17] There was much to-and-fro between the parties, but eventually the senior manager of the Second Respondent, Mr Peter Boikhutso, contacted the Third Applicant to enquire about what the family has done since they received the letter from the First Respondent's attorneys. The Third Applicant is an attorney. The First Applicant avers that they advised Mr Boikhutso they were in the process of instructing attorneys.

[18] Mr Boikhutso who had undertaken that B3 would not release the body, in light of the dispute between the parties but was now threatening to release the body if no lawyer's letter is received within the next 30 minutes.

[19] Eventually, a letter from Ramushu Attorneys was sent to the Second Respondent, in which it was recorded that they represented the Matlala family and that they were concerned about the conduct of Mr Boikhutso. In that letter, the Matlala

² See CaseLines section 01-50

family does not state that they were proceeding with court action but reserved all their rights.

[20] By then the Applicants were made aware of the fact that the Second Respondent was threatening to remove the body from B3.

[21] On the morning of 26 August 2023, the Applicants started hearing rumours from family and friends that the funeral was underway in Limpopo, at the First Respondent's parents' house. In light of this commotion, the planned funeral service on 27 August 2023 was cancelled.

[22] The deceased was buried in Ga- Marishane without her mother, her siblings or her cousins being present. The deceased's minor child was also not present at the funeral.

[23] The First Applicant, her mother, could not say her final goodbyes to her child who was clearly loved and celebrated. Nor could the family bear witness or view the deceased before she was laid to rest.

[24] The First Applicant now seeks that this court order the body to be exhumed and be returned to be re-buried in Midrand, to fulfil what she says were her daughter's dying wish. The application has been brought as a matter of urgency because the Applicants wish to hold a funeral service on 9 September 2023, at which they plan to have a viewing.

[25] The First Respondent opposes the application on several grounds. The first is the lack of urgency. In his view, his wife has already been buried. The Applicants have self-created the urgency because they have now decided to hold a funeral service on 9 September 2023. The situation might have been different had they brought the urgent application prior to the deceased being buried. He maintains that should the Applicants wish to visit the grave or conduct any customary rituals that might be required to address any customary oversight or to appease the spirit of the deceased, they are welcome to do so. His own daughter will be taken to visit her mother's grave during the school holidays. He persists in his denial that it was her

dying wish to be buried in Johannesburg.

[26] He further maintains that the Applicants do not have a clear right, nor can there be any irreparable harm if the order were not granted. In his view the deceased should be left in peace, in an area that is also her ancestral home.³

[27] The Applicants concede that there are competing rights and that our courts have moved away from conservative notions of primogeniture, having regard to issues to fairness, equality, equity, and interests of justice.

[28] They made a heart wrenching plea for why the family's rights should trump those of the husband, and why they should be afforded the opportunity to bury the deceased in a dignified and respectful manner. In a well formulated argument, Advocate Ngqele put forward the factual and legal reasons why the relief should be granted. In doing so, she relied on the cases of ***T M v C M and Another***⁴ and the recent case of ***D M v B2P Funeral Services and Others***.⁵

[29] On the issue of urgency, she submitted that the matter was inherently urgent for several reasons, *inter alia* they did not bear witness to the burial, the family could not be certain that the deceased was indeed buried where the First Respondent claimed or that she was given a dignified burial (there was no supporting evidence attached to the answering affidavit). Furthermore, the Applicants' family wished to have a burial on 9 September 2023 and before further decomposition of the body took effect.

Discussion

[30] This matter is indeed one with very painful circumstances for the Applicants.

[31] However, in the urgent court, the first issue that must be considered is whether the matter is truly urgent in that the Applicants are unlikely to obtain substantial redress

³ The deceased's forefathers, father and younger brother are buried in Ga-Matlala in Limpopo which is approximately 37km from Ga-Marishane.

⁴ (2019/24763) [2019] ZAGPJHC 412.

⁵ (2023/071479) [2023] ZAGPJHC 858 .

in the ordinary course.

[32] In the Notice of Motion, the Applicants pray that the order of exhumation be implemented by no later than 2 September 2023. This relief was based on the Applicants' plans at that time for a re-burial to be held on 9 September 2023. 2 September 2023 has come and gone. The Applicants have not supplemented their papers.

[33] The Third Applicant, Thabo Ramushu, has put up an explanatory affidavit of the attempts that were made since Saturday, 26 August 2023, in order to bring this application on an urgent basis. Mr Ramushu is the cousin of the deceased and an attorney by profession. This is his recordal of the events leading up to this application:

[33.1] On Saturday morning, 26 August 2023, he received a call from the Second Applicant informing him that she had received news that the deceased was being buried in Ga-Marishane at the First Respondent's parent's home. The Second Applicant also informed him that the First Respondent had forcibly removed the body of her deceased sister, and enquired whether anything can be done to interdict the ongoing funeral. He then called the Registrar of this Court to find out if he could make an immediate urgent application without papers having regard to the circumstances. The Registrar advised him that papers should be filed first and that the Honourable Judge would not entertain an oral application.

[33.2] He was later advised that he should approach the Urgent Court of the Limpopo Division since the funeral was taking place in Limpopo.

[33.3] He does not say whether he made that approach or whether he approached the North Gauteng Division which he could also have done.

[33.4] However, he goes on to say that having regard to the circumstances and the timing it became apparent to him that the funeral could no longer be interdicted, and that the family of the deceased should seek alternative relief.

[33.5] From Saturday afternoon, the family engaged with various attorneys and eventually succeeded in briefing the attorneys of record and this application was launched.

[33.6] The matter was allocated to the urgent Court roll on 31 August 2023. The First Respondent however only filed his answering affidavit shortly before Court commenced at 10h00. The matter was before the Honourable Francis J but was removed from the roll with costs being reserved for non-compliance with the Practice Directive. After the matter was removed, he immediately sought the Registrar's assistance in setting the matter down for Tuesday 5 September 2023.

[33.7] He submits that the matter is urgent because the family has arranged a reburial date for 9 September 2023 and would like to exhume the deceased's body before then.

[34] There is no doubt that the family made efforts to obtain an earlier court date for this application.

[35] However, in this case, unlike many cases where families have not been able to agree on where a deceased should be buried, the inescapable fact is that the deceased has been buried.

[36] There was a suggestion by the Applicants during argument that they did not bear witness to the burial in Limpopo and therefore it was uncertain whether the deceased was indeed buried in that grave. There was no evidence put up that the First Respondent had indeed buried the deceased. No supporting affidavit had been put up, no funeral programme had been attached and no details of the funeral were given by the First Respondent in his answering affidavit. I am not certain whether these submissions were made in response to a question posed by the court or whether they were made in support of the rights of family members to bear witness to the burial of a loved one.

[37] In any event, the Applicant's own version supports the First Respondent's version that the funeral did take place on Saturday, 26 August 2023, at the First

Respondent's parent's house. The announcement made by the First Respondent's family members of the planned funeral in Ga-Marishane, Limpopo, while being disputed by the Applicants as being unauthorised, was not denied. Nor could the Applicants deny that they were made aware of the fact that the First Respondent had demanded release of the body from Second Respondent towards the end of the day on 25 August 2023. Furthermore, the affidavit of Mr Ramushu confirms that the Second Applicant was made aware of the funeral taking place on Saturday morning, 26 August 2023, the same funeral which he had tried to interdict.

[38] ***In Re Several Matters on the Urgent Court Roll***⁶ where the court states that the procedure set out in Rule 6(12) is not simply there for the taking. In this regard, the Court further confirmed the principle set out in the case of ***East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and Others***.⁷

[39] ***In East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and Others*** in which it was held:-

“The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in the application in due course. The rules allow the court to come to the assistance of a litigant because of the latter, were to wait for the normal course laid down by the rules, it will not obtain substantial redress.”

[40] It is obvious that family members who wish to have a funeral where a viewing of the deceased is possible would need to act in haste. Death brings along decomposition, a process which is subject to weather and temperature conditions. But there is no certainty that the Applicants will be able to have a viewing of the deceased

⁶ 2013 (1) SA 549 (GSJ) at paragraph 7.

⁷ (11/33767) [2011] ZAGPJHC 196.

given that at the date of hearing, she had already been deceased and buried for 20 days.

[41] Exhumation in itself could be a traumatic process for loved ones of the deceased and is not to be lightly granted without a full ventilation of the issues. In this matter for example, the views of the minor child might have to be ventilated before a Court in due course.

[42] Notwithstanding the pain of a grieving mother – and the sheer arrogance of the First Respondent, I am of the view that this matter is not urgent. The deceased has already been buried. Decomposition has already commenced and there is no evidence put up that the Applicants would still be able to have a ‘viewing’ of the body. As to exhumation for purposes of the funeral itself, the Applicants have not established why they would not obtain substantial redress in the ordinary course.

[43] This court might have come to a different conclusion had there been any evidence or suggestion of foul play in the cause of death and the Applicants wished to have an autopsy done to establish the cause of death. [See the latest case in the Limpopo High Court of Theophilus Theo Mphosi brought by his sister Moditswi Cindrella Ramokoto]. But this is not the case here.

[44] My decision on urgency should not however be understood to be condoning the conduct of the First Respondent. The First Respondent’s conduct is certainly to be condemned. He does not deny that he arranged for the removal of the deceased’s body from Benoni to Limpopo under cover of darkness, with nary a thought for the feelings of his mother-in-law and his wife’s extended family. Or for that matter, the feelings of his own daughter. His actions were cruel and inappropriate for a son, a father, and an officer of the court.

[45] He may have not broken any laws, but he certainly broke many hearts, including that of his own child. And in that he may have violated the Bapedi custom of “*Boloka ka Seriti le hlompho*” meaning “*Bury with dignity and respect*”.

[46] Accordingly, the following order is made:

1. The matter is struck from Urgent Court roll.
2. There is no order as to costs.

Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

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DATE OF THE HEARING: 6 September 2023
DATE OF JUDGMENT: 7 September 2023