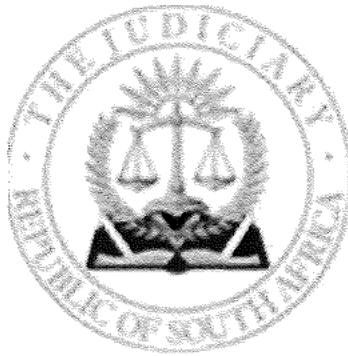




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2021 / 3734

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

HARDY AJ

15 DECEMBER 2022 12 FEBRUARY 2024

In the matter between:

QUIMBINE, Sergio

Applicant

and

QUIMBINE, Doctor

First Respondent

JD FUNERALS

Second Respondent

MEC OF HEALTH, GAUTENG

Third Respondent

CITY OF JOHANNESBURG

Fourth Respondent

PROVINCIAL POLICE COMMISSIONER, GAUTENG

Fifth Respondent

MINISTER OF HOME AFFAIRS

Sixth Respondent

JUDGMENT

HARDY AJ:

1. This application (and preceding urgent applications) is ultimately about determining the final resting place of Mr Vuteia Quimbine ("the Deceased"), who died on 01 February 2021. The Deceased is the father of the Applicant (and his siblings) with one wife who is resident in Mozambique – from where the Deceased, the Applicant and his full siblings hail. The Deceased is also the father of the First Respondent (and his full siblings) with one wife who was resident in Soweto (and was buried there after her death) – the place of that family's home. The Deceased was buried in the same grave in Soweto as his one wife on 06 February 2021. The Applicant desires that the Deceased be exhumed so that he can be buried in Beira, Mozambique in accordance with the cultural beliefs and practises that are of vital importance to his family. I accept that the First Respondent, the Applicant's half-brother, desires that the Deceased remain buried with the First Respondent's mother in Soweto. This is obviously a matter of importance to both the Applicant and First Respondent and their full views should be heard before finally determining the application.
2. The application presently before me is that set out in the Notice of Motion dated 11 February 2021, in which the Applicant seeks to hold First and Second Respondents in contempt of court (with an appropriate punishment) and to obtain the necessary orders to facilitate the exhumation of the Deceased in Soweto and reburial in Beira, Mozambique.
3. The urgent applications dated 05 February 2021 and the current application set down for an urgent hearing on 16 February 2021 are not before me for re/consideration.

4. I accept that there is a large measure of factual overlap between the two applications that make up the overall matter between at least the Applicant and the First Respondent. However, and unfortunately, the way the papers in this matter have been uploaded to CaseLines does initially create some confusion – the papers in the two applications are not easy to distinguish from one another – and require careful reading (and rereading) to separate out the current application and documents relevant to it from the other applications.
5. In these circumstances, it is useful to set out my understanding of the events evidenced in the papers.
6. On 05 February 2021, the Applicant launched an urgent application against, *inter alia*, the First Respondent and Second Respondent (the funeral home whose services had been procured by the First Respondent) to prevent the burial of the deceased, preventing the reporting of his death to the Master's office and the prevention of the Master's office issuing any letters of authority to administer the Deceased's estate.
7. On the same date (it would appear quite late that night), Crutchfield AJ granted a *rule nisi* returnable on 23 February 2021 preventing the burial of the Deceased by anybody and prohibiting the Second Respondent from releasing the Deceased's body to anybody.
8. The order granted by Crutchfield AJ also made provision for the service of the order made by her on the First Respondent by WhatsApp and SMS messages sent to 073 426 5257; and on the Second Respondent by e-mail sent to info@jdfunerals.co.za and onica@jdfunerals.co.za.
9. The Deceased was buried on 06 February 2021.

10. The order of Crutchfield AJ also provided for the Applicant to file his supplementary papers on/before 09 February 2021 for the hearing on the return day of 23 February 2021.
11. The Applicant did not file any supplementary papers in that urgent application, but on 11 February 2021 launched the present application to be heard on an urgent basis on 16 February 2021.
12. On 16 February 2021, Lamont J struck the matter from the urgent roll for lack of urgency.
13. The *rule nisi* issued on 05 February 2021 was not enrolled for 23 February 2021 (or at any other time prior to the hearing of this application) for confirmation and has thus lapsed in the interim.
14. Following the striking of this application from the urgent roll, it was set down for hearing in the ordinary course of events on 23 March 2021.
15. On 17 March 2021 (only three court days before the hearing), the notice of set down was served on the:
 - a. First Respondent by sending it via WhatsApp and SMS – although no such screen shots are attached to any affidavit as evidence of this; and
 - b. Second Respondent by e-mailing it to info@jdfunerals.co.za and onica@jdfunerals.co.za – although there is an e-mail annexed to an affidavit showing this, there is no delivery or read receipt for the e-mail proving it had arrived at its destination.

THE HEARING ON 23 MARCH 2021

16. At the hearing of this application on 23 March 2021, I raised my concerns with counsel for the Applicant about the manner of service set out in the previous

paragraph. This was of concern to me as the Applicant was seeking to hold the First and Second Respondents in contempt of court – relief not granted lightly in their absence.

17. This is not service as set out in Uniform Rule of Court 4; and there was no application to condone non-compliance with the rules for service when the application was on the ordinary roll and not the urgent roll. I could not tell whether such service had been effective in the absence of the First and Second Respondents from the hearing that day.
18. Counsel for the Applicant submitted that this form of service was endorsed by Crutchfield AJ in her urgent order of 05 February 2021.
19. I disagreed with that submission. Crutchfield AJ had endorsed a mechanism for advising the First and Second Respondents on a very urgent basis of her prohibition of the burial of the Deceased that was scheduled to take place less than 12 hours after the granting of her order. This cannot be construed as permission to use this method of service without question for service of further proceedings on the First and Second Respondents in the ordinary course of litigation – the rules of court exist for that very purpose.
20. I accordingly stood the matter down to 25 March 2021 for the Applicant to effect service of a set down for hearing on that date on the First and Second Respondents in accordance with the rules for service. The aim was to see if that would elicit any response from the First and Second Respondents in circumstances where the Applicant was alleging they were continuously flouting all procedures of the court with impunity.
21. I raised with counsel for the Applicant that I had a number of further concerns on the papers as well: the papers before me did not contain any proof of the

service of the order of Crutchfield AJ of the First and Second Respondents or any other evidence of their knowledge of the order granted in their absence (without which it would not be possible to make a finding of contempt of court against them); that I would need to be addressed on how the lapsing of the order of which they were alleged to be in contempt affected the relief sought (if at all); and why the intervention of the court was sought for an exhumation and reburial which is in the ordinary course of events a process administered by the province of Gauteng and City of Johannesburg where the Deceased has been buried in cemetery falling under the control of the City of Johannesburg.

SERVICE BETWEEN THE HEARINGS ON 23 MARCH 2021 AND 25 MARCH 2021

22. On 24 March 2021, the sheriff of the court effected service on the First and Second Respondents of a notice of set-down for 25 March 2021 (together with a copy of the current application) apparently in accordance with the rules of court.

23. At 15:50 the documents were served on "Mr Rubern" at the business premises of the Second Respondent. This appears to be good service.

24. At 13:50 the documents were served on Ms Mthombeni, a clerk over the age of 16 years, at 27 Wrench Road, Isando being the work address of the First Respondent. This appears to be good service if that address is indeed the work address of the First Respondent.

THE HEARING ON 25 MARCH 2021

25. Mr Ruben Moatsi, the proprietor and/or employee, of JD Funerals (the Second Respondent) arrived at court on 25 March 2021 in response to the documents

served on him on 24 March 2021. Whilst on camera at court for the virtual hearing of the matter, he did indicate to me that he has never had sight of any court order in this matter generally, although he was at some point contacted by the Applicant's attorney. The extent of his answers to my questions indicated that he would oppose any application to hold him in contempt of court.

26. The First Respondent was not present in the court room where parties who needed to appear in virtual court were directed by the staff at court. I thus raised queries with the counsel for the Applicant as to the compliance with the rules for service of the set down – in essence, was the service address for the First Respondent indeed his place of employment as this did not appear from the papers?

27. Counsel for the Applicant submitted that his instructing attorney had telephoned the First Respondent to advise him of the hearing on 25 March 2021 and requested an e-mail address from the First Respondent to send the set-down to him, which address the First Respondent refused to provide. The attorney thereafter conducted a Google search of the First Respondent and found employment details for him on Linked-In. The attorney telephoned the relevant company to confirm that the First Respondent was employed there; received this confirmation; and confirmed the company's address as that at which the sheriff effected service. He added that the First Respondent had been present at work at the time of service but refused to leave his work area to accept service and instructed that it be left with the person who did accept service of the documents.

28. None of these averments made from the bar at the hearing of the matter were contained in the affidavits and returns of service filed of record despite the relief

being sought by way of application. I gave the Applicant leave to file a supplementary affidavit setting out the allegations made from the bar under oath on or before 26 March 2021. This was done on the day of the hearing after the court adjourned the matter.

29. Counsel for the Applicant also addressed me on the other concerns raised by me at the hearing on 23 March 2021. (In light of the First Respondent's e-mail – set out below – it is unnecessary at this time for me to deal with these submissions any further at this time.)

30. I indicated to the parties that I would adjourn the matter to prepare a judgment regarding the relief sought against the First Respondent, but that the matter as against the Second Respondent was now clearly opposed and would have to follow that process to a final determination.

EVENTS SUBSEQUENT TO THE HEARING OF 25 MARCH 2021

31. On 06 April 2021 (less than a fortnight after the hearing), the Registrar assisting me received an e-mail transmitted from doc.quimbine@symrise.com by the First Respondent which read:

"Good day [registrar's name]

RE: UNOPPOSED ROLL FOR THE 23RD MARCH 2021

As advised by the court today after discovering that **I WAS PURPOSELY PRESENTED THE INCORRECT COURT DATE APPEARANCE** by the Applicants: Which resulted in me not being present on the actual court date which is stipulated on the court roll.

These are the latest events which occurred.

24th March 2021 I was served to appear in court on **25 March 2021 09h30**

(Document attached as notice 5)

25 March 2021 09h30 I APPEAR IN COURT AND THERE'S NO COURT CASE related to MATTER **3734/2021**.

RECEPTIONIST sends me to go check with ROOM 004 for ALL MATTERS OF MOTION. Their findings related to case 3734/2021 was that there was no date set for the seating motion after the application for the URGENT was rejected.

05 FEBRUARY 2021 ... (dealing with events of 05 and 06 February 2021) ...

Therefore pleading with honourable AJ HARDY to allow me an opportunity to appoint a lawyer who would be able to advise us further on this matter with the elders of the family.

I have attached all the documents received from the applicants attorney / personnel from the first interaction leading to this point

Your assistance will be highly appreciated."

32. The attached documents do not contain any notice of set down for the hearing of this application on 23 March 2021.

33. As the application was stood down from 23 March 2021 to 25 March 2021, the application was unlikely to have appeared on the published unopposed motion roll for 25 March 2021 (which would in the ordinary course of events have been finalised before 23 March 2021) and did not have its hearing date changed on the CaseLines system.
34. The explanation by the First Respondent for his failure to appear on 25 March 2021 seems probable and rings true.
35. In the circumstances, it appears that the First Respondent wishes to oppose the granting of the relief sought against.
36. I am of the view that he should be granted the opportunity to deal with matters as important as the burial place of his father and whether he is in contempt of court.

COSTS

37. As set out above, the Applicant did not place all the necessary information (at the very least, proof of service of the court order granted on 05 February 2021) before the court prior to 23 March 2021, which could possibly have resulted in the postponement of the application. On 25 March 2021, additional information was placed before the court without being under oath – which situation was remedied later that day with the leave of the court.
38. It appears from his e-mail of 06 April 2021, that the First Respondent had no knowledge of the set down of this application for hearing on 23 March 2021.
39. The Applicant alleges that the First Respondent's failure to respond appropriately to all of the litigation between them, whilst having full knowledge

of the litigation – in short, the First Respondent's alleged bad attitude – should attract a costs order.

40. Quite simply, the application is still undetermined and the extent of the opposition is still unknown. In the circumstances, it is not possible to determine an appropriate costs order currently by laying blame at any party's door for their conduct in the matter or knowing the outcome for costs to follow the result.

41. The costs occasioned by the matter being on the unopposed motion roll for 23 and 25 March 2021 should be determined by the court that finally determines this application.

CONCLUSION

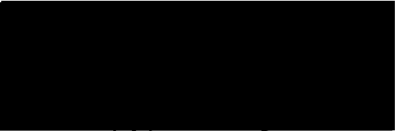
42. The application is clearly opposed by both the Second Respondent and Third Respondent.

43. It will thus be necessary for those Respondents to have the opportunity to file their answering affidavits and to proceed from that point in terms of the Uniform Rules of Court to the hearing and final determination of the matter.

ORDER

44. I accordingly grant an order the following terms:

- 1) The application is postponed *sine die*.
- 2) The First and Second Respondents are permitted to file their answering affidavits within 20 *dies* of this order.
- 3) The costs occasioned by the hearing of this application on 23 and 25 March 2021 are reserved for determination by the court that finally determines this application.



G B HARDY

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Date of hearing 25 March 2021

Date of judgment ~~15 December 2022~~ 12 February 2024

Appearances:

Counsel for Applicant M O Mudimeli

Attorney for Applicant Mphagi Attorneys
mphagiattorneys@gmail.com

First Respondent No appearance
doc.quimbine@simrise.com

Second Respondent Mr Ruben Moatsi of JD Funerals
info@jdfunerals.co.za

Third Respondent No appearance
Zsahib@justice.gov.za

Fourth Respondent No appearance
nmattera@jhbcityparks.com

Fifth Respondent No appearance
Zsahib@justice.gov.za / gp.pc.secretary@saps.gov.za

Sixth Respondent No appearance
Zsahib@justice.gov.za