



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 54/2018

Heard on 22/02/ 2019

Delivered: 24/05/2019

In the matter between

MMACOWE MARTHA MPHIKI

Applicant

And

KEROTSE LILIAN MPHIKI

First Respondent

REKATHUSA FUNERAL PALOUR

Second Respondent

JUDGMENT

PAKATI J

- [1] The applicant, Ms Mmacokwe Martha Mphiki, approached this Court on an urgent basis seeking an order for exhumation of the body of the deceased, Modisakgosi John Mphiki, from Magoyaneng Cemetery where he was buried on 06 January 2018. She further applies for an order that the second respondent, Rekathusa Funeral Parlour, rebury the deceased at Itireleng Cemetery and bear the costs of the exhumation and reburial. She also seeks a declaratory order that she be the only lawful wife of the deceased and that the marriage of the first respondent, Ms Kerotse Lilian Mphiki, to the deceased was unlawful and invalid. When the matter was argued it was agreed by the parties that urgency had become moot.

CONDONATION OF THE LATE FILING OF THE FIRST RESPONDENT'S ANSWERING AFFIDAVIT

- [2] The first respondent applies for condonation for the late filing of the answering affidavit. It was filed on 12 June 2018 about five months after the notice of motion was filed. The matter was placed on the roll of 19 January 2018 and postponed to 26 January 2018. No order as to costs was made. On 26 January 2018 it was postponed to 11 May 2018 and costs were ordered to be costs in the application. Mr Bester of KBVS Attorneys, the first respondent's erstwhile attorneys, filed a notice of withdrawal as attorneys of record on 27 February 2018. On 11 May 2018 it was further postponed to 24 August 2018 and the court advised her to secure legal representation from Legal Aid South Africa, which she did. During argument she was represented by Adv Tyuthuza. She was ordered to file her answering affidavit by 15 June 2016 and the applicant, her replying affidavit by 29 June 2018. The applicant was further ordered to file her heads of argument by 20 August 2018 and the first respondent, 22 August 2018.
- [3] The applicant neither opposes the application for condonation nor alleges that she would suffer prejudice if condonation is granted. In my view, no prejudice is likely to be suffered by the applicant if the first respondent is given an opportunity to be heard. In the interest of justice, condonation for the late filing of the first respondent's answering affidavit is hereby granted.

THE APPLICANT'S CASE

- [4] The applicant was married to the deceased on 03 February 1979 in NG Kerk of Africa, Huhudi in Vryburg by civil rights. Out of this marriage ten children were born, two of whom are deceased. The applicant claims that when the deceased died their marriage still subsisted. He was employed at Sedibeng Water in Kuruman. On 16

December 2017 he was at home with the applicant and family in Itireleng for holidays.

[5] After the applicant heard of the death of the deceased on 01 January 2018 she and her children namely, Joyce, Gladys, Sofie, Lena, Alfred and the deceased's sister, Betty, approached the first respondent and requested to bury the deceased at Itireleng. The first respondent refused and told them that she would seek a court order in order to bury the deceased at Magoyaneng but nothing was forthcoming until 04 January 2018.

[6] On 04 January 2018 at 12:06 the applicant forwarded a Short Message Service (SMS) to the first respondent's cell number 0722882332 and informed her of her intention to seek relief from court on 05 January 2018 regarding the place of burial of the deceased. The SMS records:

'Dear Me Kerotse Mphiki. Kindly take note that we, Me Mmacowe Martha Mphiki (born Moshe), the legal wife of John Mphiki, will on 5 January 2018 make an urgent application at Mothibistad Magistrate's Court, for an interim order to stop the funeral of John Mphiki planned by you for the 6th of January 2018. The interim order will be served on you by the Sheriff. Regards Vivian Mphiki – Cell number 0790637250'

No response was forthcoming from the first respondent.

[7] Mr Strydom, on behalf of the applicant, spoke to Ms Bonnie of the second respondent telephonically and informed her about the intended application. He further requested that the deceased's body should not be released to the first respondent until the court gave direction.

[8] On 05 January 2018 the applicant approached the Magistrates Court Kudumane district, in Mothibistad on urgent basis seeking an interim order prohibiting the respondents from removing the deceased's body from the second respondent's funeral parlour and that he be handed over to her for funeral arrangements at Itireleng.

The applicant states that the first respondent wanted to bury the deceased on 06 January 2018 at Magoyaneng, hence she approached court on urgent basis.

- [9] The Magistrate dismissed the applicant's application due to lack of jurisdiction. However, the applicant approached the second respondent in its premises with the founding affidavit and the court order. She was accompanied by two of her daughters, Vivian and Boipelo, and her grandson, Edward, her daughter's friend, and Mr Meshack Molaodi and Mr Strydom. The first respondent and her family were also present. An argument ensued between the applicant's children and the first respondent's child. Mr Strydom requested the first respondent to appoint someone to represent her family in an attempt to reach an amicable solution. The applicant and Mr Strydom tried to intervene without success.
- [10] According to the applicant Mr Bloem, who claimed to have an LLB degree from the University of Free State was appointed as the negotiator on behalf of the first respondent and her family. During the negotiations Mr Bloem mentioned that to facilitate the marriage to the first respondent the deceased used a different date of birth. Mr Bloem proposed that the first respondent hold a church service in honour of the deceased and thereafter hand over the body to the applicant's family for funeral arrangements at Itireleng Cemetery. The applicant and her family accepted the proposal but the first respondent refused. Notably, Mr Bloem's confirmatory affidavit has not been attached to the founding affidavit.
- [11] Mr Strydom approached Mr Bubbles Dada, the owner of the second respondent, and requested him to refrain from releasing the deceased's body to anyone until the dispute between the parties was resolved in a court of law. At that stage both families were present. The applicant alleges that the second respondent accepted

that but the first respondent refused to co-operate. The understanding was therefore that the deceased would not be buried until the dispute was resolved. The applicant and her family left the second respondent's premises under the impression that the funeral would not take place as agreed with the second respondent.

- [12] The applicant and her family learned later that the second respondent had released the deceased's body to the first respondent for burial on 06 January 2018. This caused trauma, distress and emotional discomfort to the applicant and her children as their culture and tradition that her husband had to be laid to rest where his parents and two of their predeceased children were buried was not observed.

THE FIRST RESPONDENT'S CASE

- [13] The first respondent and the deceased lived together at Deerward, House Number B103, Kuruman since 1992 and later moved to House Number 1058 Magojaneng, Kuruman. Before their marriage she had three children from a previous relationship. The deceased had informed her that he had nine children from the applicant and two others from another previous relationship. He did not inform her that he was still married to the applicant. He told her that he had problems of infidelity with the applicant which caused a stir in their relationship.
- [14] The deceased initially worked at Water Supply, now known as Sedibeng Water in Kuruman as a plumber from 1993 to 2009. He was later transferred to Moshaneng Municipality from 2009 to 2013 when he retired. He passed away on 01 January 2018 at Kimberley Hospital. The message of his death was conveyed to his other children. A meeting of the family members together with the applicant and her children was held but proved to be chaotic and was adjourned. The first respondent with her uncles continued with

the funeral arrangements. As the second respondent was preparing to transport the body to her home for the night vigil on 05 January 2018 the applicant, her legal representative, Mr Strydom, and other people arrived. The applicant attempted to hand over to her a document from the Magistrates Court but she refused to take it saying that she would only accept a document served by the Sheriff.

- [15] According to the first respondent Mr Dada, released the deceased's body to her because he had known her as the lawful wife of the deceased for years. She also claims that she paid for the deceased's funeral policy. Therefore nothing prevented her from burying the deceased. The applicant and her children did not attend the funeral.
- [16] The first respondent denies that the marriage certificate of the applicant (Annexure "C") is authentic. She denies further that when negotiations between the two families could not be successful Mr Strydom approached Mr Bubbles and informed him to keep the deceased's body until the dispute was resolved. She requests that the application be dismissed with costs on a scale as between attorney and own client.

DISCREPANCIES IN THE MARRIAGE CERTIFICATES OF THE APPLICANT AND THE FIRST RESPONDENT

- [17] From the marriage certificates issued by the Department of Home Affairs in respect of the applicant and the first respondent the following discrepancies can be observed:

17.1 The deceased's date of birth in the marriage certificate between the applicant and the deceased shows his date of birth as 02 February 1943 (Annexure "C") and it corresponds with their abridged marriage certificate (Annexure "D"). They got married by

civil rights on 03 February 1979 and Home Affairs issued the marriage certificate on 26 June 2013;

17.2 The deceased also married the first respondent by civil rights on 17 February 2012. From this relationship two children were born, one was still born. The deceased's identity number 480302 5729 081 which appears on their marriage certificate (Annexure "F") and his death certificate (Annexure "E") correspond. This clearly shows his date of birth as 02 March 1948 different from his marriage to the applicant. Home Affairs issued the marriage certificate on 21 February 2012;

17.3 The deceased's date of birth on his death certificate corresponds with the one on his marriage to the first respondent.

THE SECOND RESPONDENT'S VERSION

[18] The relief sought against the second respondent is contained in prayer (d) of the notice of motion dated 11 January 2018 namely, that the second respondent should bear the costs of the exhumation and reburial of the deceased at Itireleng Cemetery. The applicant's allegation is that the second respondent knew about the dispute between the parties regarding the place where the deceased had to be buried as well as the validity of their marriages. According to the applicant the second respondent was not supposed to release the deceased's body to the first respondent until the dispute was resolved.

[19] The second respondent's opposition is based on the following summarised argument:

19.1 That although it could gather that the dispute between the applicant and the first respondent was concerned about who should bury the deceased as well as the place where he should be buried it did not have the details of the dispute;

19.2 That it received a written instruction (Annexure "A") from the first respondent requesting the release of the body of the deceased which indemnified it from any liability should the matter proceed to court. Annexure "A" records:

'TO WHOM IT MAY CONCERN

I, Kerotse Lillian Mphiki, ID Number: 630110 1030 082, hereto referred to as the legal wife to Modisakgosi John Mphiki, [the deceased], hereby as a bona fide Policy Holder of Rekathusa in which the husband is the Policy Holder.

I now have made all necessary arrangements for the funeral, set for tomorrow, the 6th January 2018.

I hereby instruct that Rekathusa carries the funeral forward as planned, as there stand nothing prohibiting me to bury my husband. Should there be any legal challenge I exonerate Rekathusa from any liability.' My underlining

19.3 That since the first respondent was its client it was obliged to adhere to what seemed to be a reasonable instruction from it; and

19.4 That there was no court order prohibiting it from releasing the deceased's body to the first respondent. It therefore acted *bona fide* at all material times.

THE MARRIAGE BETWEEN THE DECEASED, THE APPLICANT AND THE FIRST RESPONDENT

[20] The applicant confirms that the deceased was her husband despite the different dates on the above mentioned documents. The applicant and the first respondent allege that they knew for the first time after the deceased's death that he married them by civil rights.

[21] The applicant and the first respondent claim to be the lawful wives of the deceased. I have dealt with the discrepancies in their marriage certificates. The applicant claims that when the deceased died they were still legally married and that the first respondent's marriage was therefore unlawful and invalid.

[22] Section 10 (1) and (4) of the Recognition of Customary Marriages Act¹ provides:

'10 Change of marriage system

- (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.
- (2) ...
- (3) ...
- (4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is during the subsistence of such marriage, competent to enter into any other marriage.' My underlining

[23] Clearly from the evidence the deceased was incompetent to enter into another civil marriage with the first respondent while he was still married to the applicant and he knew that. It is evident that he did not disclose to the first respondent that he was still married to the applicant. The only reasonable inference that can be drawn from the deceased's conduct of changing his date of birth, was that he wanted a short cut which enabled him to also marry the first respondent by civil rights.

[24] Considering the fact that the applicant was still married to the deceased when he died as the evidence shows, there is no reason why his body should not be exhumed from Magoyaneng Cemetery where he was buried on 06 January 2018 and reburied at Itireleng Cemetery, where his parents and their predeceased children have been laid to rest.

[25] For the reasons advanced *supra* the only reasonable conclusion is that the marriage between the deceased and the first respondent was unlawful and invalid which leaves the applicant as the lawful wife of the deceased.

¹ Act 120 of 1998

[26] That brings me to the question whether the second respondent should bear the costs for the exhumation and reburial of the deceased at Itireleng Cemetery. In paragraph 7 of the founding affidavit the applicant states:

'As a result of this failing of the settlement, my legal representative approached the owner of second respondent, Mr Bubbles Dada, to keep the body of my husband until the above Honourable Court makes a ruling as to where the body should be buried. This was done in the presence of the representatives to both parties. The second respondent indicated that he is willing to do so, but the first respondent was not co-operative in this regard. I was under the impression that the second respondent will not give the body to the first respondent.'

[27] The applicant argues that the second respondent was aware of the dispute concerning the validity of the marriage between the applicant, the first respondent and the deceased as alluded to earlier. It also knew of her intention to bury him at Itireleng Cemetery. She states further that on 04 January 2018 Ms Bonnie, an employee of the second respondent, was made aware of the dispute in her and Mr Meshack Molaodi's presence. A confirmatory affidavit of Mr Molaodi dated 09 January 2018 was filed in this regard.

[28] Ms Dada admits knowledge of the dispute but denies that the second respondent became aware of it on 04 January 2018. The second respondent argues that the applicant has failed to make out a case against it and the application should be dismissed with costs.

[29] In this regard I take into account paragraphs 9, 10 and 11 of Mr Sampie John Lourens Hoff's confirmatory affidavit to the affidavit of Ms Margaret Eva Sussie Dada, the deponent to the second respondent's answering affidavit, which records:

'9. Advocate Strydom did approach me asking me whether I would consider not releasing the deceased's body for burial until the dispute between the parties was put to rest and I informed him that, although I personally did not have a problem with the request, it would depend on the 1st respondent and that I would have to discuss the request with the 1st respondent.

10. I did discuss the request with the 1st respondent, but she was not amenable thereto and instructed me to release the deceased's body to her for burial.

11. I informed the 1st respondent that the 2nd respondent is being dragged into a dispute which has got nothing to do with the 2nd respondent, upon which the 1st respondent gave me a written instruction to proceed with the burial of the deceased.'

[30] Mr Hoff concedes the version of the applicant that Mr Strydom requested him to keep the deceased's body until the dispute was resolved. This version contradicts the account of events by the second respondent that it could gather that the dispute between the applicant and the first respondent revolved around the question as to who was responsible for the burial of the deceased but did not know the details of the dispute. Instead the second respondent relies on the instruction given to Mr Hoff by the first respondent. It is undisputed that at that stage the dispute had not yet been resolved. In his affidavit he does not dispute that this took place on 04 January 2018

[31] The following words in Annexure "A" should have alerted the second respondent before releasing the body that there was something wrong with the legality of the marriage especially after Mr Strydom had approached Mr Hoff. 'I, Kerotse Lillian Mphiki, ID Number: 630110 1030 082, hereto referred to as the legal wife to Modisakgosi John Mphiki, [the deceased], hereby as a *bona fide* Policy Holder of Rekathusa in which the husband is the Policy Holder.'

[32] .Paragraph 36 of the second respondent's answering affidavit records:

'It should be stated that, since the 1st respondent is a client of the 2nd respondent, the [2nd respondent] is in fact obligated to carry out reasonable instructions given to it by the first respondent and, given the contents of Annexure "A" to the 2nd respondent's confirmatory affidavit, the burial of the deceased proceeded on 6 January 2018.'

[33] When Mr Bloem, who represented the first respondent during negotiations, mentioned that to facilitate the marriage to the first

respondent the deceased used a different date of birth, the first respondent knew at that stage already that her marriage was unlawful.

[34] The first respondent alleges that the body was released to her by Mr Dada because he knew that she was the lawful wife of the deceased and has been paying for the funeral policy. On the contrary Mr Hoff relies on Annexure "A" referred to in paragraph 31 *supra*, an alleged instruction by the first respondent. This is clearly a contradiction. There is also no explanation why the first respondent had to mention that she was the '*legal wife*'. Moreover, the second respondent knew that what the first respondent was incorrect and economical with the truth when she said that she was the policy holder. The lawful policy holder was the deceased and not the first respondent. If the first respondent was the client of the second respondent they could have taken this Court into their confidence and attach a copy of the policy document to show who was actually the second respondent's lawful policy holder. They both failed to do so.

[35] Ms Dada denies that the second respondent became aware of the dispute on 04 January 2018 as mentioned earlier. The first respondent states that the preparation of the burial was done on 05 January 2018 and the body was buried on 06 January 2018. The letter (Annexure "A") was forwarded to the second respondent on 05 January 2018 for the release of the body. It can therefore be accepted that Mr Hoff was approached by Mr Strydom on 05 January 2018 and conceded to the request by the applicant to keep the deceased's body until the dispute was resolved. It makes no difference whether it was the 04th or 5th January 2018. What is important is that the second respondent became aware of the dispute after Mr Hoff had agreed not to release the deceased's body to the first respondent. The applicant states further that Mr Hoff

remarked that the second respondent previously had a similar incident where it had to exhume and rebury someone at their own cost. It is untenable for the second respondent to now change and say it was unaware of the dispute and that it had not been resolved.

- [36] Taking into account what I have mentioned above, I am satisfied that the applicant has made out a proper case for the relief sought and that the second respondent knew when he handed over the deceased's body to the first respondent that it was taking a risk. There is no reason why it should not be held responsible for the costs of the exhumation and reburial of the deceased's body.

COSTS

- [37] The applicant seeks costs against the first respondent on the scale as between attorney and client. She did not ask for costs of the application against the second respondent in her notice of motion. Mr Strydom now requests for costs against the second respondent for opposing the application. He indicated that both the applicant and the first respondent are man of straw but the first respondent was represented by counsel.
- [38] Ms Tyuthuza, for the first respondent, urged me to dismiss the application with costs on the scale as between attorney and own client scale. She indicated that she assists the first respondent *pro bono*.
- [39] Mr Olivier, for the second respondent also asked that the application be dismissed with costs including costs of 26 January 2018. It should be remembered that when the matter was postponed on 26 January 2018 to 11 May 2018 costs were ordered to be costs in the application. Mr Olivier argued that the application for a costs order by the applicant was opportunistic and the second respondent had

to oppose the application. He argued further that the applicant's application was an abuse of the Court's process.

[40] It is a fundamental principle that a party who succeeds should be awarded costs and this rule should not be departed from except on good grounds.² The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.³

[41] An award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.⁴ The grounds upon which the court may order a party to pay an opponent's attorney- and client costs include the following: that the party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious, or frivolous motives or in the conduct of the case. The court's discretion in this regard is not restricted to such conduct but it includes all cases in which special circumstances or considerations justify the granting of such order.⁵

[42] The respondents opposed the application but are not the parties in whose favour the judgment will be given. There is therefore no reason why in the exercise of my discretion the applicant, as the successful party, should be deprived of costs. Be that as it may, she was assisted by Ms Tyuthuza on *pro bono* basis. It would therefore not be in the interest of justice to order costs against her. The same cannot be said about the second respondent. In my view the

² South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at 912; see also Union Government v Gass 1959 (4) SA 401 (A) at 413C-F

³ Beinash v Wixley [1997] 2 All SA 241; 1997 (3) SA 721 (A) ; see also Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A) at 854C-E

⁴ Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 183-184

⁵ Rautenbach v Symington 1995 (4) SA 583 (O) at 588A-B

granting of costs on a scale as between party and party is justifiable in the circumstances.

In the circumstances I make the following order:

- 1. The applicant, Mmacowe Martha Mphiki, is declared the lawful wife of the deceased, Modisakgosi John Mphiki.**
- 2. The second respondent, Rekathusa Funeral Parlour, is ordered to bear the costs for the exhumation of the body of the deceased, Modisakgosi John Mphiki, from Magojaneng Cemetery and rebury it at Itireleng Cemetery.**
- 3. The marriage of the first respondent, Kerotse Lilian Mphiki, is null and void *ab initio*.**
- 4. No order as to costs against the first respondent, Kerotse Lilian Mphiki.**
- 5. The second respondent is ordered to pay the costs of this application on a scale as between party and party.**

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant: Adv WAF Strydom
Instructed by: Hugo Mathewson & Oosthuizen Inc

On behalf of the 1st Respondent: Adv T Tyuthuza
Instructed by: Moribe Attorneys

On behalf of the 2nd Respondent: Adv D Olivier
Instructed by: Duncan & Rothman