

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 5056/2018

In the matter between:

NIKIWE DALASILE

1st Applicant

YANDISWA DALASILE

2nd Applicant

MONGEZI DALASILE

3rd Applicant

And

BABALO MGODUKA

1st Respondent

AVBOB FUNERAL PARLOUR – KOKSTAD

2nd Respondent

JUDGMENT

JOLWANA J

[1] Applicants approached this court on an urgent basis seeking an order interdicting the first respondent from burying the deceased and other orders ancillary thereto. The right of the applicant to bury the deceased is arduously contested by the first respondent who claims that he concluded a valid customary marriage with the deceased and therefore is entitled to the burial rights pertaining to the deceased.

[2] The first and second applicants are sisters to the late Phezisa Dalasile (the deceased) who died tragically on 10 September 2018 following a car accident in Butterworth.

[3] The third applicant is the paternal uncle to the first and second applicants in that he is a brother to the latter's late father. Applicants' *locus standi* to institute these proceedings is not in issue.

[4] It is common cause that on 26 December 2014 *lobola* negotiations took place at the home of the deceased between the emissaries of the first respondent and the representatives of the family of the deceased including the third applicant.

[5] It is further common cause that at the end of those negotiations on 26 December 2014 a minute was produced and signed by the third applicant and first respondent's emissaries in which the following is recorded in isiXhosa:

"INDWENDWE ZAKWAMGODUKA ONYATHI FLAKSTAF 26 DECEMBER 2014

Bathe bakubuzwa bapheth'ezingaphi baphendule bathi baphethe iR20 000.00 sayibala savumelana ukuba yiyo. Adibene amaqwathi athi inkomo yobuso bentombi yi R6 000.00 kube inkomo inye amaqwathi ayibiza iR5 000.00 inye. Bacele ukubizwa iR4 000.00 bavunyelwa, bashiye zane eziyi R20 000.00. Kususwe iR6 000.00 eshiyekileyo: iR14 000.00 yayeyee nkomo zisabiwa nge R4 000.00 inye. Bakhuphe nebotile ezintathu uswazi, ihamb'idlani nesazimzi. Abanikwanga inani leenkomo bakulifumana zakuba NTANDATHU. Baphinde bakhupha iR2 000.00 ukuzalisa. Bashie iR22 000.00."

[6] Loosely translated this means:

"GUESTS FROM MGODUKA FAMILY, ONYATHI FLAGSTAFF 26 DECEMBER 2014
When asked they said they were carrying with them R20 000.00 which was counted and confirmed. Amaqwathi met and decided that the cow for the face of the girl is R6 000.00 and each cow will be R5 000.00. They asked that each cow should be R4 000.00 which was agreed to. They left four cows of R20 000.00, R6 000.00 of which was set aside for the face of the girl leaving R14 000.00 with each cow being R4000.00. They paid three bottles of brandy which were named according to tradition. They also paid R2 000.00 and the total paid is R22 000.00."

[7] The applicants say the first respondent's emissaries never returned to pay the outstanding two cows after the payment of which they would have been advised how many cows they were required to pay. It is only after reaching this threshold in terms of the number of cows that an arrangement would have been made for the customary marriage between the deceased and the first respondent to be celebrated.

[8] The first respondent says in his answering affidavit:

"16. On 26 December 2014 the said lobola negotiations took place and deceased family set the number of cows to be paid, before the deceased could be released to wed to my family, to six.

17. It was further agreed at the negotiations that we could start with the family rituals of dressing the deceased and giving her a marital name even before the fixed amount was paid. I hasten to mention that the basis for such an agreement was the belief system that in matters like the instant witches will not be happy with the idea that the Magoduka name will not be going to the ashcan of history anytime soon. The deceased family at that meeting made it plain that the handing over of the bride would only be done once the balance owing was paid.

18. Indeed in January 2015 the deceased was named Avuyile as her marital name and the *tsiki* ritual was performed to fulfil custom.

19. On or about November 2015 the delegation from my family arranged a meeting with negotiators from the family of the deceased to make good on our promise.

20. Indeed on 05 March 2016, it being the agreed date, after at least two failed attempts to meet before then due to unforeseen circumstances the meeting took place and an amount of R8 000.00 (eight thousand rand) was paid. I attach hereto a copy of my bank statement showing the withdrawal R10 000.00 (Ten Thousand Rand) on the 4th March 2016 which was to be to the deceased family as agreed and the balance was to cover travelling costs marked "BM1"

21. I must mention that both families were thoroughly excited about the finalization of the negotiations and the fact that the meeting of the ancestors was sealed.

22. We were welcomed by the deceased family and a sheep was slaughtered in accordance with custom. A photograph taken on that day showing and/or reflecting delegates of both families is attached hereto marked as annexure "BM2" and "BM3" respectively. I call upon the respondents to explain what was happening on this day if they have a different version to mine. Annexure "BM2" depicts the third applicant as chief negotiator from the deceased's family and my late uncle from standing in the middle as the chief negotiator from my family's side.

23. Minutes were taken and our copy of the minutes could not be located as the person that held possession of the minutes has since passed on, it being my late uncle referred to in preceding paragraphs.

24. On our departure on that day the deceased family promised us that they would bring the deceased to her marital home at their earliest convenience and further details would be communicated with our negotiating team. The deceased and I behind the scene started urgent preparations for the handing over and deceased family called my late uncle to confirm that they would be coming to hand over the deceased to our family as custom dictates. The arranged date was 2nd April 2016 as planned the family of the deceased brought and handed over the deceased. At the hearing of this matter a video footage depicting the first applicant, second applicant and the wife to the third applicant were present during the ceremony. A copy of the said video footage will also be made available to the applicants should they wish to view it before the hearing of this matter.

26. The ceremony and act of handing over the bride perfected the consummation of a customary marriage."

[9] During the hearing of this matter Ms Mxotwa, counsel for the applicants advised me that she had not seen the video and wondered if the court would want to see it. My response was that I do not have to see the video, counsel can view the video and speakers from the first respondent's family would be expected to state in the video what

the gathering was all about and what was the purpose of the visit of the deceased family to theirs.

[10] Mr Matotie, counsel for the first respondent submitted that the video is a very short video with no speakers or anybody talking in it. I found this strange as it becomes difficult to discern what the purpose of the tender of the video if it would not help to understand the nature of the occasion.

[11] This is very significant because it is common cause between the parties that the deceased had been to the home of the first respondent and the respective families have been to each other's homes. Most significantly the purpose of the video was to prove that the marriage between the parties was celebrated something that is strenuously disputed by the applicants. If the video was not going to be helpful in this regard it is difficult to understand its purpose.

[12] In the founding affidavit the applicants make the point that the deceased's family members have been to the first respondent's home as follows:

"25. The first respondent's emissaries were able to pay 4 (four) cows and they agreed to come back at least with 2 cows which would allow them to know the *lobola* exact amount and when will the deceased be given to them as their bride the two cows were costed to be R8 000.00. Attached hereto as annexure "ND4" is a copy of the negotiation meeting.

26. It is at this point when the first respondent's emissaries promised to return on a certain date for the payment of the 2 (two) cows in order to have the number required for *lobola* and when can it be possible for them to have the deceased as their bride.

27. On or about December 2014 when it was closer to the new year's eve, the deceased was invited to a ceremony that was to occur at the first respondent's home at *Bukazi* and indeed she attended the ceremony.

28. The year 2014 ended without hearing anything from the first respondent. In the middle of January 2015 the deceased called our mother to inform her that she was abducted by the family of the first respondent and she was dressed and given a name as the wife of the first respondent.

29. It is at this point that the third applicant called one of the emissaries of the first respondent to enquire as to why her daughter (the deceased) was abducted whilst there was an agreement that she will only be their bride after 2 (two) cows for announcement has been paid. The first respondent's family apologized for their conduct and promised to bring more cows with immediate effect to our family including the cow for their bad conduct.

30. Even though a promise was made to pay more cows but the first respondent's family did not act as per the agreement.

31. The deceased returned home during May 2015 when she was about to give birth to her first born Akahlulwa (the minor) and she gave birth during July 2015: On her arrival the deceased informed me that she left the first respondent's home because she never wanted to be part of that family.

31.1 I and the deceased agreed after she shared her pain with me that she must leave to Cape Town and be with our older sister the second applicant as a result her first born was born in Cape Town.

32 The first respondent's family was informed that the child has been born and they gave us a date on which they will visit our family for the purposes of bringing clothes for the child and see their daughter.

33 When they visited to our home to see the child a meeting was held in order to arrange a date for my family to take the child to the first respondent's family and introduce the child to the first respondent's ancestors.

34 The ritual mentioned above is always conducted in terms of our ancestors when a payment for damages has been effected even if the girl is not married to the alleged family. And it is always important to perform this ritual when the child is born in her mother's homestead.

35. We visited the first respondent's family and indeed the ceremony to welcome the child was conducted by both families. During the ceremony the third applicant made a comment in public that the deceased is not the bride of the first respondent because the family of the first respondent has not returned as per the agreement and my family does not recognize the first respondent's family as *abakhozi* (in laws).

36. I have been advised that in terms of Section 3 (1)(a) and (b) of the Recognition of Customary Marriages Act 120 of 1998, for a customary marriage entered into after the commencement of this act to be valid;

36.1 The prospective spouse must both be above the age of 18 years;

36.2 Must both be above the age of 18 years;

36.3 Must both consent to be each other under Customary Law;

36.4 The marriage must be negotiated and entered into or celebrated in accordance.

37. The third applicant did inform the first respondent's family that even after the payment of *lobola* the marriage will not be valid until there is a celebration in a form of *Umendiso* (handing over of the bride) has been made, if they the first respondent's family do not act immediately, the deceased will never be the bride of the first respondent and their customary marriage will not be valid, even the first respondent will never be taken as the brother in law by our family."

[13] I was taken aback that the first respondent has not denied or challenged, at least not in any direct way, some of the specific allegations contained in the founding affidavit especially the ritual relating to the introduction of the child to the ancestors and the *umendiso* custom. This is how the first respondent elected to deal with some of the profound allegations that applicants made:

“49. AD PARAGRAPHS 22,27,29,30,34,35,37,40,46,64 & 66 THEREOF

The contents of these paragraphs are denied to the extent that they are inconsistent with the narrative that I have given above. To that end I reiterate the contents of this affidavit. I further record that the deceased has always wished to be buried next to me and this conversation has come up on a number of occasions when she put pressure on me to attend to the *Nyathi* burial site.”

[14] The issue for determination is whether or not on the facts of this matter a valid customary marriage was concluded. If a valid customary marriage was concluded the first respondent will be entitled to bury the deceased. It is on the determination of this issue in their favour that the applicants will become entitled to the relief sought. The factual matrix of this matter makes it clear that applicants and first respondent accept the xhosa adage that “*ingcwaba lomfazi lisemzini*” (the grave of a wife is at the marital home). Its opposite also holds true which is that “*ingcwaba lentombi likokwayo*”, (the grave of an unmarried woman is at her maiden home). I digress to emphasize that in terms of these time honoured unwritten principles of the African cultural way of life which principles find application across cultures and traditions of the indigenous people in this country, everyone gets to have a pre-determined resting place when they die. This is not to suggest, even indirectly, that all indigenous people subscribe to this belief system.

[15] Section 211 (3) of the Constitution provides that:

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

[16] The Recognition of Customary Marriages Act 120 of 1998 (the Act) is the legislation envisaged by the Constitution and applicable to this matter.

[17] The relevant section is section 3 of the Act which provides thus:

“3(1) For a customary marriage entered into after the commencement of this Act to be valid –

- (a) the prospective spouses –
 - (i) must be above the age of 18 years, and
 - (ii) must both consent to be married to each other under customary law
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

[18] The following definitions contained in the Act are very important for a better understanding of the relevant disputed facts in this matter:

“ ‘customary law’ means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;

‘customary marriage’ means a marriage concluded in accordance with customary law;

‘lobolo’ means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage;”

[19] The first respondent’s case has some very interesting if not peculiar features. I will mention a few of those below which I have paraphrased from his answering affidavit:

(a) In January 2015 the deceased was named Avuyile as her marital name and the *tsiki* ritual was performed to fulfil the custom. He does not say which custom was being fulfilled nor does he claim that members of the deceased’s family were there.

(b) He has annexed a bank statement as annexure “BM1” and draws attention to only two transaction of R5 000.00 each made on the 4 March 2016. He then says this sum of “R10 000.00 on 4th March 2016 which was to be to the deceased family as agreed and the balance was to cover travelling costs”. He then says on 5 March 2016, one day after the withdrawal of this amount they went to the deceased’s family home where they paid the balance of R8 000.00.

(c) It must be remembered that in terms of applicants’ annexure “ND4” whose contents first respondent admits his family was to be advised of the total *lobola* or *ikhazi* cows required by the deceased family. The sum of R8 000.00 was never understood to be the balance on the payment of which there would be arrangements for the celebration of the customary marriage; certainly not in terms of “ND4”.

(d) Other than the fact that the visit to the deceased’s family is denied by the applicants, the only proof of it having taken place on the 05th March 2016 is the withdrawal in Flagstaff of the sum of R10 000.00 on the 4th March 2016. The other withdrawals on the same day in the sum of R1 900.00 are not explained.

(e) No minutes are produced by the first respondent of the meeting at the deceased's family home on 5 March 2016 reflecting the alleged payment of R 8 000.00. He explains that on that day minutes were taken and *"our copy of the minutes could not be located as the person that held possession of the minutes has since passed on, it being my late uncle referred to in the preceding paragraphs."*

(f) There is no affidavit confirming this meeting from anybody from the first respondent's family who would have been part of the delegation. This is not explained at all by the first respondent.

(g) He then says that following the payment of R8 000.00 on 5 March 2016 the deceased family *"brought and handed over the deceased."* He refers to the video footage in which his counsel Mr Matotie, submitted during the hearing of the matter, could not be useful because it is short, has no speeches in which anybody says what the purpose of the gathering was. I pause here to highlight that applicants deny that this meeting on the 2 April 2016 or the handing over of the bride ever took place or even that they were at first respondent's home on that day and for that purpose.

(h) In the answering affidavit of the first respondent no mention is made of a Xolani Mgoduka. However, and very strangely Xolani Mgoduka deposed to a very short confirmatory affidavit in which he says:

"3. I have read and understand the contents of the answering affidavit deposed to by the first respondent Babalo Mgoduka. I confirm the contents therein in so far as reference is made to me. I further confirm that I was one of the members of the delegation that partook in the lobola negotiations between the deceased's family and that of the first respondent on behalf of the first respondent. I further confirm that there was a marriage between the deceased and the first respondent."

[20] Firstly, first respondent does not make any reference at all to Xolani Mgoduka in his answering affidavit. Secondly, the fact that lobola negotiations between the two families took place was never disputed by the applicants. Thirdly, Xolani Mgoduka does not indicate the basis of his conclusion that there was a marriage between the deceased and the first respondent. Fourthly, he does not deal with two very crucial points, the alleged visit to the deceased family on the 05 March 2016 and the alleged visit by the

deceased's family to first respondent's family on 02 April 2016. These visits are both denied as having taken place at all by the applicants, certainly not for that purpose.

[21] I have an uncomfortable feeling that the confirmatory affidavit by Xolani Mgoduka was a belated attempt and an afterthought designed to mislead the court and I do not say so lightly. During the hearing I also got the impression that Mr Matotie did not know about it until I referred to it and he then started referring to it in support of the first respondent's case. On the face of it, it appears to have been printed from a different printer and probably typed by a different person to the one who typed the answering affidavit if one has regard to things like font and spacing. I sincerely hope that I am wrong in this regard.

[22] Ms Mxotwa, counsel for the applicants filed heads of argument in which, among other things, she points out that the parties have not requested that the matter or any of the issues should be referred for trial or oral evidence. She submits that the court must resolve any factual disputes on the principles of *Pascon-Evans*.¹ I agree.

[23] In any event I am not convinced that first respondent has raised a real, genuine dispute of fact as would require the court in the exercise of its discretion in the interest of justice to refer this matter for the hearing of oral evidence on any issue. What the first respondent has done is to make bare denials punctuated with unsubstantiated factual allegations that do not even fit together with the picture he seeks to paint.

¹ *Plascon Evans Paints LTD v Van Riebeek Paints (PTY) LTD* 1984 (3) SA 623 Act 634 H-I where Corbett JA stated that: It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[24] In *Wightman t/a JW Constitution v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375 para 13 Heher JA had this to say:

“A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[25] I have come to the conclusion that on the facts of this matter, the first respondent’s family or emissaries did not return to the deceased family to pay the balance of R8 000.00. Even if they had, it would not amount to their entitlement to the bride without more. Annexure “ND4” makes it clear that once the balance is paid and the threshold of six cows is reached only then would first respondent’s emissaries be told the total number of cows required by deceased’s family.

[26] There is no evidence that the visit by the applicants’ family members to first respondent’s home was an entering into or celebration of a marriage in accordance with customary law as required by section 3 of the Act. In fact no attempt has been made by the first respondent to explain what actually happened on the 2 April 2016 beyond merely alleging that deceased’s family members came and handed over the deceased. He does not say who was there on either side. His averments in this regard are couched in generalities that are unhelpful to challenge applicants’ submission that handing over or celebration of the marriage did not happen.

[27] This is surprising considering the importance of the handing over or celebration of the marriage – about which both parties agree. In *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) para 40 Bosielo JA, writing for the full court, had this to say:

“Importantly, the two experts agreed that the handing over of the *makoti* to her in-laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the *makoti* is finally welcomed and integrated into the groom’s family which henceforth becomes her new family.”

[28] Mr Matotie made a submission that if I find against the first respondent with regard to the existence of the customary marriage I should still find in favour of the first respondent with regard to the burial rights on the basis that he is the father and natural guardian of the minor children born of the relationship between the deceased and the first respondent. He based his submission in this regard on section 21 (1) (b)(i) of the Children’s Act 38 of 2005 which provides as follows:

“21 (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –

(a)...

(b) If he, regardless of whether he has lived or is living with the mother –

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father or pays damages in terms of customary law.”

[29] On this basis, so the submission went, in his capacity as the father and natural guardian of the deceased’s minor children with full parental responsibilities and rights he is entitled to make decisions on behalf of the minor children and to decide on burial arrangements of their mother. In my view to use the Children’s Act and more specifically its provisions regarding parental responsibilities and rights is an impermissible and unjustifiable stretching of this Act to resolve burial disputes for which it was never intended if regard is had to the purposes of this Act and its preamble.

[30] The further submission was made on behalf of the first respondent that in cases where the deceased died intestate, the heirs to the deceased’s estate are the ones who are entitled to decide on burial arrangements. The court was told that in this regard the law is settled as there is a long line of cases even in this Division. As I understood it the submission is that the minor children are the heirs to the estate and their father has the

right to decide on their behalf including deciding on burial rights in respect of their late mother.

[31] Besides the fact that this issue was not pertinently raised in the papers, it is in my view based on some decided cases that unfortunately wrongly decided all burial disputes with the prism of common law, which has been a common feature of our jurisprudence for a long time.

[32] I was referred to the case of *Mankahla v Matiwane* 1989 (2) SA 920 (CkGD) at 924 A-F in which Heath J, as he then was, summarized what he called principles on burial rights in the following terms:

“In my view the principles involved can be summarized as follows:

- (a) If someone is appointed in a will by the deceased then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes.
- (b) The deceased person can appoint somebody to attend to his burial in his will or in any other document or verbally formally or informally, and in all these instances effect should be given thereto in so far as it is otherwise legally possible and permissible.
- (c) A deceased can in the third instance, die intestate, but can appoint someone to attend to his burial in a document or verbally.
- (d) In the absence of a testamentary direction the duty of and the corresponding right to see to the burial of the deceased is that of the heirs. The heirs appointed as heirs in the will of a deceased.
- (e) The afore-mentioned principle that heirs (appointed as heirs), in the absence of any provision in the will as to burial of the deceased, are entitled and obliged to attend to the burial of the deceased applies in my view similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to his burial arrangements, the intestate heirs would be in the same position as testate heirs. I can see no reason why the position should be different in the case of intestate heirs.
- (f) It follows that persons obliged and entitled to see to the burial arrangements are also entitled to arrange where and when the deceased is to be buried.”

[33] The first point to be made about what the court said in *Mankahla* is that it based its reasoning purely on common law. Secondly, the case itself predates the Constitution and therefore the constitutional dispensation. Therefore, in my view, this case is irrelevant for cases based on customary law or where customary law is applicable. Thirdly, even though *Mankahla* predates the Constitution, customary law predates common law. There was therefore no basis for making general principles applicable to all cases on burial rights without answering a very important question whether on the facts of a particular case customary law was applicable or not.

[34] Therefore, all cases that would have been decided after *Mankahla* whether they specifically followed *Mankahla* or not without determining the applicability or otherwise of customary law were decided on a wrong premise. This would apply in my view to even cases that were decided during the constitutional dispensation.

[35] Even without a specific reference to common law or Roman Dutch Law it has always been wrong in my view, to decide a case without consideration first been given on whether on the facts of the case customary law is applicable or not. I venture to say that under the constitutional dispensation it could amount to the impermissible disregard of the Constitution and therefore a promotion of common law at the expense of customary law, even if that is done unwittingly.

[36] The other unfortunate result of the well documented dominance of common law over customary law has been the indiscriminate conflation of burial rights with rights of inheritance. These do not always go together, certainly not under customary law and African traditional belief systems which sometimes include issues of African traditional religious practice. It is this dominance that must be guarded against as not doing so will be at the risk of not complying with the clear provisions of the Constitution on customary law.

[37] In the result, applicants must succeed in their application as on the papers it is clear that the deceased was never handed over to respondent's family as their *makoti* and therefore the customary marriage was never celebrated. Therefore the deceased and the first respondent were not married according to customary law at the time of her death.

[38] In the result the following orders will issue:

1. It is ordered that the first respondent and/or any person acting in concert with him be and are hereby interdicted and restrained from burying the remains of the deceased Phezisa Dalasile.
2. It is ordered that the deceased shall be buried at her maiden home at Bokleni Administrative Area, Engcobo.

3. The second respondent is ordered to release the body of the deceased to the applicants.

4. The first respondent is ordered to pay costs of this application including costs reserved on 26 September 2018.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicants: N. MXOTWA

Instructed by: MSWATIE MGEDEZI ATTORNEYS

MTHATHA

Counsel for the 1st Respondent: L. MATOTIE

Instructed by: Y. MAKALIMA INC. ATTORNEYS

MTHATHA

Heard on: 27 September 2018

Delivered on: 02 October 2018