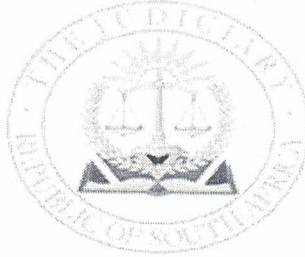


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 5009/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE: 20/4/18	
SIGNATURE: [Signature]	

In the matter between:

NKHENSANI CHRISTINAH MOTOMOKGOLO

APPLICANT

And

HLAYISEKA RIKHOTSO & 20 OTHERS

RESPONDENTS

JUDGMENT

MF KGANYAGO J

[1] This is an unusual application to be brought before the Court. The applicant on the 19th October 2017 obtained an order for leave to serve her application by way of substituted service. Thereafter the matter was brought on urgent basis and it was struck off the roll due to lack of urgency.

[2] The applicant is seeking an order in the following terms:

- "1. That the application for leave to file its supplementary affidavit to the founding affidavit be heard with the main application and that the supplementary affidavit and the application for leave to be bound in the record of the main application;*
- 2. Leave be granted to the Applicant to file its supplementary affidavit to the founding affidavit;*
- 3. Condoning the Applicant's non-compliance with the rules, forms and service provided for in the uniform rules of court and granting leave for this application to be heard as one of urgency.*
- 4. Directing the fourteenth, eighteenth, nineteenth and twentieth respondents to, upon notification for burial, provide the applicants with keys and access to Shawela village cemetery in order to rebury the deceased;*

5. *Interdicting the first, second, third, fourth, fifth, sixth, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, eighteenth, nineteenth, twentieth respondents from obstructing the applicant from reburial of the deceased next to the gravesite of his late father and brother in the Shawela village cemetery in any manner, including:*
 - 5.1 *the use of violence and /or inciting anyone else to do so;*
 - 5.2 *threats to physically injure and/or inciting anyone else to do so;*
 - 5.3 *threats to injure their property and/or inciting anyone else to do so; or*
 - 5.4 *the use of provocative language or behaving in a provocative manner and /or inciting anyone else to do so.*
6. *Interdicting the first, second, third, fourth, fifth, sixth, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, eighteenth, nineteenth, twentieth respondents from exhuming the body of the deceased and/or inciting anyone else to do so.*
7. *Interdicting the first, second, third, fourth, fifth, sixth, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, eighteenth, nineteenth, twentieth, respondents from obstructing the appellant from returning to her home in Shawela village in any manner, including*

7.1 the use of violence and /or inciting anyone else to do so;

7.2 threats to physically injure and/or incite anyone else to do so;

or

7.3 threats to injure her property and /or incite anyone else to do so; or

7.4 use of provocative language or behaving in a provocative manner and/or incite anyone else to do so.

8. *Interdicting the first, second, third, fourth, fifth, sixth, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, eighteenth, nineteenth, twentieth respondents from using violence against the applicant including:*

8.1 threatening to physically injure the applicant and /or inciting anyone else to do so.

8.2 threatening the property of the applicant and /or inciting anyone else to do so;

8.3 using provocative language or behaving in a provocative manner towards the applicant and/or inciting anyone else to do so.

9. *Directing the fifteenth respondent and officials acting under his supervision to do all things necessary to:*

9.1 accompany the applicant and her family to her home in Shawela village;

9.2 protect applicant from physical harm;

9.3 protect applicant's home from being damaged;

9.4 protect the applicant and her family during the burial of the deceased."

[3] Only the 11th ("Mahumani Traditional Council") and 12th ("Hosi AK Mahumani") respondents (herein after referred to as respondents") are opposing the applicant's application. As the matter has already been struck off the roll due to lack of urgency, prayer 3 of the applicant's notice of motion automatically falls away. Counsel for both parties have agreed that prayer 6, 7 and 8 will not be applicable against the eleventh and twelfth respondents. The parties further agreed that the only contentious issue against the eleventh and twelfth respondents is prayer 5. The remainder of the prayers as set out in the applicant's notice of motion, the respondents are not contesting them.

[4] The facts of this application are briefly as follows: According to the applicant, her son ("deceased") passed away on the 25th August 2013 in a motor accident in Pretoria. He was found by his family nine months after the accident at a Government Mortuary in Pretoria. His burial was scheduled to take place on the 18th May 2014. On the day of the funeral

there were rumours that the body that was brought for burial was not that of the deceased but rather that of an old person. Community members started chanting demanding that the coffin be opened so that the people can identify the deceased. Some family members assured the community members that the body was that of the deceased. Police were called to the applicant's house to control the protesting Shawela village community members from disrupting the funeral. The funeral proceeded under the watch of the SAPS members.

[5] In the early hours of the 26th May 2014 whilst the applicant and her sister were asleep, they heard people signing outside her home. They were afraid to come out of the house to go and check what was happening. They called the police. On arrival of the police, they went outside and they found the coffin of the deceased in the garage. They opened the coffin and they found the deceased inside it. The police took the deceased to the government mortuary.

[6] Whilst police were still busy investigating the matter, the community members of Shawela village came to the applicant's homestead and ordered them to leave their village threatening to burn her house. The

applicant left her homestead to go and live with his brother in the neighbouring village.

[7] On the 9th December 2014 the applicant and her family were summoned to a meeting by the respondents. At that meeting the applicant's family was fined R6000-00 and ordered to conduct the burial by the 13th December 2014. She was also requested to find another house to stay. They could not conduct the funeral as ordered by the respondents as the members of the community were obstructing them. They also could not access the cemetery keys as it was in possession of community members.

[8] In the meantime the police conducted DNA tests on the deceased. On receipt of the DNA test results, the police called a general community meeting at the sports ground to pronounce the said results. The DNA test results confirmed that the deceased was indeed the applicant's son. The eleventh respondent approached Greater Giyani Local Municipality ("the twenty first respondent") to allocate a graveside for the deceased. The twenty first respondent agreed to provide the gravesite. However, the applicant does not wish her son to be buried at the gravesite allocated by the twenty first respondent but would prefer for him to be

buried at Shawela village cemetery where her late husband and the other son were buried. According to her, it is a taboo to separate blood.

- [9] During 2015 the applicant approached the Magistrate Court for assistance. The Magistrate Court gave her a letter to give to the police to assist her. The police told her that they could not assist her as they were afraid of the residents of Shawela village as they are a very difficult community.
- [10]. On the 9th November 2015 the government mortuary notified the applicant that they could no longer store the deceased body, and it was moved to Two Mountains Mortuary ("sixteenth respondent") a private mortuary for storage until the matter is sorted out.
- [11] In the process the applicant approached Shirinda Legal Resources Centre for assistance. Shirinda Legal Resources tried to mediate the matter without success.
- [12] The respondents concede that the deceased was buried on the 18th May 2014 at Shawela village cemetery. However, they state that he was exhumed by unknown people. The respondents concede that there was

an unrest at Shawela village as there were allegations that they have buried a wrong person. However, they state that the applicant had agreed to bury the deceased at a gravesite allocated by the twenty first respondent.

[13] The respondents concede that they indeed summoned the applicant's family to the Royal House and that they were fined R6000-00. The respondents contends that it is a taboo to have someone who has been exhumed, like in the present case, to have him reburied in the same grave. The twelfth respondent regard himself as the custodian of customs and culture of Mahumani community.

[14] The respondents have attached the confirmatory affidavit of one Raserope Mothelo Chaisa a traditional healer. He state that on the 14th June 2014 he was called by the community of Mahumani to perform cleansing ritual ("Kuxuva") at Shawela cemetery where the deceased was buried. He state further that if a corpse is exhumed, custom dictates that it will not allowed to be reburied in the same cemetery since the spirit has been escorted from the grave side. According to him the return of the corpse to the same grave (cemetery) side will cause misfortunes. According to Chaise,

as part of the rituals that he had performed he had buried a tree stump in the grave which the deceased was initially buried.

[15] The applicant is seeking an interdict against the respondents as she is been prevented to rebury the deceased at Shawela village cemetery. The respondents are not disputing that they refusing the applicant to rebury the deceased at Shawela village cemetery. Their justification is that according to their custom, it is a taboo to rebury an exhumed corpse in the same grave (cemetery).

[16] It is not in dispute that the deceased was buried at Shawela village cemetery and later exhumed by unknown people who took him to the applicant's house. That was as a result of the rumours that were doing rounds that they have buried a wrong person.

[17] Before the Court can determine whether the applicant has satisfied the requirements of a final interdict, it is important to first determine whether indeed this custom is in existence; is well known and for some time has been practiced by the community of Mahumani village.

[18] Customary Law is entrenched in our Constitution. Courts are required to apply customary law where it is applicable subject to the Constitution and any relevant legislation. Customary law must be determined with reference to both history and the usage by the community concerned.

[19] In **Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)** 83 E-G Van der Westhuizen J said:

“The classical test for the existence of custom as a source of law is that set out in Van Breda v Jacobs, in which it was held that to be recognized as law, a practice must be certain, uniformly observed for a long period of time and reasonable. The requirements of reasonableness would now of course, be applied in a way compliant with the Constitution. The appropriateness of this test to determine the existence of a norm of indigenous customary law must be examined.”

[20] The respondents’ counsel has conceded that the applicant’s case is the first case to happen at Mahumani community. If it is the first case to happen in that community, the question is whether the said custom that it is a taboo to rebury an exhumed corpse in the same grave/cemetery has been known in the community, practiced and uniformly observed for a long period of time.

[21] According to Chaisa the traditional healer, an exhumed corpse is not allowed to be reburied in the same cemetery. However, the twelfth respondent in paragraph 20 of his answering affidavit has stated that the applicant has not asked for another grave to be allocated and as such, my understanding is that she seeks to use the same grave which cannot customarily be. The twelfth respondent is specific, he refers to the same grave and not cemetery. In other words, according to the twelfth respondent, the problem is reburying in the same grave which has already been allocated and dug. If another allocation of a grave is made in the same grave yard that should not be a problem. The twelfth respondent also regard himself as a custodian of custom and culture of Mahumani community, whilst Chaisa is an ordinary traditional healer.

[22] The applicant has stated in her founding affidavit in paragraph 5 that on the 9th December 2014 her family was invited to Mahumani Tribal Council office where she was fined R6000-00 and ordered to rebury the deceased by 13th December 2014. She further stated that she could not comply with the order as the Mahumani community members continued to obstruct her, and also she could not access the keys to Shawela village cemetery.

[23] The respondents in their answering affidavit has conceded that the applicant was summoned to the Royal House and that she was fined R6000-00. They are not disputing that the applicant was ordered to rebury the deceased by the 13th December 2014. What they are disputing is that the applicant was requested to find another house to stay.

[24] In relation to the issue that the applicant was obstructed and could not access the keys to the cemetery, the respondents has merely noted the contents. In other words the applicant's version remained unchallenged on this aspect.

[25] This meeting of the 9th December 2014 took place long after Chaisa has performed the rituals at the cemetery. Chaisa has performed the rituals on the 14th June 2014. The question is whether as at the 9th December 2014, the twelfth respondent who is the custodian of the customs and culture of the Mahumani Community, has forgotten about this taboo or has condoned it when he ordered the applicant to rebury the deceased by the 13th December 2014? On reading of paragraph 20 of his

answering affidavit, the custom that he knows is that of not reburial in the same grave and not the same cemetery.

[26] The twelfth respondent and Chaisa who seems to be the elders in the community are not speaking with one voice. The other one is referring to the same grave, whilst the other one is extending it to the whole cemetery. In my view, it can therefore not be said that the alleged custom is certain, and uniformly observed for a long period of time.

[27] The other problem that the respondents will encounter with their alleged custom if indeed it is in existence, is its reasonableness. Counsel for the respondent could not explain as to what will happen if the exhumation was made through a valid court order? Will the reburial also take place at another cemetery or grave? The respondent's counsel could not answer that or shed any light on that. In my view, the alleged custom will not pass the constitutional test. Customary law like any other law, must be in conformity with the Constitution. Courts will not apply customs that are not in conformity with the Constitution.

[28] It is clear that the exhumation of the deceased at Mahumani community is unprecedented. In my view it cannot be said with certainty that a custom

relating to exhumation and reburial has been developed and practiced for a long time by the community of Mahumani. The twelfth respondent and Chaisa whom it can be said are the elders of the community are not even certain about the said custom.

[29] I turn to the issue whether the applicant has satisfied the requirements for a final interdict. It is settled law that the requirements for a final interdict are a clear right, an injury actually committed or reasonably apprehended, and that there is no other satisfactory remedy available. (See **Setlogelo v Setlogelo 1914 AD 221 at 227**).

[30] The applicant is arguing that she is having a clear right as it is her right to make funeral arrangements and determine the deceased final resting place and also to bury him. In my view the applicant's right to bury the deceased and determine his final resting place is a valid and clear right. However that right has been threatened and infringed by the respondents in obstructing her to rebury the deceased relying on a non-existent custom.

[31] What is clear is that the protest by the community members was fueled by the rumours that the applicant has buried the wrong person.

However, that was cleared by the DNA test results conducted by the police. Therefore, the respondents has no basis to refuse the applicant to rebury the deceased. They can even call the traditional healer to perform the rituals before the reburial or allocate another gravesite in the same cemetery if they did not wish to take out the tree stump from the initial grave.

[32] I turn to the second requirements, an injury actually committed or reasonably apprehended. The deceased has been exhumed by people unknown to the applicant. The applicant has been forced to vacate his house by community members who threatened to burn it. The respondents in their answering affidavit concede that the deceased was exhumed by unknown people after his burial. The respondents also state that there were unrest and roads were closed in Shawela village as a result of the burial of the deceased and the allegations that a wrong person was buried.

[33] By exhuming the deceased and banishing the applicant from her home, an injury has actually been committed. In **von Molkte v Costa Areosa (Pty) Ltd 1975 (1) SA 255 (C)** it was held that a party seeking relief must show that he is suffering or will suffer some injury, or prejudice or

damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general. In the present case the applicant has already suffered and continue to suffer for as long as the deceased remain kept at the mortuary without a solution been reached.

[34] Turning to the third and final requirement, whether there is no other satisfactory remedy available. The applicant alleges that she engaged the respondents in many meetings which did not bear fruits. On the other hand the respondents argue that the applicant's alternative remedy is to bury the deceased at the municipal graveyard. In my view, the respondents' argument will not prevail since it is based on a non-existing custom. Reburying the deceased at the municipal graveside will inconvenience the applicant and therefore, in view it is not an appropriate remedy. There is no justification why the deceased should not be buried in the same cemetery where his father and brother were buried. The applicant is entitled to re-bury the deceased at Shawela village cemetery next to his father and brother.

[35] Under the circumstances the Court is satisfied that the applicant has satisfied all the requirements for a final interdict.

[36] In the result I make the following order:

36.1 Against eleventh and twelfth respondents, an order in terms of prayer 2 and 5 is granted.

36.2 Against the remainder of the respondents an order as prayed for in the notice of motion is granted.

36.3 The eleventh and twelfth respondents to pay the costs of this application.


MF KGANYAGO J

JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

Appearances

1. For the applicant : Adv. L. Siyo

2. Instructed by : Bowman Gilfillan Incorporated

- 3. Telephone Number : 011 669 9000**
- 4. For the Respondents : Adv. R Baloyi**
- 5. Instructed by : Mahumani Incorporated**
- 6. Telephone numbers : 012 330 0025**
- 7. Date of Argument : 15 March 2018**
- 8. Date of Judgment : 24th April 2018**