



Reportable:	YES /NO
Circulate to Judges:	YES /NO
Circulate to Magistrates:	YES /NO
Circulate to Regional Magistrates:	YES /NO

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: 2277/2015

Heard: 23-11-2015

Delivered: 25-11-2015

In the matter between:
MATLHOGONOLO KGOSIETSILE

APPLICANT

AND

LILIAN PLAATJIES

1ST RESPONDENT

**THE STATION COMMISSIONER;
SOUTH AFRICAN POLICE SERVICE**

2ND RESPONDENT

Coram: Kgomo JP, Olivier J et Pakati J

JUDGMENT – FULL BENCH

KGOMO JP

1. This appeal emanates from the judgment of my brother Coetzee AJ which he delivered *ex tempore* on 06 November 2015 because it

was and remains urgent. Leave to appeal was granted by the Judge on 18 November 2015.

2. The essence of the issue that fell for determination by that Court may be paraphrased as follows, after amendment of the relief sought which was, helpfully, suggested by the Judge:

- 2.1 That the First Respondent, Ms Lilian Plaatjies, the mother of the deceased, Mr Casius Edward Plaatjies, be interdicted and prohibited from burying his body (the remains) in Upington, Northern Cape;

- 2.2 That the Second Respondent, the Station Commissioner, South African Police Service (SAPS), Postmasburg be interdicted and prohibited from releasing the deceased's body to the deceased's mother or any other person pending the decision of the Court as regards in whom the right reposes and responsibility rests to bury the body of the deceased;

- 2.3 A declaratory order that the applicant, Matlhogonolo Kgosietsile, be declared to be the customary wife of the deceased and consequently the rightful person to arrange and bury the deceased in the manner that she deems appropriate;

- 2.4 No cost order is sought against any of the respondents.

3. The deceased's mother opposed the relief sought. The Station Commissioner merely stated that the deceased's body was in the possession and under the control of the Forensic Department of Health, Northern Cape, and that the Station Commissioner has, consequently, been misjoined. Nothing revolves around this issue because we have been given the assurance by counsel that an undertaking has been given that the body would be retained by the Forensic Department pending the outcome of this appeal, although

its condition was busy degenerating as its preservation was inadequate.

4. Coetzee AJ simply dismissed the application without any directive and remained silent on the costs issue. There exists an impasse in light of the fact that the question of who should rightfully bury the deceased remains unresolved.

5. The reasons for the dismissal of the application are set out, to the extent crucial, as follows by the Judge:

“The crux of this application, in my view is to be found in the answer to the question whether the Applicant showed, on a balance of probabilities, that a customary marriage existed between herself and the deceased. And in this regard Mr Khokho conceded that this is the real question to be answered.

*In order to be successful the Applicant has to show, as has been pronounced by Dlodlo J, in **Fanti v Boto and Others** 2008(5) SA 405 (C), and I quote:*

‘It is actually relatively easy to prove the existence of a customary marriage in view of the fact that there are essential requirements that are inescapably must be alleged and proved. These would be: Consent of the bride;

(1) Consent of the bride’s father or guardian;

(2) Payment of lobola; and

(3) The handing over of the bride.

*See **Mabuza v Mbatha** 2003 (4) SA 218 C also reported as 2003 JOL 10756 C at 223.’*

The learned Judge then proceeded:

“The same requirements are set out as follows by Olivier, Becker & Others in their work “Indigenous Law”.

- (1) A consensual agreement between the family groups with respect to the two individuals who are to be married and the lobola to be paid; and*

(2) *The transfer of the bride by the family group to the family of the man.*

Regard being had to the above requirements for the validity of a customary marriage, I emphasise, payment of lobola remains merely as one of the essential requirements. In other words, even if payment of lobola is properly alleged and proved that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements."

*And then the learned Judge referred to certain decisions, being **Gidia v Jindwana 1944 NAC NNT4; R v Mane 1947(2) PH H328 (GW); Ziwande v Sibeke 1948 NAC C21; Mkhongolo v Pakies 1953 NAC 5103.***

*In applying the well-known principles laid down in **Plascon-Evans Paints Ltd v Van Riebeck's Paints (Pty) Ltd 1984 (3) SA 623***

(A) I accept the following facts:

[1] That the deceased is the biological son of the First Respondent.

[2] That the deceased had a love relationship with the Applicant and that a child was born from this relationship.

[3] That an amount of R20 000,00 was paid by the deceased to the Applicant's family.

[4] That no negotiations took place between the family of the deceased being his brother or mother. In this regard Mr Khokho submitted that Dumane Mqomo, deceased's brother who is patently not the deceased's brother; Mabel Bosman, the deceased's aunt; Sara Mqomo, the deceased's guardian who is patently not the deceased's guardian; and Keamogetse Mqomo, the deceased's cousin, negotiated the marriage between the deceased and the Applicant. These people are clearly not the deceased's family and hence could not negotiate a valid customary marriage.

[5] That there was no consent by the deceased's mother or guardian and no allegation of such consent by the deceased's father.

In the above premises the application is dismissed". (My emphasis).

6. The history of this matter, much of which is common cause or not in dispute or uncontroverted, is the following. The deceased was born to Ms Lilian Plaatjies in 1983 in Namibia. As a toddler the mother, the said Ms Lilian Plaatjies, moved to Cape Town with the deceased. In no time she abandoned him. He was rescued by some neighbours who enlisted the assistance of Social Workers. Through their joint effort Ms Sarah Mqomo, the sister to Lilian Plaatjies, was traced to Postmasburg in this Province. His custody and control was entrusted to her.
7. Ms Sarah Mqomo henceforth became not only a guardian but a *de facto* mother to the deceased. She put him through primary school at HTT Bidi Primary School in Postmasburg from the early 1990's. He matriculated in 2004 from Ratang Thuto High School, still in Postmasburg. He obtained a Bachelor of Political Science degree from the University of the Free State. A remarkable feat, given his circumstances.
8. Upon completion of his studies the deceased was engaged as a Political Officer by the African National Congress (ANC) and was based in the ZF Mgcawu district in Upington.
9. The applicant and the deceased started a love relationship in 2010 from which a boy named **Kgolagano (Setswana for "the bond")** was born. Kgolagano is now four years old.
10. The applicant takes up what subsequently transpired in this fashion:

"6.7 On or around January 2014 the deaceased's family, which included the deceased's brother, Dumane Mqomo, Mabel Bosman, the deceased's aunt, Sarah Mqomo, the deceased's

guardian and Keamogetse Mqomo, the deceased's cousin visited my family in Tlakgameng, Vryburg, where they negotiated the marriage between myself and the deceased. The Honourable Court's attention is drawn to the attached confirmatory affidavits marked herein respectively as annexures "A", "B", "C", and "D".

- 6.8 Subsequent to the marital negotiations, on the 23rd May 2014, an amount of R20 000,00 (Twenty Thousand Rands) was paid by the deceased's family to my family for lobola.*
- 6.9 Thereafter I was subjected to the deceased's cultural rituals and I was also given the deceased's cultural name.*
- 6.10 From June 2014 myself, the deceased and our minor son stayed together in our matrimonial home in Postmasburg. Even though the deceased was employed in Upington, he was home in Postmasburg every Friday of the week and on Sunday he would drive back to Upington.*
- 6.11 On the 23rd October 2015, the deceased tragically died in a fatal car accident outside Postmasburg. His corpse was taken to the Government Mortuary where an autopsy was performed by the Forensic Pathologist.*
- 6.12 On the 24th October 2015, the First Respondent, after being notified of the deceased's death, telephonically informed me that since I was customarily married to the deceased, I must arrange the funeral of the deceased in whatever manner I deemed fit.*
- 6.13 Furthermore, on Monday the 26th October 2015, the First Respondent came to our residence in Postmasburg wherein she informed me that I must continue with the funeral arrangements of my late husband and bury him at his place of residence in Postmasburg.*
- 6.14 I then started with the funeral arrangements with a view to burying the deceased on Saturday the 31st October 2015.*

- 6.15 To my dismay, on the 29th October 2015 I received a call from Colonel Witbooi of the Postmasburg Police Service informing me that the First Respondent has deposed to an affidavit at Paballelo Police Station in Upington wherein she demanded the Postmasburg's Forensic Pathology Department of the South African Police Service to release the deceased's corpse to herself and not to me.
- 6.16 I informed colonel Witbooi that I am the legal wife of the deceased and I am legally entitled to his corpse and to bury it at his place of residence in Postmasburg. **Colonel Witbooi then informed me that since there is a dispute over the corpse they are not going to release the corpse to anyone until the Honourable court has made a ruling on the rightful owner of the corpse.**
- 6.17 I must say at the time the First Respondent stopped the funeral to take place on the 31st October 2015, I had already made funeral arrangements, payments were already made towards the hiring of tents, hiring of cooking pots, chairs and tables, groceries as well as the perishable vegetables. Animals were already slaughtered.
- 6.18 All items went to waste as the funeral could not take place on the scheduled date. I must mention that on the Friday before the scheduled Saturday of the funeral, I rushed towards my attorney's offices [in] a bid to obtain an order permitting me to carry on with the funeral but I was informed that it is late to bring this urgent application and I must postpone it to this week.
- 6.19 I pause to mention that the first Respondent does not have a house in Upington, she intends conducting the deceased's funeral service from a friend's house. I find this arrangement totally insulting to me and my entire family.
- 6.20 The first Respondent is under the impression that the deceased's policies will be paying a lot of money towards

whoever will be conducting the funeral service of the deceased. This impression is totally wrong because the deceased has left no policies behind and the expenses of his funeral services will be carried by myself with the help of the African National Congress.” (My emphasis).

11. The applicant states that notwithstanding her best endeavours Ms Lilian Plaatjies is adamant that she is entitled to bury the body of the deceased.
12. As foreshadowed earlier Ms Lilian Plaatjies is as silent as the grave in which the deceased will find his final resting place concerning the deceased's long and winding road from Namibia until he met his untimely demise. When he was alive she never cared for or about him. Now that he has died she cares. Strange.
13. Ms Lilian Plaatjies' version is that (translated): *“I want to know who of the deceased family negotiated the lobola/bogadi because my eldest son, Andile Plaatjies, and I and the rest of the family have no knowledge in that regard”*. This is a strange statement because it presupposes that she has not read para 6.7 and 6.8 of the applicant's deposition quoted in full in para 10 (above), of this Judgment. Significantly Ms Lilian Plaatjies says at para 6.16 of her statement: *“I was unaware of the allegation that the applicant was my son's lawful wife”*. Understandably so.
14. Ms Lilian Plaatjies denies that cultural rituals were performed after the bogadi was paid. There was no need or requirement for her to be informed or involved. She was never part of the deceased's life since she dumped him unceremoniously and has given no explanation to the Court *a quo* why she did it and whether she apologised for her inhuman conduct. What would she be saying

now if the deceased disappeared traceless at infancy, which is what she seems to have sought.

15. From the mouth of Ms Lilian Plaatjies comes the following (untranslated to eliminate any ambiguity):

*“Ons het toe terug gekeer Upington toe waarna ek kom uitvind het op 27 Oktober 2015 **dat daar wel ‘n polis by AVBOB is en dat ene Matlhogonolo Kgosietsile die begustigde is.** Ek het toe, vir die eerste keer sedert my kind se dood, die Applikant gebel om uit te vind of sy nie die persoon ken nie. Die Applikant het toe gesê dit is sy. Ek het haar toe gevra of sy die begrafnis voordele sal kom opeis om my in staat te stel om die begrafnis in Upington te hou waarna sy toe in gestem het. Ek het toe my suster gebel en vir haar gesê dat daar ‘n polis [is] en dat ek hom op Upington kan en gaan begrawe. My suster se antwoord was: “Thandiwe maak jy my so my suster, maar is reg”. **Dumani, haar seun, het my toe daarna gebel en gesê oor sy dooie liggam sal my kind in Upington begrawe word want sy ma, my suster, het hom groot gemaak.**”* (My emphasis).

16. AVBOB, it is a notorious fact, is a funeral undertaker. What Ms Lilian Plaatjies, perhaps unwittingly, admitted to is that the deceased instituted the applicant, whom he regarded as his wife, **Matlhogonolo Kgosietsile**, as his beneficiary. If he was averse to her burying him he, surely, would not have made her his “begunstigde” (beneficiary). A deceased need not devise a testament (will) to nominate a person to take charge of his/her burial. A mere letter or verbal declaration to witnesses would suffice. For example the following is recorded in LAWSA, Second Ed, Vol 2 (part 2), at P279 para 314, under “Burial rights and duties”: *“Failing such testamentary instructions, the wishes of the deceased person should be acceded to where there is clear proof of his or her wishes.”*

Footnote 3 gives a string of authorities for such principle and some commentary on this view. I can hardly fathom why the deceased would have preferred a mother, who was indifferent to his plight, to bury him over a loving wife.

17. In terms of s 3 of the Regulation of the Customary Marriages Act, 120 of 1998, the following are the requirements for the validity of a customary marriage:

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

(a) The prospective spouses-

- i. Must both be above the age of 18 years; and*
- ii. Must both consent to be married to each other under customary law; and*

(b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

(2) Save as provided in section 10(1), no spouses in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.

(3)(a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage”.

18. I am satisfied that the learned Judge erred in finding that:

18.1 No negotiations took place between the family of the deceased and that of the applicant. It unquestionably did. It is inconsistent for the Judge to accept that bogadi/lobola was paid but to disclaim the negotiations took part. The two are inseparable.

18.2 The court *a quo* also erred in having found that the mentioned intermediaries “are clearly not the deceased’s family and could not negotiate a valid customary marriage”.

Outside the deceased's mother, Ms Lilian Plaatjies, who disqualified herself, who could be a closer blood relative to the deceased than his mother's sister, Ms Sarah Mqomo? None.

- 18.3 The Court was also remiss in having found that "there was no consent by the deceased's mother or guardian or such consent by the father". Both the deceased and the applicant were adults. Ms Lilian Plaatjies mentions that the applicant is a "*regsgleerde van beroep*". Section 3(1) quoted above is also very clear. The days of perpetual tutelage for women are no more. See **Bhe and Others v Magistrate, Khayelitsha and others (Commission For Gender Equality As Amicus Curiae); Shibi v Sithole and Others, South African Human Rights Commission and Another v President of the Republic of South Africa and Another** 2005 (1) SA 580 (CC). See also **Shilubana And Others v Nwamitwa** 2009 (2) SA 66 (CC).
- 18.4 Coetzee AJ in dealing with the dispute of fact correctly alluded to **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A). However, in my view, he applied the principle too strictly for a case of this nature. The remarks of Erasmus J in **Mahala v Nkombombini and Another** 2006 (5) SA 524 (SE) at para 9 commend themselves to me whereat the following is recorded:
- "[9] The issue before the Court is a vexing one. Both the applicant and first respondent wish to dispose of the body of their loved one, the deceased. This is understandable. It is a matter of regret that the parties could not have come to some agreement prior to coming to Court. As appears from my summary of the affidavits, there is a dispute of fact on the papers. But, due to the urgency of the matter, there is clearly no time to refer these disputes to oral evidence for*

adjudication. The Court must decide the matter on the affidavits before the Court. In this regard, the general rule, as stated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H, operates. That rule has it that where, in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order may, generally speaking, only 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. That approach is possibly not entirely satisfactory for a matter such as the present. As was pointed out in Trollip v Du Plessis en 'n Ander 2002 (2) SA 242 (W) at 245E - F, a more robust approach is sometimes required, and the Court should then grant the order if it is satisfied that there is sufficient clarity regarding the issues to be resolved for the Court to make the order prayed for."

- 18.5 I wish to add that this does not stray from the **Plascon-Evans** rule that binds us but we invoke the approach of Phatshoane J in the **Cecilia Thupane and Others v Mary Lechuti and Others** Case No. 973/2011, Kimberley, Delivered on 5 August 2011, unreported, where she stated at para 5 of that judgment:

*"5. In **Soffiantini v Mould** 1956 (4) SA 150 (E) at 154 Price JP pronounced:*

'It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

In Plascon-Evans Paints Ltd v Van Riebeeck Paints supra the Appellate Division did not upset or criticize this enunciation. A more robust approach is sometimes necessary and a Court should grant the order if it is satisfied that there is sufficient clarity regarding the issues to be resolved for the Court to make the order prayed for. There is no reason in my view that this matter cannot be disposed off on the basis of the authorities cited above. “

19. According to the applicant and the intermediaries all the customary rituals were performed and she adopted a cultural name. Although details are lacking, those rituals must be inferred to have encompassed the handing over of the bride, the applicant. After all they lived as a married couple and to boot the “guardian/mother”, Ms Sarah Mqomo, supports her all the way.

20. In this application no thought was given to the fact that the deceased’s son, **Kgolagano**, is an heir to his father’s estate and that in matters affecting him, which this case is an example of, his best interests are paramount. A *curator ad litem* should have been appointed for him. See s 28(2) of the Constitution of the Republic of South Africa, 108 of 1996. See also **Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality project as Amicus Curiae)** 2003 (2) SA 198 (CC) at paras 20-22. I am, however, satisfied that the child’s best interests, at least as far as this application is concerned, won’t be adversely affected.

21. In **Cecilia Thupane and Others v Mary Lechuti and Others** Case No. 973/2011, Kimberley, Delivered on 5 August 2011, unreported, Phatshoane J had this to say:
“14. The conclusion reached in numerous decided cases with regard to burial rites is that in the absence of a will with directions

as to who should bury the testator the heirs to the deceased estate are entitled to arrange his/her burial. See **Mahala v Nkombomini and Another** 2006 (5) SA 524 (SE) at 528 para 11; **Gabavana And Another v Mbete and Others** [2000] 3 All SA 561(Tk); **Saiid v Schatz & another** 1972 (1) SA 491(T); **Human v Human & Others** 1975 (2) SA 251 (E); **Tseola v Maqutu** 1976 (2) SA 418 (Tk); **Sekeleni v Sekeleni And Another** 1986 (2) SA 176 (Tks); **Mankahla v Matiwane** 1989 (2) SA 920 (CkGD).

15. The following relevant passage appears in the 2003 **South African Law Journal** 'Till Death us do part': **Thembisile v Thembisile** at 790-791 para 3 by Elsje Bonthuys and Sanele Sibanda:

"The South African common-law position regarding the burial of a deceased person, who has left no specific instructions as to his burial, is that the duty of burying him, together with the corresponding rights, adheres to the heirs. This common-law rule is derived from a statement by Voet (**Mankahla v Matiwane 1989 (2) SA 920 (Ck)** at 922B-F sets out the origin and subsequent application of the rule) and has been applied to African and non-African families alike (**Gonsalves And Another v Gonsalves And Another 1985 (3) SA 507 (T)** at 509H-I).

The common-law position where there are competing claims by the heirs of the deceased was set out in **Tseola And Another v Maqutu And Another 1976 (2) SA 418 (Tk)**, which involved a burial dispute between the deceased's civil law wife and his mother, both intestate heirs under the **Interstate Succession Act 81 of 1987**, which applied because of the existence of a civil marriage. The court accepted that where the deceased has left no testamentary instructions as to where he wanted to be buried, the heirs would bear the duty of burying him as well as the corresponding right to bury him wherever they wished (at 422G). However, the court, being compelled to prefer one of the

heirs over the other, opted to recognize the wife as having stronger right than the deceased's mother. The preference for the wife was based on public policy considerations and on 'a sense of what is right' (424H). The court in this case, without explanation, appears to have taken the position that the wife's wishes should prevail over those of the deceased's mother....."

22. On a conspectus of the evidence and the submissions made.

I make the following order:

1. The order of the court *a quo* dismissing the application is set aside and substituted with the following order:

"1.1 That the First Respondent, Ms Thandiwe Lilian Plaatjies, the mother of the deceased, Mr Casius Edward Plaatjies, is hereby interdicted and prohibited from burying his body (the remains) in Upington, Northern Cape, or anywhere else.

1.2 The Second Respondent, the Station Commissioner, South African Police Service (SAPS), Postmasburg, or whomsoever is in charge of the Forensic Department of Health, Northern Cape, where the body of the deceased, Casius Edward Plaatjies, is kept is hereby interdicted and prohibited from releasing the deceased's body to Ms Lilian Plaatjies, his mother, or any other person but are ordered to release the body to Ms Matlhogonolo Kgosietsile, the widow of the deceased Casius Edward Plaatjies.

1.3 A declaratory order is hereby issued that the applicant, Matlhogonolo Kgosietsile, is declared to be the customary wife of the deceased, Casius Edward Plaatjies, and is consequently the rightful person to arrange and bury the deceased at a place of her choice and in the manner that she deems appropriate.

1.4 No cost order is made against any of the respondents.”

F DIALE KGOMO
JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur.

C J OLIVIER
JUDGE

Northern Cape High Court, Kimberley

I concur.

B M PAKATI
JUDGE

Northern Cape High Court, Kimberley

Counsel:

For the Applicant:

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For the 1st Respondent:

Mr D Janse Van Vuuren

Instructed by:

Legal Aid Board

For the 2nd Respondent:

No Appearance