

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 389/2024

In the matter between

LIMA SYBIL MAKATASI

Applicant

and

XOLA METELE

First Respondent

**AVBOB FUNERAL SERVICES
LIMITED**

Second Respondent

JUDGMENT IN URGENT APPLICATION

HARTLE J

[1] It has been left to this court to decide the competing burial claims of the applicant, who is the surviving spouse of the deceased but who was in a manner estranged from him at the time of his death, and the respondent who is his son.

[2] It is common cause that the deceased died intestate and that there is no written document evidencing his own choice in this regard as to who should be responsible to attend to his burial, how his mortal remains are to be disposed of, or where. A bitter dispute has arisen within the family over who should be entitled to take charge of his body for these purposes.

[3] The compunction under which I have been called upon to decide this issue is that the body of the deceased is in the custody for the time being of the second respondent in its mortuary where it obviously cannot remain indefinitely.

[4] I was informed by counsel that the burial service had already been held (after the issue of the present application) at the instance of the first respondent at Hanover where the deceased resided with him at the time of his demise. The body was returned to the second respondent's parlour after that service by agreement between the parties to be kept there until the "*finalisation of the matter*".

[5] Given the parties' agreement reached on the afternoon of the first enrolment of the matter before my colleague (which was made an order of court), the initial relief sought by the applicant that the second respondent be interdicted from releasing the mortal remains of the deceased to the first respondent has indeed become moot, but it yet remains compelling for this court to determine whether, as sought by the applicant in her notice of motion, she should be declared to be vested with sole authority over his mortal remains in her capacity as his surviving spouse and intestate heir of their joint estate to give effect to his claimed dying wishes, alternatively as agreed between her and their other three children who support her in the present application.

[6] When the matter came before me the issue of urgency and costs and anything ancillary thereto (several objections of a technical nature were also raised) were at my insistence set aside and I prevailed upon the parties to address me only on the single issue of whether the applicant should succeed on the basis of her claimed entitlement, as this would naturally prompt a much desired conclusion of the fate of the body. It appears that all other attempts at a mediation of the matter have thus far been in considerable vain.

[7] I heard argument late Thursday afternoon (16 May 2024), and heads were supplemented by the first respondent that night at my insistence. The opposing papers

were filed out of time despite my colleague's order directing that they be delivered by 13 May 2024. When the answering papers came to hand, *sans* any heads of argument, I was already seized of the opposed motion court roll for the day and could not read them or the replying papers except cursorily. Nonetheless I heard the parties - given the conundrum facing the family and reserved my judgment.

[8] I have since had careful regard to the founding papers, the opposing contentions and the stated law on the vexed consideration of such matters and have resolved to determine that despite the applicant having been physically separated from the deceased at the time of his passing, she was not completely estranged from him or uninvolved in his life and that this is not one of those matters in which I should regard the fact of her marriage with him as having been merely in existence on paper. To the contrary fairness in this peculiar fact scenario dictates in my opinion that the applicant rather than the first respondent should bury the deceased in keeping with the family's joint discretion, which supports their mother taking the lead in this respect and burying their father at his ancestral home.

[9] The facts of this case are entirely distinguishable from those of *Dumisa*¹ and *Mabulana*² to which Mr. Metu who appeared on behalf of the first respondent referred me. In both those matters the court looked beyond the status of the valid marriages that pertained between the spouses seeking to bury their respective husbands in opposed urgent applications where they asserted their rights by virtue of those unions to determine the burial arrangements.

[10] In *Dumisa* the spouses were in the throes of divorce. The deceased had left the matrimonial home some four years before and had commenced divorce proceedings upon the narrative that the marriage had broken down irretrievably. The applicant had also obtained a protection order against him. The divorce proceedings had reached the stage before the demise of the deceased where they were in the process of conducting

¹ [2021] ZAGPJHC 21 (19 February 2021).

² [2021] ZALMPPHC 36 (26 July 2021).

settlement negotiations in respect of the division of their joint estate only. Applying the “*fairness approach*” enunciated in *Finlay and Another v Kutoane*³ (as the court did in *W and Others v S and others*⁴, *TM v CM and Another*⁵ and *Sengadi v Tsambo; In Re: Tsambo*⁶, although coming to different conclusions in each example), the court was influenced by: the fact that the spouses had been estranged for a lengthy period of time; her case made out on the papers was the less plausible; the lack of any evidence about a will or of any reason why the deceased would have wanted the funeral planned by the applicant; the strength of the opposing case that the actual wishes of the deceased were to be buried at Zava Village; family cultural traditions and a precedent of burials of family members at Zava Village; as well as greater detail given about the cultural beliefs of the deceased’s family.

[11] In *Mabulana* the deceased’s wife sought the leave of the court to bury her spouse despite her separation from him some three years prior. She claimed that they

³ 1993 (4) SA 675 (W) at 679J-680A where Flemming DJP declared that the proper approach, where there are competing burial claims, is that “*the law should ideally mirror what the community regards as proper and as fair*”. That view would, according to de Villiers AJ in *Dumisa*, be influenced inter alia by views on social structures, views on family relationships and marriage, views on the impropriety of not complying with requests of the deceased, religious views, cultural values and traditions.

⁴ [2016] ZAWCHC 49. The parties were estranged. The court found that the marriage was on paper only and that the estranged spouse had nothing to do with the deceased. In that matter the court held that the expectations of the community, fairness and reasonableness dictated that the deceased’s relatives should determine where the burial had to be, and not the estranged spouse.

⁵ [2019] ZAGPJHC 412. The court came to a different conclusion. It was not convinced that the marriage was on paper only. Although the couple were experiencing marital problems, the parties had not yet separated. The surviving spouse, who had sued for divorce, had however not proceeded with the action as she had hoped to save the marriage. They were not estranged and also had a 3 year old child. Although evidence was presented that the deceased had intended to vacate the matrimonial home, the court found that the fairest order (on the facts of that case) was that the surviving spouse should be allowed to bury the deceased.

⁶ [2019] 1 All SA 569 (GJ). In this matter there was a dispute about the validity of a customary marriage. At some stage the applicant had left the home due to the deceased’s infidelity and drug dependence, it appeared not long before his death. The court found that the marriage was valid, but on the facts of the case, decided that the family should rather bury the deceased.

had notwithstanding their parting remained in touch concerning their mutual interests regarding the children and their matrimonial home. It transpired that just before the deceased's passing, a decree of divorce had practically been granted, but the matter could not proceed without the assistance of an interpreter. In other words, had it not been for a postponement of the matter for this reason, the divorce action would have been finalised days before the deceased's death on the basis of the parties' agreement that the order could be taken unopposed. In the particulars of claim the applicant had stated that she had lost her love and affection for the deceased.

[12] The divorce action was however withdrawn by the applicant immediately after hearing that the deceased had passed away, a factor which the court in the application lamented she had failed to disclose to it. The respondents (a sister-in-law and sister respectively) had submitted that it had been the deceased's express wishes to be buried by the first respondent who had cared for him in his final days and had in fact looked out for his interests for eight years before that.

[13] The deceased had also left a will in which the first respondent had been nominated beneficiary although in it he had not given directions as to who should prepare for and arrange his burial.

[14] The respondents in their opposing papers had refuted the communication contended for between the applicant and the deceased.

[15] The court found that the applicant's failure to have disclosed that she and the deceased were undergoing a divorce which was on the verge of being finalised and would have been disposed of on an unopposed basis but for his death was a vital factor in its consideration against the grant of the relief sought by her. In its view and in pursuit of reaching a just and fair decision, it determined that the applicant had opportunistically withheld critical information and had presented a contrary picture of the true circumstances. It further factored in that for a long period of time the applicant had in fact disassociated herself with the deceased. She had also stated in her particulars of

claim in the divorce action that she had lost her love and affection for him and that she no longer wanted to be with him. Their permanent relationship would have come to an end but for the postponement aforesaid of the divorce action.

[16] In the result the court held that their relationship existed on paper only and found support in the approach adopted by the court in the similar fact matter of *W and others v S*⁷ where despite the applicant in that matter and the deceased being in an extant civil marriage at the time of his dying, that union was just two days away from divorce when the deceased had met his death.

[17] The facts in this matter that innately justify in my view that it is fair and just that the applicant be allowed to bury the deceased are uncomplicated and straight forward with no hidden agendas.

[18] The applicant and the deceased were married in 1979 from which union four children, including the first respondent, were born. The deceased was mostly itinerant given the unfortunate discriminatory laws of our country that prevailed at the time. This caused a strain on the marriage and the upbringing of their children, but the couple endured and persisted in their lawful union.

[19] The deceased last disappeared from home in 2014 until 2021 when he was found in Idutywa working as a cattle herder/shepherd. He was in a frail state. The family endeavored to bring him home but the deceased expressed the desire to live with the first respondent at his home in Hanover. The applicant noted this development as a mere practicality and pointed out that the arrangement was felicitous because the first respondent is a man of means as compared to the rest of the family.

[20] This is how the deceased lived out the remaining few years of his life.

⁷ *Supra*.

[21] In March this year he was admitted to the Bhisho Hospital where he ultimately passed.

[22] The applicant alleges that for the period that the deceased lived with the first respondent at the latter's home, this was not an exclusionary arrangement. Indeed, she and the rest of the family enjoyed visitation rights until his passing and *"there existed a harmonious relationship with the family."*

[23] It was only after the deceased's death that the notion arose per the first respondent that his father had purportedly asserted his desire to be buried in Hanover *"versus where everyone else in the family expresses that he ought to be buried in his ancestral home"*. It is common cause that the latter is in Mooi Plaas which is the deceased's childhood homestead and a place where significant family events have taken place (each of the couple's sons have for example celebrated their cultural initiations there and the applicant and the deceased were also married at the home) and where the applicant says the deceased had expressed to her a desire to be buried ultimately.

[24] The first respondent commenced burial preparations off his own bat claiming that the deceased's mortal remains were rightfully his. He was singularly unprepared to engage with either the applicant or his three siblings in this regard and also scorned an attempt by Legal Aid South Africa, who the family approached to resolve their differences, to formally mediate the dispute between them.

[25] The only purportedly divergent sentiment that emerges from the first respondent's opposing affidavit (apart from the litany of technical points taken including (most ironically) the applicant's non-compliance with the provisions of rule 41A (2) (a) of the Uniform Rules of Court despite his having spurned the opportunity of Legal Aid

South Africa to mediate the dispute)⁸ is that the applicant and the deceased never had a matrimonial home, that she left him for an extramarital affair, and that at the time of the deceased's passing she resided with her "*current boyfriend*." The suggestion that the applicant's marriage to the deceased merely existed on paper is coincidentally uttered through the mouths of two of his brothers in opposing affidavits but they rely for that critical contention on the hearsay evidence of the first respondent. He in turn has not had the confidence to assert as much with his own voice in his opposing affidavit which is to my mind bereft of any real reason that she should be entitled as wife and intestate heir of the joint estate to make the important decision of where her spouse is to be laid to rest especially since she has the support of the rest of her children in doing so.

[26] The applicant has been quite forthcoming with the court from the outset concerning the state of her relationship with the deceased. She has not sought to exaggerate a perfect marriage but it appears to me to have been one that has always been family centered. She has forgiven his absences from home and has sought to maintain harmonious relationships for the sake of the family. One gains the impression that it came as a surprise to the family to have found the deceased in 2021 in a fragile state after a very lengthy absence from home, but the applicant and the family were mindful of his need to be reintegrated into the family. The deceased chose at that juncture to live in Hanover with the first respondent but did not sever the bonds of his marriage to the applicant.

[27] She has responded to the scurrilous allegations of her purported impropriety that they are "*rather unfortunate*" and that for "*peace sake*" she would prefer to veer away from statements made in reply that would further rupture the family. In this stance she is also supported by her other sons who confirm that despite the imperfections in their parents' relationship they had until his death remained committed to their bonds of marriage. She has not boasted that she acquired property or maintained a home in Mdantsane despite the absence from home of the plaintiff. To the contrary she regards

⁸ I was informed from the bar that counsel also tried for hours to broker a settlement of the dispute when the matter first came before the court on the basis of urgency.

the property a belonging to the joint estate. Her interest is further quite evidently in the family's security and integrity as a unit rather than in any self-serving way. Any other conclusion would to my mind be quite implausible and inconsistent with the common cause facts.

[28] Although the first respondent sought to muddy the waters by the thoughtless suggestion that the applicant has taken in a boyfriend, the first respondent has dealt with this fact in the faintest of terms and I am not persuaded that I need pay any attention thereto in a situation where I must decide the issues briskly and as best I can under the unique exigencies of the matter.⁹

[29] Further, the first respondent does not suggest that his father himself ever pointedly expressed a desire to him personally to rather be buried by him, his own blood relatives, or at any other particular location above all else. He does not take the court into his confidence in this respect at all. The plans to bury the deceased at Hanover seem instead to have been laid by him after his father's passing in discussing the burial with "*family elders*" purportedly "*in line with amaXhosa tradition*," which insistence is so patently in absolute disregard of the applicant's *ex lege* interests as a spouse in a valid marriage that was only terminated upon the deceased's death, and as intestate heir of the joint estate. It also overlooks the fact that the rest of the nuclear family have a view and an interest in the decision which they have been actively engaging with since their father passed.

⁹ See the approach adopted by the court in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) which requires party seeking to raise a dispute in his affidavit to do so "*seriously*" and to unambiguously address the fact said to be disputed. As stated by that court there is "*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.*" In this instance the first respondent has thrown fluff to offset the very firm intimation by the applicant that she remained married to the deceased as a conscious election and a firm purpose and that they never divorced.

[30] The first respondent has invested much emphasis in his opposing papers in describing why Mooi Plaas is no longer a suitable resting place for his father which strangely supports the applicant's case that this is where the deceased indeed indicated his desire to be buried.

[31] In this instance the predominating desire of the family who support the application is to give a place of honour to their parents' marriage and to allow the applicant to take the lead (upon consultation with them) in disposing of the body of their beloved father. It is commendable that the first respondent took care of him in his last few years but this was not a unitary act. He always did so within the context of a close, caring nuclear family that desires harmonious family relations.

[32] As was stated closer to home in *Mahala v Nkombombini and Another*¹⁰ in circumstances like these there should be no hard and fast rules and each case is to be decided on its own particular circumstances. Common sense should be the order of the day and the approach to strive for is one of fairness in the particular circumstances of the case.¹¹

[33] Those dictates of fairness sway me in the direction of permitting the applicant to get on with the family's arrangements of burying the deceased without further ado.

[34] I conclude with the hope that the family will find peace in this tragic situation and remember their strength in one another as a whole.

[35] In the result, I make the following order:

1. It is declared that the applicant is vested with the sole authority over the mortal remains of the late *Mxolisi Kevin Metele*.

¹⁰ 2006 (5) SA 524 (SE).

¹¹ *Trollip v Du Plessis and Another* 2002 (2) SA 242 (WLD) 245 E – F.

2. The rest of the issues raised by the parties on the papers such as they are still contestable, including the issue of the costs, are postponed *sine die* for determination on the ordinary opposed motion court roll.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : **16 May 2024**
DATE OF JUDGMENT : **18 May 2024***

Appearances:

For the applicant: Mr. L Mati instructed by Kale Attorneys Inc., East London (Ref. KALE/TK/M23).

For the first respondent: Mr. B Metu instructed b Sotenjwa Attorneys, East London (Ref. NS/001/66).

For the second respondent: Nil.

**Given the exigency of the matter the order was handed down on Saturday at 13h49 by voice note which the Registrar was requested to immediately publish to the parties, with the undertaking given by the court that a written judgement (or reasons for the order) would be made available to the parties on the morning of 20 May 2024.*