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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2023/027196

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE	SIGNATURE

In the matter between:

JOHANNESBURG CITY PARKS & ZOO 1st Appellant

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY 2nd Appellant

and

G[...] M[...] Z[...] Respondent

JUDGMENT

MAKUME, J (Senyatsi J and Manoim J)

Introduction

[1] This is an appeal against a judgement by Adams J dated August 2022 in which judgement the appellants were ordered to recognise the respondent as the holder of rights to a grave site situated at Westpark Cemetery in which the remains of her late husband remain interred.

[2] The respondent approached the Urgent Court and was successful after the official in charge of the cemetery had refused her the right to erect a tombstone on the grave site in memory of her late husband.

Background Facts

[3] The right to bury a loved one or a close member of one's family has always been a contested territory in our communities especially where a deceased person has not directed otherwise in a written will or had openly expressed a wish. This right is further exacerbated when married parties are living separately and contemplating a divorce or in the event where there is just no communication between family members when such an estranged party passes away and is at that time not living with his or her married partner. This was exactly the position between the respondent and her late husband.

[4] It is common cause and not in dispute that the respondent and her late husband S[...] M[...] Z[...] (the deceased) were married in community of property on the 11th November 1993. There were no children born out of that marriage.

[5] The marriage relationship floundered, as a result during November 2011 the respondent vacated the matrimonial home. Two years later in the year 2013 the deceased obtained by default a divorce decree without having informed the respondent. The decree of divorce was later set aside by this Court on the 10th November 2014.

[6] The deceased took no further steps to pursue the divorce action. On the 21st January 2019, he was killed in a shooting incident. The marriage between the deceased and the respondent still subsisted at the time of his death. Despite that, the family of the deceased, including his sister T[...] J[...] M[...], refused the respondent the right to participate in the burial of her husband as they were still under the wrong impression that the parties were divorced.

[7] Notwithstanding the attitude of some of the family member of the deceased, the respondent made available funds to enable the family to bury the deceased at Westpark cemetery as they did not have sufficient money. The respondent submitted a claim against her funeral policy and paid R4 500.00 for the grave site at Westpark.

[8] Annexed to her founding papers is an affidavit by Bennet Mandla Z[...] who confirms that, in the following words:

“I went with my daughter in law G[...] M[...] Z[...] to Shandu funeral parlour to pay for the gravesite. G[...] Z[...] paid for the grave site which initially was supposed to be at Slovo gravesite. She suggested that it was better for his husband to be buried at Westpark cemetery of which a sum of R4 500.00 was needed and she paid the amount hence the deceased was buried at Westpark cemetery. I was one of the delegates who was sent to request her to bury the deceased as there was no money she complied and even bought the cow and paid all the finances for the funeral as his family had no money to bury him.”

[9] It is clear from the papers that it was the respondent who chose that the deceased be buried at Westpark and not at Slovo Cemetery. The burial was conducted by Shandu Funeral Undertakers and the respondent made payment for the gravesite to the undertaker who in turn paid the appellants.

[10] It was because T[...] M[...] had been arranging with the undertakers, this is how the gravesite was booked in the name of T[...] M[...] as a result it is her details which appear on the records of the appellants. The deceased was buried on the 2nd February 2019 at Westpark.

[11] In the year 2020, the respondent approached officials of the appellants at Westpark Cemetery to seek permission to erect a tombstone on the gravesite of her late husband. She was told that the only person allowed to do that is TJ Mokoto who happens to be T[...] M [...], her sister-in-law whom the deceased lived with at the time of his death.

[12] The respondent's attorney addressed a letter to the appellant's manager at the cemetery, one Reggie Moloi, to seek clarity as to why she could not erect a tombstone. It is significant to note that at that time the respondent had already been appointed executrix in the estate of her late husband.

[13] On the 12th October 2020, Reggie Moloi the cemetery manager responded as follows to the attorney:

“Good afternoon please take note that if your client is not the owner of rights to the grave then she has to consult with the owner of the right.”

[14] Later on the 16th May 2021, Mr Reggie Moloi addressed another letter to the respondent's attorneys and said the following:

“The G[...] Z[...] matter of Westpark Cemetery is simply not a refusal by the cemetery to allow her to erect a tombstone but rather a procedural matter based on the City of Johannesburg Cemetery & Crematoria By-Laws on Chapter 2 Section 8 in its entirety.”

[15] The respondent subsequently launched an urgent application in which she sought the following relief:

a) That the first and second respondents are ordered to grant permission to the applicant to erect a tombstone (Also known as Memorial work) for her deceased husband S[...] M[...] Z[...] at grave number ECM 9710 Westpark Cemetery, Johannesburg.

b) The permission referred to in paragraphs 2 above shall be issued to the applicant within 7 days from the date of this Court order.

c) The first and second respondents are ordered to amend their records and register the applicant as the person who also has rights to the deceased's grave.

[16] The third respondent in the application being the sister-in-law was served with the notice of motion and did not oppose. It is only the City of Johannesburg which has opposed the application and based its refusal to grant permission on two reasons. Firstly, that the respondent is not the owner of the grave rights, secondly, that the respondent should seek permission from T[...] M[...] to enable her to erect the tombstone. They cited the City's By-Laws.

BURIAL RIGHTS

[17] Before dealing with the defence raised, I deem it appropriate to make reference to a few decisions of our Courts dealing with burial rights.

[18] In *Human v Human*,¹ Cloete AJP held that a surviving spouse is in preference to any other relation entitled to claim the body of the deceased. In *Noordien v Moslem Cemetery Board*² a dispute arose about the issuing of a permit by the respondent to enable the applicant to bury his son at the Muslim controlled cemetery. The court in criticising the respondent's refusal concluded as follows:

"What it in my view on the papers before me has sought to do is to take unto itself the power to deprive a person of the right of burial already conferred in the guise of adopting rules of regulations relating to burial procedure. This in my view it is not competent for the Board to do."

¹ 1975 (2) SA 251 (E).

² 1965 (4) SA 174 (C).

[19] In *Gonsalves and Another v Gonsalves and Another*,³ the Court held that, if the deceased did not choose or designate a person to carry out his burial, then and only then does the right fall upon his heirs. The respondent is the only interstate heir in the estate of her late husband.

[20] In *Serole and Another v Pienaar*,⁴ a matter that concerned the rights to bury held by the occupier of land under the Extension of Security of Tenure Act.⁵ In that matter it was held that a court will not interpret a statute in a manner which will permit rights granted to a person under that statute to intrude upon the common law right of another unless it is clear that such intrusion was intended.

[21] This case law serves to confirm that the right to bury falls on the heirs of the deceased in the absence of a specific instructions from the deceased whilst alive. That right extends, in my view, to the right to erect memorial tombstone in remembrance of the deceased.

[22] In this matter the respondent is not only the interstate heir, she is also the executrix of the estate. She chose the gravesite and paid for it.

[23] In the answering affidavit opposing the relief sought by the respondent, the appellant sets out three defences namely, that the application was not urgent, secondly, that the third respondent is the only one who has the rights over the gravesite and lastly, that the respondent should have first asked permission to erect the tombstone and not rush to court. The court *a quo* adjudicated the application on the evidence placed before it.

The By-Laws

[24] It is significant to note that in Chapter 2 of the By-laws, section 8 reads as follows:

³ 1985 (3) SA 507 (T).

⁴ 2000 (1) SA 328 (LCC).

⁵ Act 62 of 1997.

“8. (1) The holder of private rights includes: -

- a) A person who purchases a grave or who received a grave as a gift from the purchaser and whose name appears in the register of the council.
- b) A person who paid the prescribed burial fees in respect of the first burial in the grave.

8. (3) If there is a dispute about the holder of private rights, the dispute must be referred to the officer in charge for determination.”

[25] In the definition clause the word “officer in charge” means the registrar of a crematorium appointed by Regulation 21 of the Regulations relating to crematoria and cremation made in terms of Ordinance no. 18 of 1965 and includes a person authorised by the Council to be in control of any cemetery.

[26] It is so that Mr Reggie Moloi was the officer in charge. He did not make a determination whether there was a dispute or not, he simply told the respondent to get the permission of the third respondent. A reading of the By-Law means that he should have convened a meeting of the respondent and the third respondent, T[...] M[...], to first determine if indeed there was a dispute or not. He failed to perform his duty as envisaged in clause 8(3) of the By-Laws.

[27] Clause 24 of the By-Laws reads as follows:

“24(1) A person intending to erect a memorial work must make and complete an application on the prescribed application form to the officer in charge.

24(4) No person may: -

- a) erect memorial work or bring material into a cemetery for the purpose of erecting memorial work without the written consent of the officer in charge.
- b) remove memorial work for additional inscription or other alternations without the consent of the officer in charge.”

[28] There is no-where in this clause where it is said that it is compulsory that the respondent should have first sought the consent of the third respondent, it was a decision of Reggie Moloi which was based on incorrect and unfounded interpretation of the By-Laws.

What is in Issue for Determination in this Appeal

[29] There are two issues to be determined in this appeal the first being whether the respondent should have first sought a review of the decision by way of PAJA on the basis that the decision by Reggie Moloi was an administrative action, secondly, it is the question of who is the owner of the gravesite.

[30] Firstly, I deal with the question whether Reggie Moloi's decision amounted to administrative action capable of review in terms of PAJA. In their notice of appeal as well as in the heads of argument, the appellants say that, the relief sought by the respondent could only be granted if the administrative decision already made by the appellants were reviewed and set aside.

[31] At paragraph 7 of the heads, the appellants make a strange submission to the effect that Adams J did not deal with the issue of administrative review and granted the relief sought on the papers. This cannot be correct a reading of the judgement especially in paragraph 7 thereof, Adams J deals with the PAJA review and concluded as follows:

“The city takes their argument based on the rigid and inflexible approach a step further and contends that in bringing this application the Applicant was ill advised. She should have applied for a review and setting aside of the previous administrative decisions that being the registration of the third respondent as the “holder of private rights”, so the city argues in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA). The Applicant would not be able to do so, in any event as the PAJA review grounds do not exist. It cannot, for instance, be said that decision of the public official is wrong or irrational so the city submits and therefore the decision must stand.”

[32] In my view, reliance on the *Oudekraal* decision is misplaced taking into consideration the issues involved therein. In *Oudekraal*, the invalid or impugned decision was taken by the Administrator of the Province in terms of the then legislation applicable to Provincial Government. In this matter the decision was taken by an employee of the city in his capacity as officer in charge. His decision to decline permission cannot amount to administrative action. It was an action taken on an incorrect interpretation of the By-Law.

[33] Mr Reggie Moloi failed to determine if there was a dispute in terms of clause 8(3) of the By-Laws and could accordingly not be said to have taken an administrative decision. To cap it all in his last letter he in a clear language says that he has not refused to grant permission and says that it is all about procedure. This once more cannot be said to amount to administrative action.

[34] The last question to answer is who is the owner of the private rights over the gravesite. As a starting point the respondent in her application in prayer 3 asked that the Appellants be ordered to amend their records and register the respondents as the person who also has rights to the deceased grave.

[35] Two issues arise out of the wording of that prayer, the first being that the respondent did not ask that her sister in law T[...] M[...] be removed as “private owner” but that she also be recognised as having rights over the gravesite. In short, she is prepared to co-own the private rights with the third respondent. Secondly, the third respondent having received the notice of motion did not object to the prayer, this in my view should have signified to the appellants that the third respondent is prepared to co-own private rights therefore no dispute existed calling for a determination by the officer in charge.

[36] Clause 8(b) of the By-Laws is clear and unambiguous, it says that a person who paid the prescribed burial fees acquires private rights over the grave. It is uncontested that the respondent is the one who paid the prescribed burial fees. If that was not the case, why has contrary evidence not been produce either by the appellants or T[...] M[...], their silence means consent.

[37] In paragraphs 14,15 and 16 of her founding affidavit, the respondent set out how it came about that she paid for the burial fees. In response to that, the appellant via Reggie Moloi say nothing about the payment of burial fees. The deponent Moloi avoid this by relying on the issue of consent by T[...] M[...] which I have found not to be the requirement.

[38] It is also common cause that the respondent automatically became owner of the contents of the grave by virtue of her marriage in community of property to the deceased that common law right could never be taken away from her by virtue of a municipal By-Law.

[39] In conclusion, it is my view that the City's argument was correctly summarised by Adams J as being based on rigid and inflexible approach and it is to be regretted that the City took it upon itself to appeal this decision at great expenses. The respondent did not oppose the appeal that does not mean that the City was right to appeal. She is probably saving money.

[40] As the result, I propose the following order:

- a) The Appeal is dismissed;
- b) The Appellant attorneys are not entitled to charge any fees in relation to this appeal.

M A MAKUME
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

SENYATSI
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

MANOIM
JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING : 14 August 2024
DATE OF JUDGMENT : 10 September 2024

APPEARANCES

FOR THE APPELLANTS : Adv Christopher Gibson
INSTRUCTED BY : Messrs Moodie & Robertson Inc

FOR THE RESPONDENT : (No Appearance)
INSTRUCTED BY : (None)