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

Case Number: 104659/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO

_____ DATE	_____ SIGNATURE
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In the matter between:

N[...]; P[...]

First Applicant

S[...]; K[...] obo

S[...]: O[...] AND

S[...]; L[...]

Second Applicant

and

N[...]; P[...]

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on

Caselines. The date for hand-down is deemed to be 10: 00 am on 16 September 2024.

Summary:

An urgent interdict seeking to restraint the holder of burial rights to exercise the preferred method of disposing of the body of her deceased husband following the wish of the deceased. It was alleged by the surviving spouse that the deceased had expressed the wish to have his dead body be cremated as opposed to being buried. The mother and the minor children of the deceased are opposed to that wish as relayed by the surviving spouse.

Where the burial rights are not contested, the possessor of those rights has the right to decide what form the disposition of the corpse should take. Flowing from the rested intestate legal principles, the surviving spouse enjoys stronger rights than that of children and parents of the deceased. Since the legal position is clear, it is unnecessary to issue any declaration of rights. In seeking to dispose of the body through cremation method, the surviving spouse is not acting unlawfully and an interdict as a special remedy is unavailable. Held: (1) The application is dismissed. Held: (2) The first and the second applicants are ordered to pay the costs of the respondent, jointly and severally, the one paying absolving the other, to be taxed or settled on a party and party scale B.

JUDGMENT

MOSHOANA, J

Introduction

[1] Aptly identified, the present contestation involves the method of exercising what is now known as burial rights. Up to now, there are three known methods to dispose of the corpse. Those are (a) burial; (b) cremation; (c) aquamation. The most

popular method amongst the Africans is the burial method. This method entails placing the deceased's body six-feet underground in a coffin and covering it over with soil. The other method which is also gaining traction amongst the Africans is the cremation. This method entails the burning of a body to ashes. The fairly new method is one of aquamation. This method entails the use of alkaline water solution to slowly and gently break down the body into a powder-like substance similar to cremated ashes.

[2] In the present motion, the applicants, Ms P[...] N[...], the mother of the deceased and Ms K[...] on behalf of the two minor children (O[...] and L[...]) prefer and or insist on the burial method. They contend that the burial method accords with the Zulu customs and culture. The deceased was allegedly a staunch supporter of Zulu customs and traditions. The respondent, Ms P[...] N[...], the surviving spouse, allegedly following the wishes of the deceased, prefers and insists on the cremation method.

[3] Over and above the competing rights issue, this motion pits methods of burial against cremation. From a biblical point of view, the Holy scripture states:
"By the sweat of your brow you will eat food until *you return to the ground* since from it you were taken; for dust you are and *to dust you will return*."¹

[4] Proponents of both methods use Genesis 3:19 to support the burial and the cremation method. Seemingly, the phrase return to the ground supports the burial and to dust you will return supports the cremation method. Having said that, this judgment will not seek to elevate one method over another. It is not concerned with the question of which of the methods is morally acceptable and defensible. This judgment will concern itself with who has the right to choose a method. The peripheral issues of rights guaranteed in section 28 and 30 of the Constitution may be touched on since the applicant attempted to bring those rights into the fold.

¹ Genesis 3:19 New International Version Bible

Background facts pertinent to the present application

[5] The deceased, identified only in the notice of motion as Mr M[...] N[...], was married to the respondent Ms P[...] N[...] (surviving spouse) by civil rights on or about 11 February 2017. The deceased and the surviving spouse lived together as husband and wife at 6 Vlak street; Meerdale; Johannesburg (the matrimonial home). Although for reason that appear flimsy, the applicants, conveniently labelled the surviving spouse as the estranged wife. I interpose to mention that a person is estranged if as a wife or husband is no longer living with their spouse. In *casu*, it is undisputed that the deceased and the surviving spouse lived under the same roof as husband and wife until the demise of the deceased.

[6] In a weak attempt to bolster the alleged estrangement, the applicants conveniently alleged that before his death, the deceased had expressed to his mother, uncle and attorney of record his intention to divorce the surviving spouse. The applicants were so brazen to even suggest that divorce summons were issued but the surviving spouse refused to accept service thereof, yet a copy of the issued summons was not availed to this Court.

[7] Nevertheless, on 8 September 2024, the deceased left the matrimonial home to visit a place identified in the papers as *Mai-Mai*. In due course, the surviving spouse received a call from the friend of the deceased to come to *Mai-Mai* because the deceased has been shot. Indeed, the deceased was shot and he died because of the bullet wound. Later, the family gathered to arrange the funeral of the deceased. In the family meeting, the surviving spouse mentioned to all present that the deceased had expressed to him, and at some stage in the presence of the minor children not born between the deceased and the surviving spouse, that upon his death he wished to have his body cremated instead of being buried.

[8] The family did not expressly object to the wish but sought an undertaking from the surviving spouse to have the ashes released to them for burial. The surviving spouse did not provide such an undertaking there and then. As a result, a cremation process was scheduled to take place on 13 September 2024. Owing to the request

to perform certain rituals before the cremation could take place, the cremation was rescheduled to 17 September 2024. Unbeknown to the surviving spouse, on 14 September 2024, the applicants launched the present application and enrolled it for hearing on 15 September 2024. Indeed, the application was argued before me from 19H00 hours on that evening. Judgment on the matter was reserved.

Analysis

[9] In motion proceedings, an applicant stands and fall by its case made out in the founding papers. It being the case the other party is called upon to meet. Such that a party is not permitted to make out a case in reply. In *casu*, only two sets of affidavits were delivered. A belated attempt was made, when the shoe was really pinching, by the applicants to be indulged to deliver a replying affidavit. Correctly, this opportunistic belated attempt was resisted by the surviving spouse. In an *ex-tempore*, this Court dispensed with a ruling dismissing the request to deliver the replying affidavit.

[10] Other than seeking urgent audience in terms of Rule 6(12) of the Uniform Rules, the applicants sought the following prayers:

- a. It is declared that the First and/or Second Applicant is entitled to arrange the burial of the body of the late M[...] N[...] ("*the deceased*");
- b. Alternatively (to paragraph a above), it is declared that the First and/or Second Applicants are entitled to determine whether the body of the deceased will be buried or cremated;
- c. The Respondent is interdicted and restrained from arranging the funeral or burial of the deceased;
- d. Alternatively (to paragraph c above), the Respondent is interdicted and restrained from disposing the body of the deceased by way of cremation and that the Respondent is ordered to bury the body of the deceased at the recognised public cemetery;
- e. Any funeral undertaker or any person in possession of the body of the deceased is authorised to release the body to the First Applicant;

f. It is declared that the First Applicant is entitled to take possession of the body of the deceased for purposes of arranging its burial.

[11] Regard being had to the notice of motion, the applicants are essentially seeking declaratory and interdictory reliefs as well as concomitant orders. With regard to declaratory relief, the law is settled. Corbett CJ in *Shoba v OC Temporary Police Camp, Wagendrift Dam*² laid the following principle with regard to declaratory reliefs:

“An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case ... But because it is not the *function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding ...*”

[12] In *Proxi Smart Services (Pty) Ltd v The Law Society of SA and Others*³, the Court, correctly, in my view, held that a Court will not grant a declaratory order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute.

[13] With regard to burial rights and/or rights to dispose of a body of a deceased person the law was settled by this Court in *Sengadi v Tsambo (Tsambo High Court)*⁴ which was confirmed by the Supreme Court of Appeal in *Tsambo v Sengadi*⁵. In *Tsambo High Court*, the following was laid down:

“The applicant as the customary law wife of the deceased ... is entitled to bury her customary law marriage husband, the deceased”⁶

² 1995 (4) SA 1 (A) at 14F-I

³ Case 74313/16 dated 16 May 2018.

⁴ 2019 (4) SA 50 (GJ)

⁵ (244/19) [2020] ZASCA 46 (30 April 2020)

⁶ *Tsambo High Court* at para 41

[14] More recently, this Court per Phooko AJ in *Simakuhle v Simakuhle and Another (Simakuhle)*⁷ aptly restated the law thus:

“In my view, the First Respondent, as the wife to the deceased, has burial rights and *may decide* where her late husband should be buried.”

[15] This Court is in full agreement with *Simakuhle* and do add that possession of burial rights extend to the right to decide on the method through which the body of the deceased may be disposed of. Differently put, regard being had to the law of intestate succession, the surviving spouse is first in line to decide what to do with the body of the deceased⁸. The children and the parents of the deceased are second and third in line. The concept of burial rights is not limited to one disposal method but it applies to all known disposal methods. Thus, for the present purposes, the surviving spouse has cremation rights. In order to cement this trite common law position, Professor G.H.I Friedman in his work *Restitution*⁹ stated the following:

“The primary responsibility for insuring the burial of a deceased person falls on the personal representative of the deceased, who will in turn be entitled to an indemnity for expenses in this regard out of the estate as a first charge... Thus, the surviving spouse will be responsible for the burial of a spouse, and the parent for the burial of a child in the absence of a surviving spouse.

[16] Accordingly, the surviving spouse takes over the overall responsibility for the body of the deceased. If the surviving spouse decides, as in this case, to dispose of the body of the deceased, through the cremation method, there is no basis in law to prevent the surviving spouse from doing so. Therefore, since the legal position is clear with regards to burial rights, it is unnecessary to grant a declaratory relief. This right was actually recognised by the applicants. In the founding affidavit the following evidence is laid bare:

“31.I pray that this honourable Court take into account that *despite her right to bury the deceased by virtue of their marriage*, she does not have the *right to*

⁷ [2024] ZAGPPHC 33 at para 36

⁸ See *Mahala v Nkombombini and Another* 2006 (5) SA 524 (SE) at para 14

⁹ *Carswell 2nded*, 1992 at 279-80

cremate of the body of the deceased against the culture, traditions and believe of his family and children, as entrenched in the Constitution.

[17] *Apropos*, the above allegation, the applicants contends that cremation as a method of disposing the deceased's body clashes with two fundamental rights, thus unlawful. This Court does not agree. As a departure point, the applicants have no right to exercise any burial rights. In exercising her rights, the surviving spouse is not acting unlawfully.

[18] Since the decision of *Setlogelo v Setlogelo*¹⁰, the discretionary remedy of interdict existed to prevent any continuation of unlawfulness. More recently, the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*¹¹, felicitously stated the law as follows:

“An interdict is an order by a court prohibiting or compelling the doing of a particular act for the purposes of *protecting legally enforceable right*, which is threatened by continuing or anticipated harm...

In *granting an interdict*, the court must exercise its discretion judicially upon consideration of all the facts and circumstances. An interdict is “not a remedy for the past invasion of rights: it is concerned with the present and the future”. The past invasion should be addressed by an action of damages. An interdict is appropriate only when future injury is feared.”

[19] The applicants do not have the legally enforceable rights. In a feeble attempt to generate such rights, the applicants seek to rely on two constitutional rights. There is no legal basis to rely on these peripheral rights. This Court says so for the reasons that follow.

The rights of the minor children

[20] None of the rights of the minor children as protected in section 28 of the Constitution are implicated by the choice of the disposal method. During oral

¹⁰ 1914 AD 221.

¹¹ 2023 (1) SA 353 (CC) at para 47-48

argument, Mr Pheto, who appeared on behalf of the applicants, submitted that section 28(1)(f)(ii) of the Constitution is contravened by using the disposal method. Far from it. The section primarily deals with work and provision of services. A child is protected from performing work or provide services that will place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development. In this case, there is no work or provision of services involved. On this simple basis, this peripheral and not so well orchestrated argument, stands to fail.

Cultural rights

[21] Section 30 of the Constitution deals with denial of cultural rights. As indicated earlier, the applicants do not possess any burial rights. There is no clear cultural rights demonstrated in this Court that the Zulu nation does not cremate. On the contrary, the surviving spouse presented uncontested evidence that in the immediate family of the deceased, three deceased bodies were cremated. The onus rested on the applicants to establish the alleged culture against cremation. That notwithstanding, it remains undisputed that the surviving spouse in no unclear terms expressed the wishes of the deceased to the family. This is what Mr Khanyile¹² refers to as *Intando KaMufi* – loosely translated as the likes of the deceased.

[22] On application of the *Plascon-Evans* principle, this Court must accept that in the Zulu culture, the likes of the deceased are accommodated. On the balance of probabilities, although there might be negative attitude towards cremation as a disposal method, based on the *Intando KaMufi* practice, the culture does accommodate cremation. Howbeit, in exercising her burial rights, the surviving spouse is not denying any person to enjoy their culture. Thus, the provision of section 30, peripheral as it may be, has not been breached in any manner whatsoever.

The issue of estrangement

¹² A dissertation by Khayelihle Mnguni for an LLM degree: *A Study to explore the impact cremation against the Zulu people's cultural belief system* 2021 University of Kwa-Zulu Natal.

[23] Counsel for the applicants placed reliance on authorities¹³ which suggest that where the surviving spouse is estranged to the deceased, the burial rights are lost. Although this Court does not share similar sentiments with regard to the loss of burial rights as a result of estrangement, this Court takes a view that those cases relied upon are distinguishable. In *casu* the deceased and the surviving spouse shared a matrimonial home. Their marriage relationship did not exist on paper only. Until the last day, the deceased and the surviving spouse lived as a husband and wife. The uncontested evidence of the surviving spouse is that on the fateful day, the deceased left from the matrimonial home. This alleged and disputed divorce intention is not predicated on anything. If indeed there were divorce summons issued but not served, a copy thereof ought to have been availed by the attorney of record to the Court.

[24] With regard to the authorities relied on, this Court takes a view that what generates the burial rights as they are commonly known, is the existence of the marriage. In law a marriage is terminated by either a decree of divorce or death. As at the time of death, the deceased and the surviving spouse were still married. Thus, to my mind, the burial rights remain intact even if estrangement enters the fray. One of the grounds for divorce is the irretrievable breakdown of the marriage. Warring married parties do sometimes reach a reconciliation, even at the doorsteps of a divorce Court.

[25] Those cases that accommodated the loss of burial rights did so under the banner of fairness and reasonableness principle. Supposedly obtaining fortification from Flemming DJP in *Finlay and Another v Kutoane*¹⁴. To my mind, although in this particular instance, given the undisputed facts of this case, there is no basis for this Court to attempt the fairness and reasonableness approach, where a Court develops the common law, a Court must seek guidance from section 39(2) of the Constitution. The rule that the surviving spouse retains the burial rights, is a common law rule. What is apparent to this Court is that the role contemplated in section 39(2) is to

¹³ *Dumisa and Another v Dumisa and Another* (3763/2021) [2021] ZAGPJHC 21 (9 February 2021) and the authorities cited therein.

¹⁴ 1993 (4) 675 (W)

develop and not to reject or refuse to apply the common law. What section 39(2) contemplates is that the first step a Court must take is to decide whether the common law requires development. Development entails growth or advancement. Once that decision is made, then a Court must do so by promoting the spirit, purport and objects of the Bill of Rights.

[26] The critical question will always be whether the common law rule requires development or not. Should that key question be answered in the negative, in my view, then the default position that, it is the duty of a Court to apply the law as opposed to make the law, must apply¹⁵. When two legally enforceable rights compete, fairness and reasonableness may be drawn in to see which right must be upheld and which one must suffer¹⁶. Where a family member and a surviving spouse compete over burial rights, there are no competing rights *per se* but competing stakes over the exercise of one right; namely; the burial right. In my view, the family members when compared with a surviving spouse do not enjoy burial rights of the deceased spouse. Only a surviving spouse enjoys the burial rights. Resultantly, in my view, there are no two competing rights, which require application of the fairness and reasonableness principle, which itself is a common law principle. What obtains is the stake to exercise one legal right. Often the question is who must exercise the right and not which right is superior. For all the above reasons this attempted estrangement basis stands to fail.

Criminal investigations

[27] Lastly, a fanciful argument suggesting that the cremation will interfere with criminal investigations was attempted. This argument is not only fanciful but it is also too speculative. It speculates vagaries in the murder investigation. On the applicant's own version, the deceased was shot and he died as a result of the bullet wound. There cannot be speculations as to how the deceased passed. The argument that the criminal investigations may require exhumation is not only fanciful but it is also

¹⁵ Section 165(2) of the Constitution provides that the Courts are independent and subject only to the Constitution and the law, which *they must apply* impartially and without fear, favour or prejudice.

¹⁶ See for an example *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)

preposterous given the undisputed manner in which the deceased died. He was shot and he died as a result of the bullet wound. Why would there be a need to exhume? This basis to oppose the exercise of the accrued burial rights must also fail.

Conclusion

[35] For all the above reasons, the application must fail. With regard to costs, this Court has a wide discretion. Punitive costs are not warranted. However, party and party costs order on a scale B is warranted in this matter.

Order

- 1 The application is dismissed.
- 2 The applicants are ordered to jointly and severally, the one paying absolving the other, pay the costs of this application on a party and party scale to be taxed or settled at scale B.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

For Applicants:	Mr A M Pheto
Instructed by:	Lumbiwa Leotlela & Assoc Inc
For Respondent:	Mr Bobison-Opoku
Date of the hearing:	15 September 2024
Date of judgment:	18 September 2024