

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **5928/2024**

In the matter between:

G[...] E[...] M[...]

Applicant

And

M[...] M[...] M[...]

1st Respondent

KEAMOGETSWE FUNERAL PARLOUR

2nd Respondent

Coram: JP DAFFUE J
Heard: 18 OCTOBER 2024
Delivered: 22 OCTOBER 2024

Summary: The court was approached on an urgent basis to adjudicate which of the parties were vested with the burial rights of the deceased, a male person who at the time of his death was still married in community of property with the applicant. The spouses have been living separately for three years. They were awaiting trial dates for the adjudication of the opposed divorce proceedings. Having *prima facie* accepted the applicant's entitlement to bury the deceased, the court considered (a) the breakdown in the marriage relationship, (b) the duration of the acrimonious relationship between the deceased and surviving spouse, (c) the reasons for the breakdown, (d) that the spouses had been living separately for three years and clearly severed ties, (e) for several years the deceased had been engaged in a love relationship with another women who stayed with him and who had been embraced by his family, (f) the deceased's expressed wish during his lifetime to be buried next to his father in Hertzogville, being the town where he was born and bred and where

his mother and other family members had already made arrangements for him to be buried. The court held that fairness required the application to be dismissed, each party to pay their own costs.

ORDER

1. The application is dismissed, each party to pay their own costs.

JUDGMENT

Daffue J

Introduction

[1] The central issue in these interdict proceedings is the right to bury the deceased who unexpectedly passed away on 12 October 2024 due to unnatural causes. At loggerheads are the deceased's lawful wife, she being the applicant, and the deceased's mother, supported by the deceased's family members and his life partner.

[2] Late Thursday afternoon, 17 October 2024, an application was issued with the intention to apply for urgent relief on Friday morning, 18 October 2024 at 09h30. The applicant intended to obtain an interdict to prohibit the respondents from proceeding with the deceased's funeral service and burial scheduled to take place, as alleged, on Saturday, 19 October 2024 at 08h00. The application became opposed. Answering and replying affidavits were filed and the opposed application was eventually argued during the course of Friday afternoon. It transpired that the funeral was in fact arranged to take place the next weekend only, but the court was none the less prepared to hear the application on an urgent basis.

The parties

[3] The applicant is Mrs G[...] E[...] M[...]. She resides in Seretse township, Boshof, Free State Province. At the time of the deceased's death, she was still lawfully married to him in community of property, he being the late Mr G[...] J[...] M[...]. She was represented by Adv NA Feza, instructed by Fixane Attorneys, Bloemfontein.

[4] The first respondent is Mrs M[...] M[...] M[...], a female pensioner residing in Malebogo township, Hertzogville, Free State Province. She is the biological mother of the deceased. She was represented by Adv MP Modise, duly instructed by Moruri Attorneys, Bloemfontein.

[5] The second respondent is Keamogetswe Funeral Parlour which entity has not been served with the application papers *ex facie* the court file and who also did not play any role in the proceedings before me.

The relief sought and the parties' contentions

[6] It is not necessary to quote the relief sought in the notice of motion, save to state that the applicant sought an interdict prohibiting the deceased's funeral service and burial to proceed in Hertzogville as arranged by the first respondent. Also, that the applicant be authorized to take possession of the deceased's body for purposes of arranging his burial. The applicant contended that she was entitled to bury the deceased and that the burial should take place in Boshof where the deceased stayed and worked during his lifetime. The first respondent opposed the application. She contended that the deceased should be buried as arranged by her in Hertzogville in accordance with the deceased's express wish to be buried next to his father and bearing in mind the fact that the deceased was born and bred in Hertzogville. She submitted that although still legally married, the applicant and deceased were on the brink of a divorce, having been staying separately since December 2021. Her further reasons will be considered during the evaluation of the evidence.

Material background facts

[7] The applicant and the deceased were married to each other in community of property in Kimberley on 16 November 2013 and the marriage still subsisted at the time of the deceased's death. Two minor children were born out of the marriage, to wit an eight-year-old daughter and a seven-year-old boy.

[8] The applicant initially instituted a divorce action in the Northern Cape Division of the High Court in Kimberley. The deceased filed a special plea relying on lack of jurisdiction of that court as both parties were permanently resident in the Free State

Province. Thereafter these proceedings were withdrawn. On 17 July 2023 the deceased initiated divorce proceedings in this Division under case number 3666/2023. On 6 December 2023 the applicant filed her plea and counterclaim. Thereupon the plaintiff filed his plea to the counterclaim on 2 October 2023. On 30 July 2024 the legal representatives of the parties held a pre-trial conference in terms of Rule 37 of the Uniform Rules of Court whereupon minutes were prepared and filed with the court. On 30 September 2024 the divorce action was declared trial-ready.

[9] There can be no doubt that both spouses sought finalisation of the divorce proceedings. They merely waited for trial dates to be allocated. It is common cause, as is also apparent from the pleadings in the divorce action, that the applicant moved out of the former matrimonial home in December 2021 and that the parties have not been living together as husband and wife ever since. Serious allegations were made by both parties in respect of the reasons for the breakdown. According to the deceased he had lost all love and respect for the applicant who abused him emotionally and abandoned the matrimonial home. On the other hand, the applicant alleged that the deceased physically and emotionally abused her throughout the duration of the marriage which caused her to depart from the matrimonial home and as a result she had lost all love and respect for him. The deceased was also accused of entering into numerous extra-marital affairs.

[10] Both spouses insisted that the primary care of the two children should be awarded to them. On 12 May 2023 the deceased approached the Children's Court in Boshof and obtained a court order under case number 7/2023. That court, after hearing submissions by the parties and social workers, ordered that the children should remain in the care of the deceased pending finalisation of the divorce proceedings in the High Court, subject to certain contact rights in favour of the applicant.

Evaluation of the evidence and submissions by the parties

[11] I did not herein before deal in any detail with the parties' factual allegations, but will consider the material issues raised by them during my evaluation in the next paragraphs.

[12] It is trite that opposed application procedure for final relief is not suitable to adjudicate disputed facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.¹ It is also necessary to remind ourselves again of the principles established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*² pertaining to the adjudication of applications for final relief in opposed motion proceedings. In the event of disputed facts, the applicant seeking final relief shall accept the version set up by their opponent, unless the latter's allegations are in the opinion of the court not raising a real, genuine or *bona fide* dispute, or are so far-fetched, or clearly untenable that the court is justified in rejecting them merely on the papers. I must immediately point out that the notice of motion was prepared on the basis that a rule *nisi* would be sought with return date Tuesday, 22 October 2024. However, bearing in mind that full sets of affidavits were filed and that the applicant eventually requested in the replying affidavit that final relief be granted to her, the application should be adjudicated in accordance with the *Plascon-Evans* principles.

[13] The applicant contended that she as the deceased's lawful wife was entitled to bury him. Her counsel, Adv Feza, emphasised this aspect in her oral submissions. It is the applicant's case that the law is trite. This was again confirmed in *Sengadi v Tsambo*³ which judgment was confirmed by the Supreme Court of Appeal in *Tsambo v Sengadi*⁴ (*Tsambo*), to wit that the customary law wife of the deceased was entitled to bury her customary law marriage husband, the deceased. Obviously, the same principle applies to civil marriages.⁵ Notwithstanding the finding of the High Court that a valid customary marriage has been entered into, it found on the facts of that case that the deceased's family should bury him. This finding was not taken on appeal. In *Tsambo* the Supreme Court of Appeal was asked to adjudicate whether a customary law marriage did indeed come into existence between the deceased and the respondent (the applicant in the court a quo). It held that the respondent and the deceased concluded a customary marriage that complied with all the requirements for validity as contemplated in s 3(1) of the Recognition of Customary Marriages Act 120 of 1998.⁶

¹ National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 26.

² [1984] ZASCA 51; 1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C.

³ [2018] ZAGPJHC 666; 2019 (4) SA 50 (GJ); [2019] 1 All SA 569 (GJ).

⁴ (244/19) [2020] ZASCA 46 (30 April 2020).

⁵ Tseola and Another v Maqutu and Another 1976 (2) 418 (T.H.C) at 425D.

⁶ *Loc cit* para 30; see also Mbungela and Another v Mkabi and Others 2020 (1) SA 41 (SCA).

[14] In *Simakuhle v Simakuhle and Another*⁷ the court dismissed an application by the eldest brother of the deceased to bury the deceased at his ancestral home in the Eastern Cape and not in Centurion, Gauteng where the deceased's customary law wife wanted him to be buried. The court quoted *Tsambo* with approval, held that the deceased's wife had burial rights and might decide where her late husband should be buried.⁸ It then dismissed the application.

[15] Adv Feza referred to the allegations and counter-allegations by the parties in the divorce proceedings, the closing of pleadings and even the mere awaiting of trial dates, but submitted that all these factors were really immaterial insofar as a valid civil marriage existed at the time when the deceased passed away. She submitted that it happens frequently, and it could happen in this case, that parties reconcile even at the doorsteps of the divorce court.

[16] In *Tsambo* the customary marriage was concluded on 28 February 2016. The following facts should be considered in order to conclude eventually herein whether the facts *in casu* are on all fours with the facts in *Tsambo*. For easy reference I quote from the judgment.

'According to the respondent, she and the deceased continued to live together as husband and wife until sometime during 2018, when their relationship went through a rough patch, apparently because of the deceased's infidelity and drug addiction for which he refused to undergo rehabilitation. This caused the respondent to leave the matrimonial home although she did not take all her personal belongings with her. Due to the deteriorating health and depression of the deceased, during April 2018, the respondent convened a meeting of the two families. She reported the deterioration in the deceased's health. The deceased, however, stalked out in a huff before any resolution could be reached. During August 2018, the couple reconciled but did not resume their cohabitation as the respondent had insisted that she would return to the matrimonial home only if the deceased agreed to submit himself to a rehabilitation programme. Unfortunately, the deceased committed suicide on 23 October 2018. The respondent returned to the matrimonial home on 24 October 2018 in order to mourn the passing of her husband.' (Emphasis added)

⁷ [2024] JDR 0331 (GP), a judgment delivered on 24 January 2024.

⁸ *Ibid* para 36.

[17] In *P.N and Others v P.N*⁹ (*P.N*) the court considered allegations by the applicants, labelling the deceased's surviving spouse as an estranged wife. The applicants alleged that the deceased had expressed to his mother, uncle and attorney of record that he intended to divorce his wife. They even alleged that divorce summons had been issued, but no proof of this was tendered. The learned judge, Moshwana J, regarded the applicants' attempts to prove an estrangement as 'weak' and rejected same. It was common cause that the spouses were still living 'under the same roof as husband and wife until the demise of the deceased.'¹⁰ Having considered the facts in that case, the learned judge concluded as follows:¹¹

'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.' (Emphasis added)

[18] The learned judge continued in the next paragraph,¹² criticising authorities quoted by the applicants, that the burial rights of an estranged surviving spouse are lost in such instances. I do not agree that fairness and reasonableness should not be considered. The facts *in casu* demonstrate my viewpoint clearly and sufficiently. A marriage certificate on the verge of being torn up, figuratively speaking, should not be used as a sword to rip apart family relationships.

[19] I have been informed from the bar that the minor children have been staying with the deceased ever since the separation of the parties, bearing in mind the aforesaid Children's Court's order. Since the death of the deceased they are in the primary care of their paternal grandmother, the first respondent.

⁹ (104659/2022) [2024] ZAGPJHC 924 (18 September 2024).

¹⁰ *Ibid* paras 5 & 6.

¹¹ *Ibid* para 24.

¹² *Ibid* para 25.

[20] Adv Modise *inter alia* referred to *Mabulana v Mabulana (Mabulana)*,¹³ submitting that the facts in that case were acutely similar to the facts *in casu*. In *Mabulana* the deceased passed away just before the trial date of the divorce proceedings. By then they had agreed that a decree of divorce could be obtained on an unopposed basis and that their estate be equally divided. The court dismissed the estranged wife's application to bury the deceased, stating that it was not just and equitable for her to do so in the said circumstances.

[21] Adv Modise emphasised that the first respondent and the deceased's family had no intention to exclude the applicant from the funeral and/or burial proceedings, but submitted that the first respondent was entitled to bury the deceased in Hertzogville. He submitted that the following material facts should be considered in adjudicating the application:

- a. the serious allegations and counter-allegations in the divorce proceedings cannot be ignored;
- b. the parties had been staying separately since December 2021, a period of nearly three years;
- c. the parties were merely awaiting trial dates for the divorce proceedings to be finalised;
- d. the deceased had moved on with his life and had been staying with his new life partner, M[...] M[...], from 2021 in what was previously the matrimonial home of the applicant and the deceased and consequently, it could never be the deceased's wish to be buried by his estranged wife;
- e. when first respondent's husband and the deceased's father passed away in July 2024, the applicant was notably absent;
- f. during his lifetime the deceased expressed on multiple occasions his intention to marry M[...] M[...] as soon as the divorce proceedings were finalised;
- g. the deceased's family had embraced M[...] M[...] as the deceased's life partner who regularly accompanied him to all family gatherings and functions;

¹³ [2021] ZALMPPHC 36.

h. the deceased expressed the wish to several family members after the passing of his father in July 2024 that, in the event of his own death, he should be buried alongside his father in Hertzogville.¹⁴

[22] In the replying affidavit the applicant merely noted the allegations pertaining to the romantic relationship of the deceased and his life partner and the fact that they have been staying together in the deceased's home, the former matrimonial home. She did not deny any of the allegations mentioned above, save to submit that it was far-fetched that the deceased would want to be buried in Hertzogville as he resided and worked in Boshof. It is common cause that the deceased clearly disassociated himself from the applicant and that she disassociated herself from his family over the last three years. This cannot be disregarded.¹⁵ Although the applicant was lawfully married to the deceased and is also an intestate heir in the absence of a will, it would be preposterous to claim that she, in the words of Mantame J, wants 'to be laid closer to him when he is no more'.¹⁶

[23] Flemming DJP stated in *Finlay and Another v Kutoane*¹⁷ that in deciding burial rights between competing persons, the following should be taken into consideration: 'Also in deciding between competing persons, the law should ideally mirror what the community regards as proper and as fair. That perception will be partly the result of views on social structures, mainly of family relationships and marriage, and on the vesting of authority and the finality of decisions. There may be views about the impropriety of not complying with requests of the deceased. Religious views, cultural values and traditions may play a role.'

This *dictum* was cited with approval in *Dumisa v Dumisa and Another*.¹⁸

[24] I took cognisance of the *Simakuhle*, *Mabulana*, *Tsambo* and *P.N* judgments. I agree with the approach adopted in *Simakuhle* and *Mabulana*. The facts in *Mabulana* closely resemble those *in casu*. It is also instructive to consider the approach by the High Court in *Tsambo* as mentioned above. Contrary thereto, the

¹⁴ In *Mabulu v Thys and Another* 1993 (4) SA 701 SECLD at 703A-B Zietsman JP, citing several previous judgments with approval, stated that the wishes of a deceased person concerning his burial should be acceded to in the case of clear proof. The court ultimately found, in dealing with the hearsay evidence, that the wishes of the deceased had not been established.

¹⁵ *Wellem v Silwana* 2016 JDR 0832 (WCC) para 38.

¹⁶ *Ibid* para 40.

¹⁷ 1993 (4) SA 675 (WLD) at 679J-680A.

¹⁸ (3763/2021) [2021] ZAGPJHC 21 (9 February 2021) para 8 and authorities cited in the judgment.

facts in *P.N* differ materially from those *in casu*, but having said that, I respectfully do not agree with the reasoning in *P.N* for the reasons set out herein. In my view fairness and reasonableness cannot be taken out of the equation, bearing in mind the particular facts.

[25] Whatever the future may hold pertaining to the primary care of the two minor children, fact of the matter is that they are presently in the care of their paternal grandmother in Hertzogville. It cannot be found untenable or far-fetched that the deceased expressed the wish to be buried alongside his father in Hertzogville, the town of his birth. His wish must be respected. I am not prepared to accept that it is unreasonable in the prevailing circumstances.¹⁹ The acrimonious relationship between the deceased and the applicant and the extremely serious allegations made against each other cannot be brushed aside. It would be unfair and unreasonable to disregard the wish of the deceased and all the factors and circumstances set out above. The applicant and the deceased's marriage existed on paper only. The bonds of marriage were bound to be dissolved soon. I also accept that in the absence of a valid will, the applicant as intestate heir would in principle be entitled to bury the deceased. Again, fairness dictates that this principle should not be followed. The applicant has disassociated herself from the deceased and his family over a period of three years.

[26] The deceased's wish where to be buried were conveyed by him in July 2024, a couple of months before his death. The first respondent relied in this regard on an affidavit of the deceased's cousin. This is obviously hearsay evidence. Standing on its own, I would not be prepared to accept the statement as admissible. However, bearing in mind the totality of the common cause facts, I am inclined to accept the hearsay evidence. I wish to emphasise that my conclusion would be the same, even if the statement was ruled to be inadmissible.

Conclusion

[27] I therefore conclude that the application should be dismissed in order to allow the first respondent and the deceased's family to continue with the funeral and burial proceedings. The only question left to be considered is the costs of the application. No doubt, the feud between the parties pertaining to the burial rights has the

¹⁹ See *Trollip v Du Plessis* 2002 (2) SA 242 (W), cited with approval in *Mabulana* loc cit para 24.

potential of permanently divide the family, the applicant being on the one side and her children and the deceased's family on the other. This sensitive issue should really have been resolved by the family elders, rather than the court. Cost awards are in the discretion of the court. The applicant as the lawful wife of the deceased was *prima facie* entitled to approach the court for the relief sought. She lost. The first respondent as the successful litigant is in terms of the general rule entitled to costs in her favour. Such an order will create even more tension and division which should be avoided as far as possible. Consequently, and after having thought about this over the weekend, I decided, in the exercise of my discretion, that it would be fair and equitable to order the parties to pay their own costs.

Order

[28] The following order is made:

1. The application is dismissed, each party to pay their own costs.

JP DAFFUE J

Appearances

For applicant:	Adv NA Feza
Instructed by:	Fixane Attorneys Bloemfontein

For respondent:	Adv MP Modise
Instructed by:	Moruri Attorneys Bloemfontein.