



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT
JUDGMENT**

Case No.: 2026-057370

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED YES/NO

DATE 20 MARCH 2026

SIGNATURE

In the application between:

NKATEKO CLEOPATRAH KHOZA

APPLICANT

And

RIKHOTSO MASANA

1ST RESPONDENT

AVBOB FUNERAL SERVICES

2ND RESPONDENT

SOUTH AFRICAN POLICE SERVICES

3RD RESPONDENT

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] This is an urgent application concerning the burial rights of Zwide Greaten Nxumalo, the deceased, who died on 09th March 2026 after being shot. The first respondent arranged for the deceased's body to be taken to the premises of the second respondent and scheduled the funeral for the 15th March 2026. The applicant approached the court on an urgent basis seeking the following orders:

PART A

1. That this application is heard as one of urgency in terms of rule 6(12) and that non-compliance with the form, time limits/periods, service requirements provided for in the Uniform Rule3s of Court, for serving court papers is hereby condoned.
2. The funeral of the late **Zwide Greaten Nxumalo with ID NO. 8[...]** (hereinafter referred to as "the Deceased") scheduled for **15 March 2026** is postponed to the 21st of March 2026, or to a further date to be determined by the court, pending determination of burial rights between the applicant and the 1st Respondent in terms of Part B.
3. The 2nd Respondent is interdicted from releasing the deceased's corpse pending determination of Part B of this Application.
4. The Sheriff of the Court and/or the South African Police Service is authorised to serve the interim order to the Respondents and/or to Execute the orders herein.
5. That the Applicant is granted leave to amend its papers for Part B should the need arise.

6. The matter is postponed to the Urgent Court or determination of PART B on the 3rd 17th of March 2026.
7. That this order shall operate as an interim interdict.
8. Costs be reserved for determination at the hearing of Part B of the Application.

PART B

1. The Applicant is declared to have entered into a valid customary marriage to the deceased.
2. The Applicant is declared to have all customary burial rights over the deceased.
3. The Second Respondent is directed to release the corpse of the deceased only to the Applicant or at the direction of the Applicant.
4. The First Respondent is interdicted from preventing the Applicant from accessing her matrimonial home;
5. The interim interdict on Part A is made final;
6. The Sheriff of the Court and/or the South African Police Service is authorised to serve this Court Order to the Respondents and/or to Execute the orders herein.
7. That the First Respondent pay costs of application.

[2] Part A was adjudicated upon on the 12th March 2026 and the applicant was granted an interim order on the same day. The matter is before me for the adjudication of Part B.

APPLICANT'S VERSION

[3] In the founding affidavit the applicant avers that she entered into a valid customary marriage with the deceased following lobola negotiations concluded on 8 March 2010. She attaches a lobola letter in support thereof.

[4] She explains that the relationship deteriorated during 2023 when the deceased insisted that she resign from her employment in Lydenburg and move back home alternatively that she should commute daily instead of staying in Lydenburg. Upon her refusal, the deceased moved another woman into their shared residence.

[5] She further avers that despite the deterioration of the relationship, the deceased continued to visit her and that their children later began residing with the deceased. She denies that the deceased was ever married to the first respondent.

FIRST RESPONDENT'S VERSION

[6] The first respondent avers in the answering affidavit that she concluded a valid customary marriage with the deceased in 2021 in terms of customary law and that she resided with him continuously thereafter until his demise. Further that during 2023 the children of the deceased and the applicant started residing with them.

[7] She attaches a lobola letter and confirmatory affidavits from the deceased's mother and uncle of the deceased's family. She alleges that the relationship between

the applicant and the deceased had terminated and denies that the deceased was married to the applicant.

[8] She further alleges that the deceased wished to be buried under her direction and refers to a funeral policy taken by the deceased at AVBOB, a funeral parlour, although no proof was produced.

SUBMISSIONS

[9] It was submitted on behalf of the applicant that the applicant was married to the deceased in terms of customary law and therefore a declaratory order should be made in this regard and further that she be awarded burial rights on that basis.

[10] Counsel for the 1st respondent argued that this matter does not rest on the validity of either party's marriage but rather that the application should be dismissed on the basis that the first respondent was entitled to bury the deceased because of proximity. It was contended that the first respondent shared a residence with the deceased for 5 years prior to his sudden demise. Further that she had a close bond with the deceased and she knew what his wishes were regarding his burial.

LEGAL FRAMEWORK

Disputes of Fact

[11] This matter proceeds on motion. Where disputes of fact arise on affidavit, the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984

(3) SA 623 H-I apply. A final order may only be granted if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify such order.

Burial Disputes

[12] It is well established that burial disputes must be resolved having regard to fairness and the particular circumstances of the case. See *Mahala v Nkombombini* 2006 (5) SA 524 (SCA).

Customary Marriage

[13] In terms of the Recognition of Customary Marriages Act 120 of 1998, a valid customary marriage requires consent of the parties and compliance with customary law requirements. The existence of a lobola letter alone is not conclusive proof of a valid marriage (*MM v MN* 2013 (4) SA 415 (CC)).

EVALUATION

Proximity

[14] The respondent contends that burial rights should be granted to her on the basis of her proximity to the deceased, having resided with him for approximately five years. She further alleges that the relationship between the deceased and the applicant was non-existent.

[15] She denied the applicant's averment that the deceased often visited her together with their 2 children. She however, confirmed that the applicant's children, aged 15 and 8 years, visited the applicant during school holidays and on her leave days, without indicating who transported them there. In my view, the applicant's version that the deceased and the children visited her sounds more probable. The respondent's bald denial of the applicant's averments in this regard does not advance her case.

[16] The respondent's allegation that she commenced residing with the deceased in 2021 is disputed by the applicant, who states that she herself resided with the deceased until 2023, when she relocated to Lydenburg due to employment obligations. The affidavits of the deceased's mother and uncle do not materially assist the respondent in resolving this factual dispute, as they merely confirm the existence of her marriage to the deceased without providing any contextual information.

[17] The applicant has been candid regarding the state of her relationship with the deceased. She disclosed in her founding affidavit that, during 2024, their children began residing with the deceased and that, by 2023, she no longer visited the shared home after the deceased introduced another woman into the residence. She nevertheless maintains that the deceased continued to visit her until his death.

Customary Law Marriage

[18] The applicant bases her claim to burial rights on her alleged customary marriage to the deceased. Counsel for the applicant urged the court to declare that a

valid customary marriage existed between the applicant and the deceased prior to his death on the basis that their union complied with section 3(1) of the Recognition of Customary Marriages Act 120 of 1998.

[19] Both parties allege that they entered into valid customary marriages with the deceased. The applicant contends that lobola negotiations were conducted on 8 March 2019, culminating in a customary marriage. The respondent, on the other hand, alleges that she concluded a customary marriage with the deceased in 2021.

[20] Each party denies the existence of any other marriage involving the deceased. In particular, both deny that the deceased was a party to a second customary marriage.

[21] In motion proceedings, the dispute must be determined in accordance with the principles set out in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**. Where final relief is sought and material disputes of fact arise, the matter falls to be decided on the facts as stated by the respondent, together with those facts admitted by the applicant, unless the respondent's version is so far-fetched, untenable or clearly implausible that it may be rejected on the papers.

[22] Accordingly, unless the respondent's version regarding the alleged 2021 customary marriage can properly be rejected as palpably implausible, it must be accepted for purposes of determining the application. Conversely, if neither version can be rejected on the papers and genuine, material disputes of fact persist, the Court may either dismiss the application or refer the matter to oral evidence.

[23] Given the urgency that characterises burial disputes, a referral to oral evidence is not practical. The need for swift resolution requires courts to determine such matters on the papers wherever reasonably possible thus making the approach in *Plascon-Evans* not suitable for urgent matters such as this one.

[24] In ***Mahala v Nkombombini***, the Court reiterated that burial disputes demand expeditious and pragmatic adjudication. The enquiry is directed at resolving the immediate question of who is entitled to bury the deceased, rather than definitively determining broader matrimonial rights. Consistent with this approach, courts are entitled, in suitable circumstances, to adopt a robust and common-sense evaluation of the affidavits (See *Trollip v Du Plessis* en *ander* 2002 (2) SA 242 W 245 E-F).

[25] Guided by the above I therefore considered the affidavits.

[26] Firstly, there is no indication that the deceased left a will expressing his burial wishes. The first respondent avers that the deceased's wish was to be buried by AVBOB, a Funeral Parlor, with which the deceased had a policy. It goes without saying that by paying the AVBOB premiums the deceased made provision for AVBOB to take care of his remains upon his passing.

[27] Secondly, the parents of the deceased's affidavits do not offer any assistance to the court. The mother supports the first respondent, confirming her as the customary law wife of the deceased while the father supports the applicant and

confirms that the applicant is the customary law wife of the deceased. This complicates the matter further as one would expect the parents of the deceased to be of one voice in identifying their deceased son's spouse(s). The determination of the validity of either party's marriage cannot be resolved at this point and will have to be dealt with at a later stage.

[28] It is apparent from the stance taken by the mother and father of the deceased that they each recognize that the deceased was married, the question is to who? This is not a question that can be answered at this stage. The matter of urgency is the deceased must be buried and both alleged spouses insist that they have the burial rights.

[29] Since the parties could not find a common ground and the parents of the deceased or extended families could not assist the parties to come to an understanding that would allow them to bury their loved one with dignity, this court has to be guided by what would be fair and reasonable under the circumstances. In an attempt to do so, I considered the following:

- (a) the issue of proximity – it is not in dispute that the deceased was staying with the first respondent at the time of death;
- (b) duration of the cohabitation – according to the respondent she started staying with the deceased after her customary marriage in December 2021 while the applicant insists it was after June 2023 when she relocated to Lydenburg for work purposes;
- (c) Estrangement or separation – the applicant's acknowledgement that her relationship with the deceased was strained mainly because of the distance;

(d) expressed wishes – the first respondent’s averment that the deceased chose AVBOB to be his funeral parlour.

(e) views of the family – there is no information available in this regard save the clear division between the deceased’s parents who chose sides instead of mediating the dispute.

(f) the location of the funeral – both the applicant and the respondent indicate the residence of the deceased as their residence.

[30] For purposes of the burial and this application only, the applicant and the first respondent having provided *prima facie* proof of their marriage to the deceased, are considered to have the rights to bury the deceased. Unfortunately, since there is no co-operation in preparing for the burial of the deceased, one of them has to take the lead.

[31] Generally, the first wife holds the highest status, often acting as mentor to junior wives. Adopting a robust and commonsense approach, and guided by *Mahala v Nkombombini*. The applicant, due to the fact that her lobola negotiations predates the lobola negotiations of the first respondent should take the lead.

[32] Notwithstanding the proximity of the first respondent and the problems in the applicant’s relationship, I found the limited duration of the cohabitation and the lack of evidence of the breakdown in the applicant’s relationship with the deceased to be compelling.

[33] This judgment should not be interpreted to be declaring either of the parties to be validly married to the deceased. The pronouncements herein are made for purposes of the burial of the deceased only.

[33] Regarding the issue of cost, this court has a wide discretion and find that there should be no order as to costs.

Order

Consequently, the following order is made:

1. The applicant is granted burial rights.
2. The second respondent is directed to release the corpse of the deceased to the applicant or at the direction of the applicant.
3. The Sheriff of the court and or the South African Police Service is authorized to serve this court order on the respondents or execute the orders herein.
4. No order as to costs.

P D KEKANA
ACTING JUDGE OF HIGH COURT,
MPUMALANGA, MBOMBELA

Date of hearing: 17 March 2026

Date of judgment: 20 March 2026

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