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

Case Number: 2026/053364

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

1 April 2026

DATE

SIGNATURE

P[...] **L[...]** **C[...]**

1st Applicant

T[...] **G[...]** **C[...]**

2nd Applicant

and

KINGS AND QUEENS FUNERAL PARLOUR

1st

Respondent

DUBE

2nd

Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicants launched urgent proceedings against the respondents for an order interdicting the second respondent to release the body of the Late C[...] K[...] (“the Deceased”) to the applicants for burial in Cape Town, South Africa. The first applicant (who is said to be South African, together with the deceased) avers that as the surviving spouse, she is entitled to bury the deceased. The second applicant is the son born of the marriage between the applicant and the deceased, and supports the application for the relief sought.

[2] The application is opposed by Johnson Mahoka Dube¹ a Zimbabwean citizen and the deceased's elder brother, who disputes the existence of the marriage between the deceased and the applicant. He further denies that the deceased and the first applicant are South Africans and asserts that the deceased's real surname is Dube, not K[...]. He argues that the deceased should therefore be buried in Zimbabwe, he argues.

[3] The first respondent is a funeral undertaker at whose premises the mortal remains of the deceased are kept. The first respondent is not participating in these proceedings; reference to the respondent shall refer to Johnson Mahoka Dube.

Background and parties' versions

[4] The first applicant avers that she and the deceased were born in KwaZulu-Natal. They became romantically involved in 1999 and were married in terms of customary law on 21 November 2001. As evidence of the alleged marriage, the first applicant attached a lobola letter to her founding papers. She states that there are two children born of the marriage, namely T[...] G[...] C[...], born on 8 January 2005, and N[...] C[...], born on 17 August 2009. They initially resided in Berea, Johannesburg and relocated to Cape Town in 2018, where the deceased was running a security company.

[5] The deceased sustained burn injuries on 26 February 2026 and was transported to Tygerberg Hospital by an ambulance, accompanied by the second applicant. The

¹ The applicants did not identify the second respondent's names in detail, and John Mahoka Dube avers that he was authorised by the Dube family to oppose the application and has filed an affidavit titled ‘Second Respondent's Answering Affidavit’.

applicant states that during the journey to the hospital, the deceased told the second applicant that if he were to die, he would wish to be buried in Cape Town. The deceased succumbed to his injuries while at Tygerberg Hospital.

[6] The first applicant then went to the hospital with a funeral undertaker to transfer the deceased's body to a mortuary. She was astonished to be informed that a certain Mr Dube visited the hospital and claimed the body, as to her knowledge, the deceased was South African and had never claimed to be from Zimbabwe. The hospital informed her that the deceased's body was released to Mr Dube.

[7] The first applicant later learned that the Dube family planned to travel to Zimbabwe with the deceased's body on 8 March 2026, and she immediately initiated urgent proceedings for an interdict, scheduling it for that date. The parties agreed that, since the Dube family intends to oppose the application and requires more time, the matter should be moved to Tuesday, 10 March 2026. The second respondent undertook that the deceased's body would stay with the first respondent and not be taken to Zimbabwe.

[8] The second respondent, on the other hand, agreed with the first applicant that the deceased had two male children with the applicant. He states that the applicant is the deceased's partner but is also Zimbabwean, with her correct name being S[...] N[...], and her Zimbabwean Identity number is 2[...]. Furthermore, both the applicant and the deceased may have fraudulently obtained South African identities and citizenship. He also mentions that the applicant was not residing in South Africa with the deceased but was living at the deceased's house in Zimbabwe. The respondent further indicated that she had the deceased's Zimbabwean mobile numbers through which the deceased sent her money.

[9] In support of his averments, the second respondent stated that the first applicant and the deceased are Zimbabwean and submitted copies of photographs taken during the ceremony in Zimbabwe, at which the deceased and the applicant attended an event. The respondent also included a copy of the Facebook page where the Dubes' family wished the applicant a happy birthday.

[10] The respondent attached several confirmatory affidavits to his answering affidavit, confirming various averments he made. Firstly, a confirmatory affidavit sworn by T[...] N[...], aged 35 and born on 24 April 1990, who is the deceased's eldest daughter. Like her siblings (including the first applicant's children), she does not use the deceased's surname, and her mother is V[...] N[...], a Zimbabwean citizen. She has a younger sister, N[...] N[...], aged 12 and born on 30 September 2013, who is the deceased's youngest child. She attached photographs of herself with the second applicant (her stepbrother), a photo of herself with the deceased, and another photo taken by the deceased and his brother. She wishes for the deceased to be buried in Zimbabwe under customary law; in the absence of a surviving spouse (as her father was unmarried), the decision regarding the burial rests with her as the eldest daughter.

[11] A second confirmatory affidavit was sworn by Rangarirai Alfred Dube, who stated that he is the deceased's cousin and that he arrived in South Africa with the deceased in 1990. He was asked in March this year by the deceased's stepmother to travel to Tygerberg Hospital to identify the deceased's body. He travelled to Cape Town with his niece, Tjandapiwa Nkomo. He discovered that the deceased had been admitted under the incorrect surname of K[...], and through the investigating officer, Detective Williams, was permitted to identify the body. A further confirmatory affidavit sworn by Tjandapiwa Nkomo confirmed that she is a cousin of the deceased and that she accompanied Rangarirai Alfred Dube to Tygerberg Hospital.

[12] A third confirmatory affidavit was sworn by Arte Dube, stating that he went to Cape Town to collect the body of the deceased on 6 March 2026. They were permitted to take the body after presenting a handwritten letter from the Zimbabwean Consulate in South Africa and a letter from the Zimbabwean authorities in Plumtree, where the deceased was born. He positively identified the deceased. The hospital staff also completed the necessary forms for the deceased's release; the deceased's surname was changed from K[...] to Dube before the body was released. They left Tygerberg on 7 March 2026, heading to Gauteng Province to prepare for their journey to Zimbabwe.

[13] On the first day of hearing before me, I directed that the parties obtain formal status reports on the deceased from the Department of Home Affairs and the Zimbabwean Embassy to be submitted within 48 hours. The official from the Department of Home Affairs deposed to an affidavit under section 212 of the Criminal Procedure Act, stating that the deceased was indeed a South African. The statement further noted that there had been previous enquiries about the deceased's status, which had been subsequently resolved. At the time of the hearing, the Zimbabwean Embassy had not yet submitted a report to the court.

Contentions and Submissions by the parties

Urgency

[14] Counsel for the applicant argued that the applicant satisfied the requirements for urgency according to the court's rules and directives. The application was filed urgently because the available information indicated that the deceased would be taken to Zimbabwe on 8 March 2026. The matter was moved to Tuesday, 10 March 2026, by agreement between the parties. Counsel disputed the respondent's claim that postponing the application to Tuesday reduced its urgency, as it was requested by the respondent's agreement to keep the first respondent in South Africa and to allow sufficient time to file answering papers. To this end, the second respondent's claim that urgency was self-created is unfounded.

[15] The counsel for the applicants also contended that they would not obtain substantial redress if the application was launched under normal circumstances. The deceased's body would have been transported and buried in Zimbabwe. The costs associated with the exhumation and repatriation would be prohibitive.

[16] The respondent's counsel expressed regret at being given only a brief two-hour period to oppose and respond to the application. Furthermore, the applicant failed to comply with the rules governing urgent court procedures and related directives. Specifically, the applicant did not provide details explaining the basis for the urgency. Additionally, the respondent's counsel argued that the second requirement of the absence of substantial redress was also satisfied, particularly as the applicant could have obtained

substantial redress by exhuming the remains if the matter was ultimately decided in her favour.

[17] Having considered the submissions from both parties, I find that the application is indeed urgent and that non-compliance with deadlines, forms, directives, and time frames is tolerated.

Merits

[18] The counsel for the applicant argued that the evidence before the court, supported by a statement from the Department of Home Affairs, clearly shows that the deceased was a South African. This assertion was made despite the Home Affairs official's statement that the deceased had previously been flagged and cleared.

[19] The applicant's counsel further submitted, without conceding any challenge to the marriage, that the court should consider the wishes of the deceased's children and that the second applicant, as one of the children, should have the final say. The counsel referred to *Mankahla*,² where the court held that in the absence of a will, the surviving spouse, or failing that, the children, have the right to decide. In *Mankahla*,³ the children were still minors, and the court, acting as their guardian, ordered that the funeral service be held in their hometown.

[20] The applicant's counsel further referred to *Mnyama*⁴ where the court had to, *inter alia*, consider the admissibility of hearsay evidence in the interest of justice as contemplated in section 3(1)(c) of the Law of Evidence Amendment Act,⁵ and concluded that verbal wishes conveyed by the deceased regarding his burial may be accepted. The court in that case had regard to the probative value of the evidence and analysed it to determine whether it had sufficient cogency to warrant its acceptance.

² *Mankahla v Matiwane* 1989 (2) SA 920.

³ *Id.*

⁴ *Mnyama v Gxalaba and Another* 1990 (1) SA 650 (C).

⁵ 45 of 1988.

[21] In conclusion, the applicant's counsel submitted that when there remains a dispute or uncertainty arising from the children's wishes, the court should consider the circumstances leading up to the death. In this regard, the deceased has been in South Africa since birth and has lived with the applicant and their two children in Cape Town. The deceased also informed the second applicant that his wish is to be buried in Cape Town.

[22] The respondent's counsel, on the other hand, argues that there is overwhelming evidence from the respondent and his relatives indicating that the deceased is a Zimbabwean citizen. The Consulate has already confirmed this position prior to releasing his body from Tygerberg Hospital. The first applicant also attended a discussion meeting with the family shortly after the death to arrange the burial, but then decided to withdraw for no apparent reason.

[23] The respondent further argues that the applicant has not met the requirements for a final interdict. Significantly, he argued, the applicant failed to demonstrate a clear right, as the lobola letter does not constitute proof of marriage. In any case, the argument continued, the deceased body in the respondent's possession is that of C[...] D[...], whereas the applicants seek an order for the release of C[...] K[...]. However, the counsel admitted that the court is not barred from ordering the release of C[...] D[...]s remains.

[24] Since the marriage is being disputed and there are no legislative provisions governing burial rights, respondent's counsel argued that the court should follow common law, which states that, in the absence of the spouse, the eldest child, then the parents, and finally the siblings would need to decide on the funeral. In this case, the eldest daughter has expressed her wishes to bury the deceased in Zimbabwe. The counsel was quick to acknowledge that the principle of primogeniture has been abolished.

Issues

[25] The issues for the determination are whether the application is urgent and who bears the burial rights.

Legal principles and discussion

[26] The parties acknowledge that, generally, the priority for who assumes responsibilities and rights to bury a deceased person would be the person named in the Will, failing which the surviving spouse,⁶ then the children, parents and thereafter the siblings. There is a dispute between the parties as to whether the deceased was married to the applicant. The respondent contends that the deceased was Zimbabwean and that the marriage would have been negotiated with the Dube family. Whereas the first applicant contends that, as a South African, the customary law was followed. This court cannot determine the dispute regarding the validity of the marriage, which is closely linked to the citizenship status of the first applicant and the deceased, which would require oral evidence. As will be shown below, the determination of the validity of the marriage does not preclude determining the question of burial, which is the issue before this court.

[27] The legal position agreed upon by both parties is that the children of the deceased have the right to decide on burial when there is no will. The parties further recognised that the principle of primogeniture is outlawed in South Africa. Therefore, the right to decide does not solely rest with the eldest child. It is undisputed between the parties that the applicant and the deceased have two children, and the applicant disputes that the deceased was not a Zimbabwean and is unaware of any family members in that country. It follows, therefore, that the paternity of the two Zimbabwean female children is disputed. Based on the undisputed evidence regarding the deceased's children, one of whom is the second applicant, I conclude that his decision should be taken into consideration. The second applicant's brother, who was born in 2009, is a minor, and his well-being is to be decided by the court as the upper guardian of the minor children.⁷ I therefore conclude that on behalf of the minor, the deceased should be buried in Cape Town. My decision aligns with the wishes of the second applicant.

⁶ See also *P.N. and Others v P.N.* (104659/2022) [2024] (18 September 2024); *Sengadi V Tsambo* (40344/2018) [2018] ZAGPJHC 613; 2019 (4) SA 50 (GJ) (3 November 2018) confirmed by the SCA in *Tsambo v Sengadi* (244/10) [2020] ZASCA 46 (30 April 2020)

⁷ See *Mnyama* above, fn 4.

[28] Even if the daughter's wishes were to be accommodated, the counsel for the applicants submitted that, when children's wishes are in conflict, the court, in Mahala's case, held that it should adopt a practical approach. The practical considerations in this case are that he lived in South Africa for over thirty years as an adult, and that his cousin (Rangarirai Alfred Dube) stated they arrived together in 1990. Both parties agreed that the deceased had built his life in Cape Town. The deceased's children reside in Cape Town. Critically, the evidence that the deceased informed the second applicant that he wished to be buried in Cape Town was not gainsaid, and it overrides other considerations and the parties' wishes, including those of the first applicant and the second respondent.

Conclusion

[29] I find that the decision regarding the burial rights would, in this case, not relate to the citizenship of the deceased and/or the first applicant, nor to the validity of the customary marriage. Based on these premises, I am convinced that a proper case has been made for an order instructing the first and second respondents to release the mortal remains of C[...] K[...], whose surname is recorded as C[...] D[...], to the applicants for burial.

[30] I am also persuaded that, in this case, the right to bury the deceased belongs to the children. The harm would be irreparable, and there is no other satisfactory redress available for the deceased's children. Of paramount importance are the deceased's expressed wishes, which in this case were communicated to the second applicant. Several factors were considered to prevent confusion arising from conflicting views among the children. It is undeniable that harm exists, and the proposed remedy of exhumation by the respondent is clearly untenable.

Costs

[31] The costs will follow the results.

Order

[32] As a result, I made the following order:

1. The Applicants' non-compliance with the forms, service and directives of the court is condoned, and this case is dealt with as urgent in terms of Rule 6(12) of the Uniform Rules of Court.
2. The First and or Third Respondents are directed to release the remains of C[...] K[...] K[...], registered as C[...] D[...] with the First Respondent, to the applicants.
3. The Applicants are authorised to bury the remains of C[...] K[...] K[...] in Cape Town.
4. The second respondent is ordered to pay the legal costs, including costs of counsel on scale B, where so employed.

M V Noko
Judge of the High Court

DISCLAIMER: This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The hand-down date is 1 April 2026.

Date of Hearing: 27 March 2026.

Date of Judgment: 1 April 2026.

Appearances:

For the Applicants:

Lebethe D, instructed by Ndlovu-
Lebethe Attorneys, Randburg.

For Second Respondent:

Samuel S, instructed by Sam Sekhu
Attorneys Inc., Braamfontein.