

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, MTHATHA)**

Case No: 3527/2015

Heard: 23/06/2017

Delivered: 28/06/2017

ELIZABETH NONZWAKAZI MKONO

APPLICANT

versus

EXECUTOR OF THE ESTATE LATE:

VELILE MKONO AND 3 OTHERS

RESPONDENTS

**JUDGMENT IN THE APPLICATION IN TERMS OF
SECTION 18(3) OF THE SUPERIOR COURTS ACT
NO. 10 OF 2013**

MJALI J:

1. Following a spate of court applications against each other the applicant herein launched the present application for an order couched in the following terms:
 - 1.1. Directing, as is contemplated in Section 18(3) of the Superior Courts Act No. 10 of 2013, that the orders of Mjali and Brooks JJ on 14 October 2016 under case No. 3527/15 are not suspended pending the applicants' application for leave to appeal to the Constitutional Court or any subsequent appeal,
 - 1.2. Directing that consequently the applicant and Saziso Mkono are entitled to bury the deceased, Alfred Velile Mkono forthwith.

- 1.3. That the costs of this application is to be paid by the respondents should the application be opposed,
 - 1.4. Granting the applicant further and alternative relief.
2. At the time of the launch of this application, Mrs Noncedile Mildred Mkono who was the applicant in Case No. 3527/15 had died from a car accident which occurred after the Court order of 14 October 2016 and her application to appeal against it had been refused with costs. A subsequent petition to the Supreme court of Appeal had also been dismissed for lack of the prospects of success on appeal. There has been no substitution for Mrs Noncedile Mildred Mkono, however, despite many other difficulties pertaining to non compliance with the court rules, we deemed it fit in the interests of justice to hear Mr Nonkonyana who represented her estate. Mr Nonkonyana opposed the application on the basis that there is an appeal which lies with the Constitutional Court and he is confident on the existence of prospects of success in the appeal to that Court. His client would be prejudiced if this Court were to order that the applicant and Saziso Mkono are entitled to bury the deceased whilst the appeal process has not been finalised and that the issue of who has a right to bury the deceased is subject of another litigation between the parties under case number 3382/15. The hearing of that case is dependant on the finalisation of the appeal process of the present matter. Further, that there are no exceptional circumstances and that there is nothing to execute on our order of 14 October 2016.
3. The order sought to be declared operational read as follows:
- “The application for the rescission of default judgment granted on 7 July 2005, for an order declaring the marriage between Alfred Velile Mkono and Nonzwakazi Elizabeth Nodangala on 19 May 1987 to be null and void, for an order declaring the Last Will and Testament of Alfred Velile Mkono executed on 4 February 2014 to be null and void and*

for an order declaring that Velile Alfred Mkono died intestate is dismissed with costs, such costs to include the wasted costs reserved on 17 December 2015 and 28 January 2016 respectively.”

4. In order to succeed in an application in terms of section 18(3) of the Superior Courts Act No. 10 of 2013 the applicant must prove the existence of exceptional circumstances. The following factors were cited as exceptional circumstances warranting the envisaged order. The deceased died in November 2015 and has been kept in the mortuary for a period of a year and eight months at rapidly escalating costs which at the time of the hearing of this application were well in excess of three hundred thousand rand. The daily rate is R600.00. The family has not been able to find closure as the deceased has not been laid to rest and that his spirit cannot rest. The respondents have almost exhausted all the avenues following the dismissal of their petition to the Supreme Court of Appeal and that their bid to appeal to the Constitutional Court is merely to delay the process and to frustrate the applicant who might not be able to recoup the costs incurred in keeping the deceased in the mortuary as well as the costs of litigation from the estate of Noncedile Mildred Mkono who initiated the whole legal process as only R18 000.00 is available in her estate. The prolonged litigation has no other motive but to frustrate the applicant and to dissipate the assets of the deceased, Velile Alfred Mkono. The applicant has had to seek services of the legal aid as her resources were depleted by the litigation which does not seem to see the end.
5. It was further contended on behalf of the applicant that no appeal has been launched in the Constitutional Court as the time frames for doing so had lapsed before the launch thereof. Further that despite numerous requests, the respondents could not supply them with any proof of the launch of the appeal in the Constitutional Court. A fact which according to Mr Schuring was

clearly indicative of the lack of interest in getting finality in this matter. On the contrary Mr Nonkonyana argued that it was in the interests of both parties to have the issues between them finalised and that whilst the respondent failed to comply with the time frames for the launch of an appeal in the Constitutional Court, there is indeed an appeal pending before that Court. Proof that such an appeal has been filed and that attention has been drawn to its urgency has since been furnished to this Court.

6. Another factor which has been cited as motivation for the orders sought is that the respondents seek to challenge the judgment on the same grounds which failed to persuade this Court in their application for leave to appeal as well as the Supreme Court of Appeal in their subsequent petition. For that reason, Mr Schuring, who appeared for the applicant argued that there are no prospect of success in the appeal to the Constitutional Court. I do not in this judgment wish to pronounce on the existence or otherwise of the prospects of success in the appeal to the Constitutional Court as that is a matter for that Court to decide.
7. Before us, Mr Nonkonyana who initially opposed any order in favour of the applicant as in his view there was nothing executable in the order of 14 October 2015, later conceded that the cost order was executable. Bearing in mind the prolonged litigation in this matter which has rendered the applicant impecunious as well as the fact that the respondents have almost exhausted all the avenues following their failed bid in the Supreme Court of Appeal, I am however of the view that the applicant has made out a case for the granting of an order sought in terms of prayer 1 of the notice of motion, namely that our order of 14 October 2016 is not suspended pending the respondents' application for leave to appeal to the Constitution Court or any subsequent appeal.

8. As regards prayer 2, namely the declaration of the applicant and Saziso Mkono as being entitled to bury the deceased, Alfred Velile Mkono forthwith this Court cannot grant such an order as it is subject of litigation under case No. 3382/2015 the hearing of which hinges on the finalisation of the present matter. That matter was adjourned until the date of the hearing of this application and was before us so that its further conduct can be determined. Given the history of this matter and extra-ordinary nature thereof, an order as a form of a further and alternative relief with a view to regulating the further conduct of matter No. 3382/15 which would be the only remaining lis between the parties once the appeal is finalised in the Constitutional Court, would be justified. In that regard an order granting leave to the applicant to have matter No. 3382/15 set down as a matter of urgency within five (5) days of it being notified of the outcome of the appeal in the Constitutional Court will be in the interests of justice and can only serve to achieve the required finality in this matter.

9. On the question of costs, the applicant sought costs against the defendants in the event of the application being opposed. The defendants opposed the application and were in my view entitled to do so especially when one considers that the applicant sought to obtain a declaration as being entitled to bury the deceased, an issue which was not part of the order sought to be declared operational. Both parties have partly succeeded in this application and it is fair to order that each party should pay its own costs.

In the result the following order shall issue. That,

a) An order is granted in favour of the applicant that in terms of Section 18(3) of the Superior Courts Act No. 10 of 2013, that the orders of Mjali and Brooks JJ on 14 October 2016 under

case No. 3527/15 are not suspended pending the respondents' application for leave to appeal to the Constitutional Court or any subsequent appeal,

- b) Matter No. 3382/15 is postponed sine die and the Rule extended accordingly. The respondents are ordered to forthwith serve a notice of the outcome of the appeal to applicant.
- c) In the event of the appeal to the Constitutional Court being unsuccessful the applicant is granted leave to have matter No. 3382/15 set down as a matter of urgency within five(5) days of the receipt of such notice by the respondent or of its becoming aware of the outcome of the appeal through other means.
- d) Each party to pay its own costs.
- e) The Registrar of this Court is ordered to forward a copy of this judgment to the Constitutional Court for the attention of the Judges who will be presiding over Case No. CCT156/17

G N Z MJALI

JUDGE OF THE HIGH COURT, MTHATHA

I agree.

R.W.N. BROOKS

JUDGE OF THE HIGH COURT, MTHATHA

On behalf of the applicant	Adv. Schuring
Instructed by	The Legal Aid
For the Respondents	Adv. Nonkonyana
Instructed by	Mnikelo Dalasile & Associates