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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **11th September 2019** Signature: _____

CASE NO: 2019/24763

DATE: 11TH SEPTEMBER 2019

In the matter between:

M, T

Applicant

and

M, C

First Respondent

FAITH FUNERAL HOME

Second Respondent

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant against the first respondent for an order that she and her family, being the parents and siblings

of B M ('the deceased'), as against the first respondent, who is the wife of the deceased, be allowed to bury him.

[2]. The application was heard on what was in essence the return day of a *rule nisi* which I had issued in the early evening of Friday, the 6th of September 2019. In terms of the *rule nisi*, I had granted an interim order interdicting the funeral and burial which the first respondent had scheduled and planned for Saturday, the 7th of September 2019. I had also interdicted the funeral parlour from releasing the body to the first respondent pending the hearing of the application.

[3]. The deceased was married to the first respondent on 5 December 2015 and one minor child, a 3 year old boy, was born of the marriage between them. During June 2019 the first respondent had caused a divorce summons to be issued against the deceased as they were experiencing challenges in their marriage. She did however not proceed with the divorce proceedings as they were hoping that the marriage could be saved. There was evidence placed before me to the effect that in the weeks and months prior to his death the deceased had indicated that he was very unhappy in his marriage and that he was in the process of moving out of the communal home. The communal home was in fact the residence of the parents of the first respondent, the wife of the deceased. This property is situated in Toekomsrus in Randfontein. The first respondent confirms that, whilst they were still living in the same house at the time of the death of the deceased, they were not living together as husband and wife. They were sleeping in separate beds. The two of them were living in back quarters, a cottage of sorts, of the property of the first respondent's parents, which they shared with their minor son as well as with the two other children of the respondent from a previous relationship.

[4]. The deceased died in the early hours of Monday, 2 September 2019, and he had reportedly died from pesticide poisoning. It is the version of the first respondent that the deceased had committed suicide. The post mortem confirms the cause of death as being consistent with pesticide poisoning. The toxicology report is however still awaited. The first respondent explained that on

the evening of Sunday, 1 September 2019, the deceased arrived from church, whereafter he and their son had supper. Thereafter she went to bed. In the early hours of the morning, her son screamed uncontrollably, and this awoke her. She then found the deceased outside the house in the yard clearly in distress and foaming from the mouth. An ambulance was summoned, but on their arrival within minutes, the paramedics declared the deceased dead on the scene.

[5]. It is the case of the applicant and the family that the first respondent, the wife of the deceased, should not be allowed to bury him. She had issued a divorce summons against him and the deceased himself had made it known to all that he did not want to continue with his marriage. Prior to his death the deceased had in fact informed his older brother that he intended moving back to the family home in Pretoria. The applicant and her family are also of the view that the first respondent is unaffected by the death of the deceased. She is more interested, so they contend, in cashing in his policies and benefiting from any other benefits on his death. This is denied by the first respondent.

[6]. Normally the right to bury a deceased person reposes on his spouse (widow), who, in the absence of a valid will and last testament, is normally the heiress to the deceased's estate. In that regard see: *Nzaba v Minister of Safety and Security and Others*, Case No: 0535/2005 (unreported). The applicant and her family urged me to deviate from this general rule because the deceased and the first respondent were in the process of getting a divorce. The fact of the matter is however that as at the date of his death, the deceased and the first respondent were still legally married.

[7]. My understanding is that in customary law the male head of the family of the deceased is the person who decides the arrangements concerning the burial of the body of the deceased. This authority of the male head of the family or the father of the deceased was predicated on the principle of primogeniture. The Constitution has decreed that the principle of primogeniture regarding the law of intestacy violated the right of women to human dignity guaranteed in section 10 of the Constitution. In our new constitutional dispensation these

traditional cultural customary law practices were reconsidered in the light of our constitutional development pursuant to section 39 (2) and 111 (2) of the Constitution, Act 108 of 1996. See *Bhe and Others v Magistrate Khayelitsha and Others*; *Shibi v Sithole and Others*, where the principle of primogeniture was abolished; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, 2005 (1) SA 560 (cc) 2005 (1) BCRL (1).

[8]. The first respondent is the wife of the deceased and she is entitled to bury her husband. There is a competing claim by the family of the deceased, who believe that it would have been the wish of the deceased on his deathbed to be buried by them. They do not however say so in as many words. There are also considerations of fairness, equality, equity and the interests of justice as well as the balance of convenience and the exigency that the first respondent had made arrangements for the funeral on Saturday, the 7th of September 2019, which arrangements were summarily derailed by the order of the court on Friday, the 6th of September 2019. The balance of convenience therefore appears to be in favour of the first respondent.

[9]. These multiple competing and practical considerations cannot be governed and resolved strictly on the basis of the principles governing the granting of interdicts. The court is obliged to adopt a practical common sense approach. In any event, the order I intend granting would subsume the legitimate burial rights of the first respondent as the lawful wife of the deceased. I think that the reality of the matter is that the rights of the wife trump the interest of the applicant and the family, and, all things considered, the fairest thing to do is to allow the wife to bury her husband.

[10]. The first respondent seeks an order to bury the deceased in Randfontein. The applicant and her family have indicated they would attend the deceased's funeral irrespective of where same is to be held. Taking into consideration the competing interests and balancing same on the principle of proportionality, I am of the view that the first respondent should be allowed to bury her husband.

Order

In the result, I make the following order:-

- (1) The first respondent is granted permission to bury B M, identity number: [...] ('the deceased').
- (2) The second respondent shall release to the first respondent the body of the deceased for purposes of the funeral and the burial.
- (3) There shall be no order as to cost.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	10 th September 2019
JUDGMENT DATE:	11 th September 2019
FOR THE APPLICANT:	Ms Malebo Maleka
INSTRUCTED BY:	Malebo Maleka Attorneys
FOR THE FIRST RESPONDENT:	In person
INSTRUCTED BY:	In person
FOR THE SECOND RESPONDENT:	No appearance