

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

CASE NO: 31066/2021

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

In the matter between:

MAHLASELA DORCAS MOKWENA

Applicant

and

ANNA REFILWE MOKWENA

First Respondent

ESTATE LATE: SERUWANE FRANK MOKWENA

Second Respondent

CHRIS HANI BARAGWANATH HOSPITAL

Third Respondent

NEDBANK

Fourth Respondent

FIRST NATIONAL BANK

Fifth Respondent

PUTCO BUS SERVICES (PTY) LTD

Sixth Respondent

JUDGMENT

MAKUME J:

[1] This is the return date of a rule nisi granted by my brother Mabesele J on the 2 July 2021 in terms of which the Respondents are in the main called upon to show cause why a final order shall not be granted amongst others: -

- Permitting the Applicant to take possession of the body of one Frank Seruwane Mokwena from the Baragwanath Hospital Mortuary and to bury the deceased at Burgersfort in Limpopo.

[2] It is common cause that during or about 1978 the deceased Frank Seruwe Mokwena (the deceased) concluded a customary marriage in Limpopo with the Applicant. Eight children were born out of that marriage all of them are now major the last one born in the year 2000. The Applicant lives in Limpopo.

[3] The deceased was employed as a bus driver by PUTCO Bus Company and owned a house in Freedom Park Soweto. It was whilst employed in Johannesburg and living here that he met the First Respondent. A romantic relationship developed which led to the deceased and the first Respondent concluding a marriage by civil rights during 1998. No children were born out of that marriage.

[4] The first Respondent and the deceased lived together as husband and wife at the house in Freedom Park. It is common cause that the Applicant was aware of the cohabitation though she did not consent to it. It is also true that the first Respondent was aware and knew that the deceased had a wife in Limpopo being the Applicant with children.

[5] The deceased passed away by natural causes on the 21st June 2021. On hearing the news, the Applicant dispatched two of her sons to come to Johannesburg and to collect the body of their father for burial at the family burial place in Limpopo as it is their tradition. On arrival the first Respondent refused and told them that she is preparing to bury the deceased on Saturday the 2nd July 2021 in Soweto. The sons reported to their mother and this resulted in the urgent interim interdict referred to above.

[6] The first Respondent has filed her answering affidavit and the Applicant filed a reply. The three sets of affidavits deal mainly with two issues namely:

- i) The validity or otherwise of the two marriages.

ii) The right to bury.

[7] I do not think that this court is well placed to deal with the first issue namely to declare which of the two marriages still exists. It is an issue to be dealt with at another forum perhaps in trial proceedings.

[8] The crux of the dispute in this matter is who between the two woman has the right to claim the body of the deceased and bury it.

[9] The Applicant not only relies on her right derived from the marriage with the deceased by custom but also makes the point in paragraph 5.15 of her founding affidavit where she says the following:

“Arrangements are already made to bury the deceased at his ancestral graveyard at Burgersfort, Driekop where all the family of the Mokwena are laid to rest. This is a special graveyard specifically reserved for all family members of the deceased.”

[10] On the other hand the first Respondent also lays a claim to burial rights based on her civil marriage with the deceased. Over and above that she has annexed to her answering affidavit a hand written document allegedly penned by the deceased in which he says that on his death the first Respondent “will be the owner of all assets we own.” The piece of paper is not dated and was seemingly an instruction to the bank to draft a Will. No Will was attached to the answering affidavit.

[11] On the 7th July 2021 when counsel appeared before me to make their submissions it was only then that the first Respondent’s counsels sought to introduce two documents marked “SFMF” it is a document dated the 15 December 2020 which seem to be an application by the deceased and the first Respondent instructing Nedbank to draft a Will. There was no formal application to introduce the Will as evidence neither was there any affidavit filed explaining why that document was not disclosed in the answering affidavit to enable the Applicant to have dealt with it in reply.

[12] I made no ruling about the Will save to note that in the Will itself there is nowhere that the deceased says where he wants to be buried and who must be responsible. It is only in the application to Nedbank where there is mention of Nasrec Cemetery and even then he did not indicate who must be responsible for his burial. I will accordingly not take notice of that Will in this judgment for reasons mentioned above.

[13] The children of the deceased say they want their father to be buried in Burgersfort. Their mother the Applicant makes a strong case based on the tradition of the family. I have not been persuaded to ignore that, neither has the Respondent given a contrary version.

[14] It is interesting to note that in her answering affidavit the first Respondent did not deal with pertinent averments by the Applicant for example in paragraph 5.3 of the founding affidavit the Applicant says that she and the deceased concluded a customary marriage in the year 1978 and that same still subsists. This is not disputed by the first Respondent. Significantly at paragraph 5.9 the Applicant says “the whole family of the deceased including all his children wished that he be buried at our home in Burgersfort. The first Respondent simply says she notes that.

[15] In response to the direct statement by the Applicant as set out in paragraph 5.15 the first Respondent does not deny that it is a tradition of the deceased that all family members are buried at a special burial place in Burgersfort. All that first Respondent says is that “*I am a lawful wife and that the deceased lived with me*” and on that basis she claims the right to bury the deceased.

[16] The issue of burial rites has long been a burning issue in our courts more especially where a man had decided to get married to more than one woman.

[17] The deceased was such a person. The High Court in the matter of **Thembisile & Another v Thembisile & Another 2002 (2) SA 209** was faced with a matter with similar facts as the present matter. In that matter the Applicant had concluded a customary marriage with the deceased and had one son with him. The deceased went on to conclude a civil marriage with the second woman and two

children were born. When he died the court held that the first wife married by custom and her eldest son had the right to bury the deceased at his ancestral place in the Transkei and not in Rustenburg where he had been living with the second wife.

[18] The present matter is on all four with the decision in Thembisile referred to above. Whilst it is correct that the deceased lived both in Soweto and Burgersfort and that he mostly spent his time with the first Respondent in Soweto he had not expressed a wish to cut ties with his first wife and his children. All his children and his family are in Burgersfort it will be an inconvenience to allow that his remains be buried in Soweto far from his family and ancestors. Whenever his wife and children including grandchildren wish to visit the grave they will have to travel all the way from Burgersfort to Soweto at great express.

[19] I am satisfied that the Applicant has made out a case for some of the relief she seeks. I say this as I indicated before that some of the order granted in the *rule nisi*. I am unable to confirm them as evidence will have to be led at trial proceedings and this being the urgent court is not suited to deal sufficiently with those issues.

[20] In the result I make the following order:

ORDER

1. The first Respondent is hereby interdicted from burying the deceased Frank Seruwane Mokwena in Soweto.
2. It is further ordered that on receipt of this order Vuyo Funeral Undertakers in Orlando West, Soweto shall release the body of the deceased Frank Seruwane Mokwena to the Applicant or to persons nominated and authorised by the Applicant.
3. The Applicant shall bury the body of the deceased at the family burial site in Bothashoek village in Burgersfort, Limpopo.

4. The bank account held in the name of the deceased at Nedbank being account number [...] shall remain frozen until an executor shall have been appointed by the Master of the High Court.
5. The bank account of the deceased held at First National Bank being account number [...] shall remain frozen pending the appointment of an executor by the Master of the High Court.
6. It is further directed that Nedbank, First National Bank or any other Institution holding money on behalf of the deceased including his employer shall release to the Applicant such amounts of money reasonably required to pay for the burial expenses of the deceased.
7. The first Respondent has the right to attend the funeral of the deceased at Burgersfort, Limpopo.
8. Each party to pay own costs.

DATED at JOHANNESBURG this the 26 day of AUGUST 2021.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	07 JULY 2021
DATE OF JUDGMENT	:	27 AUGUST 2021
FOR APPLICANT	:	ADV MM MOKWENA
INSTRUCTED BY	:	THAPELO SETHWANA ATTORNEYS
FOR RESPONDENT	:	ADV KHUNOU

INSTRUCTED BY : DITAN ATTORNEYS