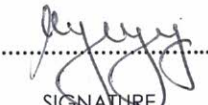




**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION POLOKWANE**

**Case No: 1127/2018B**

|     |  |
|-----|--|
| (1) | REPORTABLE: <del>NO</del> /YES   |
| (2) | OF INTEREST TO OTHER JUDGES: <del>NO</del> /YES  |
| (3) | REVISED.   |
|     | <div style="display: flex; justify-content: space-between;"> <div style="text-align: center;"> <p>23/02/18</p> <p>.....</p> <p>DATE</p> </div> <div style="text-align: center;">  <p>.....</p> <p>SIGNATURE</p> </div> </div> |

In the matter between

**MOLEMA MAANE MALEPE**

**APPLICANT**

**AND**

**DITHABE THOBEJANE**

**FIRST RESPONDENT**

**TSWELOPELE FUNERAL PARLOUR**

**UNDERTAKER & FUNERAL DIRECTORS**

**SECOND RESPONDENT**

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**JUDGMENT**

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**Kganyago J**

[1] The applicant has brought an application on urgent basis seeking an order in the following terms:

- “1. That non-compliance with the rules be condoned and that the matter be heard on urgent basis in terms of Rule 6(12);*
- 2. That the 1<sup>st</sup> Respondent, or any other person directly and indirectly instructed by the Respondent, be interdicted from proceeding and/or continuing, either directly or indirectly, with the burial and/or funeral of the deceased, Makomane Solomon Malepe, scheduled to take place on Saturday, 24 February 2018 or at any date soon thereafter;*
- 3. That the 2<sup>nd</sup> Respondent be interdicted and precluded from releasing the deceased body into the 1<sup>st</sup> Respondent’s possession, or possession of any other person who may require or demand the release of the aforesaid body;*
- 4. That the 2<sup>nd</sup> Respondent be ordered to release the deceased’s body into the Applicant’s possession or his authorised representative for burial purpose*
- 5. That the Applicant be declared the sole and exclusive person having the legal right to bury the deceased.*
- 6. That the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents be ordered to pay the costs of this application on attorney and client scale in the event it is opposed.*
- 7. Further and/or alternative relief.”*

[2] The first respondent is opposing the applicant’s application. According to the applicant, she is the surviving spouse of the late Mamokone Solomon Malepe (“ the deceased”). She and the deceased were married to each other by civil rights, in community of property on the 13<sup>th</sup> December 1991 and that their marriage was never dissolved by any court of law. She has attached a copy of a marriage certificate to her founding affidavit. From the said marriage they were blessed with five children, of which three of them are now majors.

[3] The deceased has passed away on the 13<sup>th</sup> February 2018. At the time of his death, the deceased had deserted the applicant and was living with the first respondent at her house. The deceased has left the common home during 2016. According to the applicant, the first respondent intends to bury the deceased on the 24<sup>th</sup> February 2018. The applicant’s contends that the first respondent has no legal right to bury the deceased and that it is her who has the legal right to bury him.

[4] According to the first respondent, the deceased was her life partner. The applicant has issued divorce summons against the deceased during 2017. At the

time the applicant issued divorce summons, she was already in a love relationship with one Kando Thobejane. The first respondent is therefore of the view that the applicant has moved on with her life with Mr Thobejane whilst the deceased has moved on with his life with her. The first respondent submits that she has taken care of the deceased whilst he was ill until he passed on in her house. The first respondent contends that the deceased had made a wish that upon his death, she in cooperation with his family should bury him. The first respondent has also attached a confirmatory affidavit of Petrus Malepe whom it is alleged that he is the brother in law of the first respondent. According to the first respondent, at the time of the deceased death, he had already paid lobola for her. She has attached a document to her answering affidavit which it is alleged to be the lobola agreement.

[5] The applicant has filed her replying affidavit wherein she has conceded that during 2017 she has issued divorce summons against the deceased, but that the matter was mediated and resolved. She further stated that the deceased never entered a notice of intention to defend the divorce action, and further that she did not proceed to obtain a default order.

[6] The duty and right to bury a deceased person can be contentious. Instead of burying the deceased with dignity, parties will be involved in acrimonious litigation. It is trite that in applications of this nature, the party that approach the court must do so with clean hands. He or she must also make a full disclosure of all the circumstances surrounding the case in order to enable the court to arrive at a fair and just decision. Failure to do so may result in the court inferring that the application is nothing less than vexatious and malicious. At this stage I am not called upon to determine the validity of the alleged customary union between the deceased and the first respondent, and it will therefore not be necessary for me to pronounce on it.

[7] The applicant in her founding affidavit has failed to disclose that during 2017 she has issued divorce summons against the deceased and that the said summons was duly served on the deceased. This issue was raised by the first respondent for the first time in her answering affidavit. In her replying affidavit, the applicant has conceded that indeed she has issued divorce summons against the deceased. However, she contends that the matter was mediated and resolved. She does not state when the matter was mediated and resolved, and also by whom. She does not state whether after that mediation the deceased has returned to their common home. She does state whether after their dispute was resolved she has withdrawn her divorce action. She is merely giving a scanty picture of the outcome of the alleged mediation. Her counsel stated from the bar that there was an agreement not to proceed with the divorce action but could not give the full details of the alleged

agreement. He could not explain what was going to happen after the divorce action was allegedly stopped.

[8] The respondent in her answering affidavit has stated that the applicant is in a love relationship with one Kando Thobejane, and has therefore moved on with her life with Mr Thobejane whilst the deceased has moved on with his life with her. In reply to these allegations, the applicant in her replying affidavit has merely stated that the contents are noted and that there is no need to admit or deny. Since she is not admitting or denying, the court will accept the first respondent's version as the truth. That will explain why the applicant has instituted a divorce action against the deceased. The fact that the applicant has issued divorce summons against the deceased, are the facts which are within her knowledge, and in my view crucial information to be disclosed by her in her founding affidavit. She has deliberately failed to disclose them as she knew very well that they are prejudicial for her case. In my view failure to disclose such crucial information shows that she not taking this court into confidence and was therefore not honest with this court.

[9] Paragraph 7.5 of the applicant's divorce summons read as follows:

*"As a result of the aforesaid, the Plaintiff has lost love and affection towards the Defendant."*

[10] As I have already pointed out in paragraph 7 *supra*, the details of the alleged mediation agreement is scanty, and the applicant has failed to submit proof that she has withdrawn her divorce summons against the deceased. It can therefore, not be said with certainty that she abandoned her divorce action against the deceased, or that their dispute has been amicably resolved, moreso that she not disputing that she has moved on with her life with Mr Thobejane.

[11] In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)** the court held that a serious duty is imposed on a legal advisor who settles answering affidavit to ascertain and engage with facts which his client dispute and to reflect such disputes accurately in the answering affidavit. If that does not happen it should not come as a surprise that the court take a robust view of the matter. Even if Wightman case refers to an answering affidavit, in my view, the same principle will also be applicable to a founding affidavit and a replying affidavit. The applicant's founding and replying affidavit does not reflect the facts of this case accurately, hence in most instances the applicant's counsel was forced to make submissions from the bar.

[12] The applicant has disowned the deceased whilst he was still alive, and has also put it in black and white that she has lost love and affection towards him. If she has lost love and affection towards the deceased whilst he was still alive, what now makes her love a corpse. It does not make sense at all.

[13] It is not in dispute that at the time of the deceased death, he deceased was living with the first respondent, and that he passed away at her place. It is not in dispute that the first respondent and the deceased were not legally married at the time of the deceased death. The applicant is now using the marriage certificate between her and the deceased as an entitlement for her to bury the deceased.

[14] In **W and Others v S and Others [2016] ZAWCHC 49 (4 May 2016)** the blood relatives of the deceased brought an urgent application on the basis that they have a right a right to bury the deceased who was estranged from her husband and was virtually on the eve of her divorce. The court held that the deceased by actions has disassociated herself from the first respondent whilst still alive. It is unheard of that a person who was severing ties with her husband would now be claimed to be husband's ancestor when she is no more. It was further held that if the deceased wanted to be rid from the first respondent whilst still alive, what would then convince this court that she wanted to be laid closer to him when he is no more.

[15] In my view the present case is not distinguishable from the W and Others v S and Others case. I therefore, tend to align myself with that case. The applicant by instituting divorce summons against the deceased, and stating in her particulars of claim to the summons that she has lost all love and affection towards the deceased, was disassociating herself from the deceased. The first respondent is the one who took care of the deceased from the moment he started to be sick up until his last breath. After she saw that the deceased has passed on, she went to inform the deceased family and not the applicant. The deceased family on been informed has not attacked the first respondent, but has been supporting her and also making the funeral arrangements with her. Now that he is dead, what makes the applicant to love a corpse which she has lost love and affection whilst still breathing.

[16] The first respondent has the support of the family of the deceased represented Petrus Malepe the brother of the deceased. Petrus even regard himself as the brother in law of the first respondent. He has deposed a confirmatory affidavit confirming the averments made by the first respondent in her answering affidavit. In paragraph 64 of her answering affidavit, the first respondent is stating that the

deceased during her life time has expressed to her that upon his death she should cooperate with his (deceased) family to bury him. That has been corroborated by Petrus when he deposed the confirmatory affidavit to the first respondent answering affidavit.

[17] Counsel for applicant has conceded that the deceased wishes cannot be lightly ignored by the court. In my view the deceased has made a choice, and that his choice was to be with the first respondent, and also be buried by the first respondent in cooperation with his family. Therefore his choice must be respected since the applicant has disassociated and disowned him whilst still alive. The court also takes a dim view on the applicant for deliberately failing to disclose the crucial information regarding the divorce action that she has instituted against the deceased. The time period which the deceased and the first respondent has spent together in this case becomes immaterial as the applicant has made her intention clear which was to sever ties with the deceased whilst still alive by serving him with divorce summons.

[18] Under the circumstances, the court is not satisfied that the applicant has made a proper case for the granting of an interdict against the respondents.

[19] In the result, I make the following order:

19.1 The applicant's application is dismissed with costs.

  
MF KGANYAGO

JUDGE OF THE HIGH COURT  
SOUTH AFRICA LIMPOPO  
DIVISION POLOKWANE

Appearance for the applicant: Adv Ramabala

KNS Mgiba Attorneys

For the respondent: Mr Thobejane

Botha Massyn & Thobejane Associated Attorneys

Date of hearing: 22<sup>nd</sup> February 2018

Date of judgment: 23<sup>rd</sup> February 2018