

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 5040/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

MOYAHABO EUGLY MABULANA

APPLICANT

And

GLEDIES MABULANA

FIRST RESPONDENT

SOPHY MABULANA

SECOND RESPONDENT

TWO MOUNTAINS BURIAL SOCIETY

THIRD RESPONDENT

NURSE MADUMO

FOURTH RESPONDENT

MPHO ARON NYALUNGU

FIFTH RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] On 21st July 2021 the applicant brought an ex-parte urgent application seeking an interim relief that the first and second respondents be interdicted from burying Nakampe Wilard Mabulana (deceased); that she be allowed to bury the deceased and first and second respondents or any other person be interdicted from misusing or taking the deceased assets pending the final determination of the matter. On that date the court gave directives that the application be served on the respondents and it be set down to be heard on 22nd July 2021 at 14h00.
- [2] On 22nd July 2021 the first and second respondents applied for joinder of Nurse Madumo and Mpho Aron Nyalungu the children of the deceased from another marriage as fourth and fifth respondents. The applicant did not oppose the application and the joinder application was granted. The matter was adjourned to the 23rd July 2021 at 14h00 to enable the respondents to file their answering affidavit and reply by the applicant if any, and the matter was supposed to be heard virtually.
- [3] On 23rd July 2021 the court was informed that due to some technicalities, counsel for the respondents was having some problems to join the virtual hearing and the parties have agreed that the court finalise the matter on papers without oral submissions. The court dismissed that applicant's application and notified the parties that the written reasons for the order will follow. What now follows is the written reasons for the order of the 23rd July 2021.

[4] The applicant is the deceased's wife, the first respondent is the deceased sister in law and the second respondent is the deceased sister. According to the applicant, she and the deceased were married each other on 3rd July 1996 in terms of civil rites, and from the said marriage they had three children who are currently all majors. The applicant avers that during 2018 her marriage between her and the deceased faced some challenges and difficulties which led to the deceased moving out of their common matrimonial home. However, during their separation they continued to communicate with each other concerning their children and matrimonial home.

[5] On 18th July 2021 the applicant was informed by one of their the children of the passing away of the deceased. On hearing that the applicant started preparing and making arrangements for the deceased burial. When the applicant went to the third respondent, the employees of the third respondent informed her that the deceased was brought to them by the first and second respondents, and that they will not be able to assist her. The applicant was advised by the employees of the third respondent to try and resolve their issues as a family. The applicant approached the first and second respondents to try and resolve the matter, but the first and second respondents did not want to talk to her in order to resolve the deceased burial arrangements.

[6] On 20th July 2021 the applicant went to the third respondent's premises seeking necessary documents to apply for a death certificate of the deceased, but the third respondent did not provide her same. The third respondent told the applicant that they were unable to assist her as the first and second respondents were arranging the funeral of the deceased. The third

respondent further informed the applicant that the only thing that can stop them from handing over the deceased body to the first and second respondents was a court order. According to the applicant, the first and second respondents are intending to bury the deceased on 24th July 2021.

[7] That led to the applicant instituting an urgent application against the respondents. It is the applicant's contention that the respondents are unlawfully and without good cause refusing her as the deceased wife to fully and fairly participate in her late husband funeral arrangements and burial. The applicant had submitted that she and the children have already prepared the burial site for her late husband.

[8] The first, second, fourth and fifth respondents (respondents) are opposing the applicant's application. The respondents' answering affidavit has been deposed by the fourth respondent on behalf of all the respondents and other respondents have filed confirmatory affidavits.

[9] The respondents in their answering affidavit have submitted that the deceased and the applicant were married to each other on 3rd July 1996. On 9th January 2018 the applicant instituted divorce proceedings against the deceased, and in her papers has stated that she had lost love and affection towards the deceased. In her particulars of claim in the divorce action, the applicant has stated that there were no children born between her and the deceased. That the deceased had vigorously contested the divorce, but on 30th June 2021 the parties at court agreed that the applicant should obtain the decree of divorce on unopposed basis, and that their joint estate be equally divided. On that date the matter was postponed to 28th July 2021 to enable the applicant

to obtain the assistance on an interpreter. That had it not been for the postponement, the divorce would have been finalised on 30th June 2021.

- [10] The respondents further submit that it has been the wishes of the deceased to be buried by the first respondent, and further that the deceased had left a will and particulars of his burial societies to the first respondent. The respondents avers that towards the deceased final days, he was not well and was cared for by the first respondent, and further that the first respondent has been taking care of the deceased since 2013, and even after the deceased ceased working. The respondents further avers that there was no communication between the deceased and the applicant.
- [11] The respondent have submitted that the applicant had withdrawn her divorce action immediately after hearing that the deceased had passed away. The respondents further submit that the applicant and her children are not prohibited from attending the deceased funeral. It is the respondents' contention that the third respondent derives its entitlement and right to bury the deceased by virtue of the fact that it is named as one of the beneficiaries in the deceased will.
- [12] The applicant in her replying affidavit has submitted that she is having a clear right to bury the deceased since she is married to the deceased, and the will is silent on the issue of the person who must prepare and arrange the deceased funeral. It is the applicant's contention that the marriage relationship between her and the deceased was terminated by the death of deceased and that the deceased death certificate state that he was still married at the time of his death.

[13] Family feuds in relation to who has the right to bury a deceased person had the potential of permanently dividing the family. These are sensitive disputes which are best suited to be mediated and resolved by family elders rather than bring them to court where there is no winner, but divides a united family structure which end up being teared apart. It is the time when the family should be united more than ever, and preparing to give the loved one a dignified burial, rather than hang their dirty linen in court. It will therefore be the duty of the court to evaluate the evidence presented before it in its totality in order to arrive at a just and fair decision.

[14] The applicant and the deceased were married to each other by civil rite which marriage still subsisted at the time of the deceased death, even though the parties were undergoing a divorce process which was on the verge of been finalised. The parties have already agreed that the applicant should proceed to obtain the decree of divorce on uncontested basis, and have also agreed on how their joint estate should be divided. In fact had it not been for their matter been postponed on 30th June 2021, their divorce would have been finalised at the time of the deceased death.

[15] In applications of this nature, it is the duty of all the parties to make a full disclosure of all the relevant and vital facts relating to the matter in dispute to enable the court make a just and fair decision. The applicant was aware that at the time of the deceased death, she had instituted a divorce action against the deceased; that they have already agreed that she will obtain the decree of divorce on uncontested basis; have agreed on how their estate will be divided and have already secured a date on which the divorce will be finalised, which was few days before the deceased death. All these are vital and necessary

information which would assist the court in arriving a just and fair decision, but the applicant without justification failed to disclose that, and even in her replying affidavit she admitted the contents of the paragraphs without giving an explanation why she had failed to disclose these vital information in her founding affidavit.

[16] The applicant in her founding affidavit has stated that she became aware of the deceased death on 18th July 2021 which is the date on which the deceased passed away. However, on 19th July 2021 she filed a notice of withdrawal of her divorce action. In her replying affidavit she had stated that the marriage relationship between her and the deceased was terminated by the death of the deceased, but does not explain why she withdrew her divorce action immediately on learning about the deceased death. In my view, it was opportunistic of her to withdraw her divorce action immediately on learning of the deceased death, as she knew the implications it will have on her in relation to her right to bury the deceased.

[17] The applicant in her founding affidavit has stated that the deceased had moved out of their common home during 2018, and she did not dispute the respondents' version that towards the deceased final days, he was not well and was being cared for by the first respondent. The deceased therefore passed away in the care of the first respondent. The applicant in her divorce papers has stated that she had lost love, affection and respect towards the deceased and that she desired for a divorce. The parties have already agreed that the applicant will obtain a decree of divorce on uncontested basis; they have already agreed how their joint estate was going to be divided on finalisation of the divorce; they have already settled on the date on which the

their divorce was to be finalised, which was a few days before the deceased death and the parties have been separated since 2018.

[18] The applicant had for a long period of time disassociated herself with the deceased, she had lost love, affection and respect towards the deceased, and did not want be with him anymore. All these have been expressly stated by the applicant in her divorce papers, and the applicant had failed explain how the death of the deceased had restored the lost love, affection and respect towards the deceased when she was on the eve of obtaining the permanent termination of the relationship which she had with the deceased. Even at the time of the deceased death, the relationship was existing on papers only as they have separated during 2018, and a final decree of divorce which they were supposed to obtain on 28th July 2021 was a mere formality as the parties have already agreed on contentious issues.

[19] In *W and Others v S and Others*¹ Mantame J said:

“...the deceased, by her actions disassociated herself from the first respondent whilst she was still alive. It is unheard of that a person who was severing ties with her husband would now be claimed to be the husband’s ancestor when she is no more... nothing was left from his civil union with the deceased, as they were two (2) days away from divorce when the deceased met her death.”

[20] In my view, the case at hand is not distinguishable from the *W and Others* case above, as the applicant was a few days away from obtaining a decree of divorce when the deceased passed away, the parties have since 2018 separated from each other, and have already agreed on a divorce. What was

¹ [2016] ZAWCHC 49 (4 May 2016) at para 38

still joining them together was a marriage certificate of which the actual marriage existed only on paper.

[21] The deceased had left a will which relates to his half share of the joint estate, and the applicant is not challenging its validity. In terms of the deceased will, he had nominated the second and fourth respondents as the only heirs of his estate. The applicant in her replying affidavit has stated that the will is silent on who must prepare and arrange the deceased funeral, and that ‘as the lawful wife of the deceased had a clear right to bury the deceased.

[22] In *Tseola and Another v Maqutu and Another*² Munnik CJ said:

“...from these two cases it is quite clear that it is the duty and therefore the right of the heir to bury the deceased and to use his discretion in doing so where no testamentary directions have been given. In fact the testamentary directions can even be ignored if they are of an impracticable nature/or involving or going beyond a just scale of expenditure.”

[23] The deceased will did not give directions as who will be responsible for arranging his funeral, and also did not specify where he should be buried. However, the deceased had nominated the heirs in his will, and those heirs are still alive. The deceased and the applicant have disassociated themselves from each other during the deceased’s lifetime, and they have already agreed to separate from each other permanently, and were on the verge of achieving their wishes. The respondents in their answering affidavit have that stated it has always been the deceased wishes to be buried by the first respondent. The applicant in her replying affidavit has combined three paragraphs and stated that the respondents are not telling the truth except where they differ with her on the allegations, and the rest of the paragraphs are noted, and

² 1976 (2) SA 418 (THC) at 422H

further that she is having a clear right to bury the deceased as they are still married. It is not clear whether she is disputing that it has always been the deceased wishes to be buried by the first respondent. The only conclusion will be that she is not disputing that, but according to her, despite those wishes, she is entitled to bury the deceased as she was still lawfully married to the deceased.

[24] The wishes of the deceased had to be respected. In *Trollip v Du Plessis and Another*³ the court held that it was within the bounds of reasonableness to respect the wishes of the deceased, whether expressed in a testament or not, and if no such preference was expressed, resort could be had to the heirs. During his last days the deceased was in the care of the first respondent and the applicant did take care of him and was not even present when he passed away, and they have being separated from each other for a long time. The deceased by making his separate will despite being married in community of property with the applicant, and in that will had disinherited the applicant, was a sign that he had made his position clear that he had severed ties with the applicant even though on papers they were still married. The deceased had expressed his wishes to buried by the first respondent, and also taking into consideration that the marriage of the parties only existed on papers, in my view, the first, second fourth and fifth respondents are ones who are having a right to make preparations and funeral arrangements of the deceased and also to bury him. It follows that the applicant has failed to establish a clear right to bury the deceased.

[25] In the result I make the following order

³ 2002 (2) SA 242 (W)

25.1 Forms and service provided for in the Uniform Rules of Court are dispensed with and the matter is enrolled as urgent.

25.2 The applicant's application is dismissed with costs on party and party scale

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the applicant	: Adv Sibiya TD
Instructed by	: HM Mhlongo Attorneys
Counsel for the respondent	: Mr Mokoena
Instructed by	: MB Mokoena Attorneys
Date heard	: 23rd July 2021
Date delivered	: 26th July 2021 electronically