REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 7767/2021

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES / NO

DATE: 14/03/2023

In the matter between:

MALEPONO BABY MORWAMAKOTO	**1ST APPLICANT**
MAAKOMANE CASWELL RADINGWANA	**2ND APPLICANT**
KGOBALALA CHRIST RADINGWANA	**3RD APPLICANT**
MAAKOMANE PHILEMON RADINGWANA	**4TH APPLICANT**
MAMOKGOSHI LORRAIN MAHLABA	**5TH APPLICANT**

And

MARTHA FRANCINAH RADINGWANA	**1ST RESPONDENT**

DIHABISO TLAKALE MANKWANA	**2ND RESPONDENT**
PHOKWANE FUNERAL PARLOUR	**3RD RESPONDENT**
SOUTH AFRICAN POLICE SERVICES	**4TH RESPONDENT**
FETAKGOMO-TUBATSE MUNICIPALITY	**5TH RESPONDENT**
DEPARTMENT OF HEALTH-SEKHUKHUNE DISTRICT	**6TH RESPONDENT**
MEC-DEPARTMENT OF HEALTH	**7TH RESPONDENT**

JUDGMENT

MDHLULI AJ

Introduction

[1] This is an opposed application in terms of which the 1st to 5th Applicants (Applicants) in their notice of motion seek an order in the following terms:

1.1 That the 1st and 2nd Respondents be hereby ordered, in collaboration with the Phokwane Funeral Parlour, to exhume the body of the late Frans Mfana Radingwana from the Legolaneng cemetery and to re-bury it at the local Ga- Mampuru cemetery; within (30) day days of the service of the court order;

1.2 That the Schoonord South African Police Services, the Fetakgomo-Tubatse Municipality, and the Sekhukhune District of Health be hereby ordered to ensure that the court order is complied with and carried out according to the applicable health regulations;

1.3 That the 1st and 2nd Respondents be hereby ordered to pay the exhumation and the reburial expenses;

1.4 That the 1st and 2nd Respondents be hereby ordered to pay the costs of this application;

1.5 Any further and/or alternative relief that the Honorable Court may deem appropriate.

The application is opposed by the 1st and 2nd Respondents. In their opposition amongst others, they raised points of law and pray for dismissal of Applicants' application with costs, on a punitive scale, jointly and severally and those costs to be taxable and immediately payable, alternatively, costs *de bonis propiis,* on the scale of attorney and own client's scale. I elected to hear the parties on these preliminary issues first and this judgement primarily relates to the points of law raised therein.

At the outset, it is necessary to mention that the state of the Applicants' papers in the present case was far from satisfactory. In *Louw and Others v Nel*[1], the Supreme Court of Appeal remarked, with reference to motion proceedings, that the parties' affidavits constitute both their pleadings and their evidence[2]. Pleadings must be lucid, logical and intelligible. A litigant must plead his or her cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his or her opponent to the case that must be met. A litigant who fails to do so may not afterwards advance a contention of law or fact where its determination may depend on evidence which his or her opponent has failed to place before the court because he or she was not sufficiently alerted to its relevance[3]

The facts

[2] The 1st Applicant alleges in her founding affidavit that she is the first customary wife and widow of the deceased Frans Mfana Radingwana. They were married by customary union on the 20th March 1972. She never separated with the deceased. She never changed her maiden surname subsequent to the marriage. She stated that she has *locus standi in iudicio* to bring this application in terms of section 6 of the *Recognition of Customary Marriages Act No. 120 of 1998 (The Act).* She attached annexure **MBM2** (p19) being the letter from the Tribal Council and another **MBM2** (p20) notes by one Kenneth Setlamorago Rampuru as proof of her alleged marriage. The 2nd, 3rd and 5th Applicants are said to be the children of the deceased. Whilst the 4th Applicant is said to be the deceased's younger brother. All of whom support the application.

[1] 2011 (2) ALL SA 495 (SCA)
[2] At para 17, quoting from National Director of Public Prosecutions v Phillips and Others 2002 (1) BCLR 42 (W)
[3] National Director of Public Prosecutions v Phillips and Others 2002 (1) BCLR 42 (W), para 36.

The 1st Applicant attest to the civil marriage between the deceased and the 1st Respondent, however, challenges its validity as it offends sections 2(1) and 4(9) of the Act as well as section 3(2) of the Marriages Act No. 25 of 1961 in her papers. However, and surprisingly given her version she has not sought for any prayers in respect of this marriage. She denies the existence of any marriage between the deceased and the 2nd Respondent, save for the relationship between them which ended 10 years before the marriage between deceased and 1st Respondent. She alleged further that the 2nd Respondent was cohabiting with one Mr Phala in Germiston. She alleges the deceased paid lobola and married one Kidibone Dikotope and attached annexure **MBM5** as proof of the said marriage.

The deceased died on the 16th January 2021. They were called to a meeting and there was no consensus as to the funeral site and place for the deceased. As a result, the 1st to 3rd and 5th Applicants brought an urgent application in this court before my brother Judge Kganyago on the 22nd January 2021 against the 1st Respondent and Somalakazi Funeral Services then, which was struck from the roll with costs. The said order of the court is attached as **MBM6**. It is important to note that this application was instituted on the 22nd October 2021, some nine months after the burial and dismissal of the said struck application and the excuse for same is covid-19 though mentioned, the effects and why it is the cause of the "delay" this court has not been taken into confidence. The circumstances therein would have been helpful as the legal sector and the courts functioned throughout the Covid-19 period subject to their respective regulations and directives. The Applicants were duly represented then and currently by the same attorneys of record, save for the counsel who is on record in this present application before me.

The Applicants did not attend the funeral service as they allege it was concealed from them, however, Kidibone attended in the early hours of the morning and the program of the said service is attached as annexure **MBM7.**

[3] The 1st Respondent acts for herself as well as for 2nd Respondent who has therein consented to being represented. They deny the existence of any marriage between the deceased and the 1st Applicant. They allege that 3rd and 5th Applicant are not the biological children of the deceased, and were the sole reason the deceased ended a relationship with their mother, the 1st Applicant. They admit the 4th Applicant is the deceased's brother. They have no knowledge of the allegations pertaining to Kidibone Dikotope.

The preliminary issues

[4] The Respondents were served with the notice of motion on the 27th October 2021, served and filed their notice to oppose on the 12th November 2021. The answering affidavit was served and filed on the 07th December 2021. The Respondents filed their answering affidavit a few days out of time, two days to be specific, including a condonation application which is not opposed by the Applicants. In their opposition amongst others, they raised the following points of law and pray for dismissal of Applicants' application with costs, on a punitive scale, jointly and severally and those costs to be taxable and immediately payable, alternatively, costs *de bonis propiis,* on the scale of attorney and own client's scale:

4.1 Non- compliance with Rule 18(4)
4.2 *Locus standi*
4.3 Non-joinder
4.4 ispute of facts

I shall deal with these in detail herein under.

The law

[5] **The law in re condonation**

Rule 27(3) which provides that "The court may, on good cause shown, condone any non-compliance with these rules

The law in re non-compliance with rule 18(4)

Rule 18(4) which provides that "every pleading shall **contain a clear and concise statement of the material facts** upon which the pleader relies for his claim, defense or answer to any pleading as the case may be, **with sufficient particularity to enable the opposite party to reply thereto**"

The law in re locus *standi in iudicio*

Section 38 of the Constitution Act No. 108 of 1996 provides: "Anyone listed in the section has the right to approach a competent court, alleging that the right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group of class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members."

It is trite that the test for *locus standi* is whether the applicant has a direct personal interest in the suit to be considered. [4] In *Minister of Safety and Security v Lupacchini and Others*[5], two connotations of the expression were aptly identified. It was well said that its primary sense, it refers to the capacity to litigate or that is the capacity to sue or to be sued. It was correctly pointed out that whilst the capacity to litigate is of course not the same as the capacity to act, there is usually a close correlation between them. In its secondary sense, the expression denotes whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim.

Locus standi is thus an issue which needs to be determined preliminarily in a judicial process.[6] In other words, the issue of *locus standi* has to be decided *in limine* before the merits.[7] That the parties have the necessary legal standing or *locus standi in judicio* must accordingly appear *ex facie* the founding pleadings".[8]

The law in re non-joinder

Rule 10(3) of the Uniform Rules of Court provide that: "Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever

[4] *per* Searle, JP in *Rescue Committee, DRC v Martheze 1929 CPD 300.*
[5] [2015] JOL 33825 (FD)
[6] See *Watt v Sea Plant Products 1998 (4) All SA 109 (C) at 113-114.*
[7] See *Giant Concert v Rinaldo 2013 (3) BCLR 251 (CC) at 58.*
[8] *See Commissioner of Inland Revenue v van der Heever 1999 (3) SA 1051 (SCA) at par 10.*

the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action".

The test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court. See *Pheko and Others v Ekurhuleni Metropolitan Municipality.* [9]

The law in re dispute of facts

Rule 6(5)(g) which provides that "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

The law in re exhumation

The exhumation of mortal remains are governed by Regulations relating to the Management of Human Remains, R363 of 22 May 2013 ("the Regulation") read with the National Health Act 61 of 2003. Section 26 of the Regulation:

26. (1) No exhumations and reburials of human remains shall be done unless:

(a) authorised by the relevant sphere of government and permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place; or

(b) a court issued by magistrate and shall be permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place.

[9] [2015] ZACC 10 at para 56

(2) Exhumation approval shall not be issued without a reburial permit issued by the relevant local government in which the burial will take place, or without a cremation permit, in cases where the exhumed body will be cremated.

(3) No person shall exhume any human remains unless for the: -

(a) removal from the original grave to a new grave acquired in the same cemetery;
(b) removal for burial in another cemetery;
(c) removal for cremation;
(d) removal for forensic examination of the deceased;
(e) transfer from public grave to private grave
(f) for legal reasons, such as crime related investigations; or
(g) for archaeological reasons.

(4) The local government shall grant a permit for an exhumation on condition that the exhumation of the human remains shall only be done by a registered undertaker, such undertaker shall be based in the jurisdiction of the local government issuing the exhumation permit referred to in this regulation.

[6] **Arguments**

In regard to the non-compliance with rules Respondents argues that the Applicant's application is not only spurious, misguided but a fragrant disregard of the rules. In particular for purpose of this point, rule 18(4). The Respondents contends that there is no clear cause of action when looks at the notice of motion as same can be termed "a forest of words, without cogency and cohesiveness". That notwithstanding the fatal nature of the application, nothing has been pleaded in the papers about the regulations and procedures of that sensitive and complex process, which the Applicant's seek.

That in light of the above, this court should make adverse findings on the Applicant's legal representatives, their attorneys including counsel in terms of section 173 of the Constitution of the Republic of South Africa 1996. This punitive measured they argue are premised on the facts that there is no shred of factual and legal grounds for the

Applicants to have instituted the application. That the Applicants and their legal representatives aided and abetted each other in misleading this court. Respondents relied on the dictum by Innes CJ in *Geldenhuys and Neethling v Beuthin*[10] that "courts of law exist to settle concrete controversies and actual infringements of rights and not to pronounce upon abstract questions, or give advice on differing contentions". See also *Exparte Ginsberg*[11] amongst others. In *Graaff-Reinet Municipality v Van Reneveld's Pass Irrigation Board*[12] it Watermeyer CJ held that "though this principle originated as a rule of practice, it has since crystallized into the rule of law. Therefore, parties should avoid approaching the courts with matters that can be characterized as disingenuous, and/or instituted to "test waters", and/or seek the reaction".

The Applicants did not bother to respond to this *point in limine* both on papers and in argument. In fact, during the hearing counsel of the Applicant submitted that according to him there were only two *points in limine* raised namely *locus standi in iuducio* and joinder. I disagree with this position.

A litigant who approaches court for a relief should be able to set out a cause of action which is clear and able to be responded and/or pleaded. Necessary averments are essential to support the cause of action, which generally would be a point of contention with the other party, requires a response and/or plea and each party would need to prove to get the order/s sought.

The Applicants seek an order for exhumation primarily. However, there is nowhere in the founding affidavit where this crucial aspect for this court's determination is canvassed. Paragraph 3 of the Applicant's founding affidavit which relates to the purpose of the application, repeats the prayers as per the notice of motion. During argument the counsel for the Applicant in response to this court's questions conceded that there was no pleading in relation to the order sought save to have mentioned "the applicable regulations", which same have not been averred. This concession should have been the end of this matter, because this was the reason why the application was instituted to begin with.

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[10] 1918 AD 426
[11] 1936 TPD 155 at 157-8
[12] 1950 (2) SA 420 (A)

This failure by the Applicants is very concerning as, why this court is burdened with this application on this failure remains a mystery. It is trite that in motion proceedings you fall and stand by your papers, in particular the founding in respect to the Applicants. No case was properly made out by the Applicants for the orders sought. I find that this failure by the Applicant makes the application defective. As a result, this point has to be upheld.

It was argued on behalf of the Respondents that the Applicants lack *locus standi* based on the lack and sufficiency and directness of litigants thereof and referred this court to in that 1st Applicant in particular failed to prove she was married to the deceased in terms of customary law.

Whereas the Applicants insists that they have locus standi, in particulars the 1st Applicant by virtue of her alleged customary marriage to the deceased and relies on section 6 of the Act which provides that "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law". Relied on *MM V MN*[13] where the marriage was confirmed by the headman. I appreciate the refence herein, however, the facts therein are distinguishable to the current case. In the referred case, proof of the marriage was submitted by way of the Tribal certificate. This letter is nothing close to the certificate. The Applicant's counsel goes into great length in argument on the validity of the marriage of the 1st Respondent and the deceased. To my surprise as same is not an issue raised as an issue for determination by this court and/or prayer/s sought on its validity. The Applicants submitted that the raising of this point is baseless, that "The phrase '*locus standi in iudicio'* means the capacity to litigate or the personal capacity to sue or be sued without assistance. The rule is that every natural person of full legal capacity has the right to sue or be sued in a court of law. An applicant must further show that he has locus standi by virtue of the fact that he has an interest in the subject matter of the interdict. This is something different to legal capacity too litigate and referred me to *N v S and Others*[14] .

[13] 2010 (4) SA 286 (GNP) para [10]
[14] (940/2013) [2014] ZAECMHC 18 (20 April 2014 dictum of Stretch J

Section (2)(1) of the Act[15] provides that "A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage". My findings on this point relate to the papers before and not that there is are onerous approaches expected of parties in customary marriages before the Act. Before me should be placed evidence which prima facie points me to the existence of a customary marriage between the 1st Applicant and the deceased. Moreover, I am alive to the provisions of section 3.9 of the Act provides that "failure to register a customary marriage does not affect the validity of that marriage". The fact that this alleged marriage was never registered is not an issue that affects my findings herein.

I considered also the order of judge Kganyago herein as it is trite that when dealing with urgent matters, the courts over an above looking at the grounds of urgency, consider the merits to. Our courts are duty bound generally do take into account the interest of justice as well. The application was struck from the roll. I have not been placed in possession of the reasons for judgment therein and/or the papers themselves by any of the parties before me. Save submissions by Respondents in argument that the 1st Applicant then sought to interdict the funeral and the burial of the deceased. The afore going is not before me, however, I presume given the background herein that, should the merits have warranted, the honourable court therein would have granted an order that would for example stay the funeral pending the determination of as essential issue like of which "wife" has the right to bury the deceased.

Moreover, it is not the 1st Applicant's version that she ever bothered to register her marriage before and/or after the death of the decease, which is an option or service available for her if she was so resolved on persisting with her claim of being the first wife. This would have assisted her cause of action greatly if same was averred, but there is no evidence to this effect or any other to my satisfaction.

Applicants finally on this point argues the funeral program is proof that the deceased married 4 (four) wives and that I should find that the said four wives include the 1st Applicant. Respondents persist in their denial of 1st Applicant as a wife and consider the

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[15] 120 of 1998

mention of this program as insensitive on the part of the Applicants. I am not in a position to make a finding in favour of the Applicant as submitted because the said program makes reference to no names therein. I believe documentary evidence should speak for itself, in this instance this program cannot.

They further contend that **"MBM2"** should not be given any weight as it does not proof the existence of the said marriage. That the letter written in *Sepedi* from the Babinanoko Ba-Mampuru Traditional Council date stamped 20th January 2021 is not translated by sworn translators as required by our Rules with no particular reference to any specific rule during argument. Moreover, the sought translation they argue would be in line with the Heads of Courts Language Policy Adopted around the use of English as a language of court. However, Applicants counsel differed with him and submitted "there was no law that prescribes English as a language of court". This proposition is factually wrong in that before the adoption of the use of English as a language of court, the rules provided for Afrikaans and English as the languages of court despite South Africa having 11 (eleven) official languages, Sepedi included therein.

Rule 60(1)[16] provides that "If any document in a language other than an official language of the Republic is produced in any proceedings, it shall be accompanied by a translation certified to be correct by a sworn translator". The Heads of Court took a resolution that English shall be a language of record in Superior Courts in South Africa held in March 2017 in the absence of a policy decision from the Executive in this regard.

The language of the letter **MBM2** is not a foreign language, however, same should have been converted to English generally. However, for the purposes of this particular before me, it is a good and beneficial thing for the parties herein in that I know and understand the language of the said above referred letter and the note on another **MBM2**. The Honourable Chief Mampuru and/or his/her representative has not deposed to any affidavit save for this letter. On this basis I conclude that even if I were to consider this letter, it would be on the basis that it is hearsay and I will need to employ the best evidence rule principles. Then Law of Evidence Amendment[17] provides as follows: Section 3(1) Subject to the provision of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

[1616] Uniform Rules of Court
[17] Act No. 45 of 1988.

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) 25 if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section- "hearsay evidence" means evidence: whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; "party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

The Applicants attached another **“MBM2”** hand written Sepedi notes signed by one Kenneth Setlamorago Mampuru of identity number [....] who states in Sepedi that “he testifies that the

1st Applicant was married by the deceased during 20th March 1972. Further that the late Joseph Kgobalala Mampuru told him that he received lobola payment in terms of 8 “cows”.” The latter **MBM2** is shocking in that:

> firstly- the writer thereof was not even born at the time the 1st Applicant allegedly married the deceased; secondly-this court is not told who this writer is, how he gets involved herein to warrant this attachment; thirdly-this court is not told who the said late Mampuru who received the said alleged lobola is and how he relates to the 1st Applicant. This attachment does not take this point any further in terms of what is required to be adduced. In the same manner, again this write like chief Mampuru has not deposed to any affidavit. The latter **MBM2** stands to fall the same fate as the former MBM2 and I will not repeat my findings herein above contained.

Having said all the above on this point, the letter as well as the note does not satisfy me as to the existence of the customary marriage, more so, that these are the only “proof” that the Applicants attached. I say only proof mindful that the Applicants attached. I take judicial notice that customary marriages are concluded between family members and/or representatives. It is not the Applicant’s version that the chief and/or any of his/her representatives were part of the negotiations. Neither is it the Applicant’s version that the said late Joseph Kgobalalala Mampuru was part of the negotiations. I agree with the submission by the Applicant’s counsel that customary practices evolve and develop to meet the changing needs, this rings true in particular taking into account the year in which the 1st Applicant alleges she was married. However, one thing that has not evolved since then to date is the involvement of families of the parties to the customary marriage who can bear testimony to the existence or lack thereof amongst others. In the matter before me, there is no evidence to the least extent from the family members from both alleged parties to the marriage save for the deceased’s brother who by virtue of his age cannot attest to such evidence.

Even if I were to consider the legal position prior to the enactment of the Act, the implication therein which result in action proceedings having been preferred and not motion proceedings. This then takes me to the next *point in limine* of dispute of facts which I discuss herein under. I decided not going to engage the standing or lack thereof of the remaining Applicants as same does not take this matter any further. I am persuaded that this point stands to be upheld too.

It is trite that he who alleges must prove. The duty and onus is on the 1st Applicant to prove her *locus standi* which in essence will qualify her for the relief sought. All the above considered the Applicants in particular the 1st has failed to discharge this onus, at least to me based on the current papers and argument before me.

With respect to non-joinder the Respondents contends rightfully in my view that the Applicant has failed to join the Somalakazi Funeral Services. In the struck application Somalakazi Funeral Services was the 2nd Respondent. The Applicants has accused the 1st and 2nd Respondent of concealing the funeral and taking the deceased from the parlor in the wee hours in the morning. The Applicants submitted that Somalakazi has no interest in this matter hence it was not joined. Referred me to *Judicial Services Commission v Cape Bar Council*[18] wherein it was held that "the mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea". I find the reference herein is like comparing bananas to apples. Businesses thrive on reputation. The submissions made by the Applicants in relation to Somalakazi on their own have a potential to reflect badly on the business of Somalakazi. The Respondent counsel during reply submitted that "courts are public documents and that Somalakazi ought to have been joined because a bad impression can be created against the funeral service provider. given the allegations levelled against them. Further that, even a nominal joinder would have sufficed. This point is upheld. In the normal circumstances this failure would not necessarily be fatal to the application as this court can order the stay of proceedings pending the joinder of the party in the interest of finality of matters and in line with interest of justice under general circumstances. Based on the circumstances of this application, the stay of this application is not possible.

With respect to disputes of facts the Respondents submitted that based on the Respondent's raising real, genuine and bona fide dispute of fact ought to have foreseen that an action instead of motion proceedings should have been instituted.[19] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[20] the SCA held that "a real genuine and bona fide dispute of fact can exist only when the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact to be disputed". I find that the Respondents have done same. Based on the above, the life span of

[18] (818/11) [2012] ZASCA 115 (14 September 2012) para 12.
[19] SA Football Association v Mangope (2013) 34 ILJ 311 (LAC)
[20] 2008 (3) SA 371 (SCA)

this application comes to an end here with the points so raised being upheld.

Costs

[7] It is trite that costs are generally the discretion of a judicial officer. This discretion must be exercised within the ambits of the law and exercised judiciously. The Respondents argues that the *points* in limine be upheld with costs as the application is clearly ill-conceived, constitute an abuse of the court's processes and should be dismissed with punitive costs order same taxable and immediately payable, and/or alternatively costs de *bonis propiis*. The Respondent argues that this court should find the conduct of the Applicants in how they handled this matter should be found to be contemptuous. Furthermore, that this court should find adverse findings against the conduct of the legal representatives, both attorneys and counsel based on section 173 of the Constitution, in how they handled this matter. Applicants pray for the 1st and 2nd Respondents to pay the costs of this application in the notice of motion. Moreover, in the founding affidavit submit that the deceased should pay this costs as he is the one complaining of having been dumped and abandoned. A prayer never heard of wherein the deceased and not his estate pays for costs as submitted by Applicant. They say this over and above the fact that the 1st Respondent will not assist them financially and they being unemployed.

The conduct of the Applicants herein is disturbing given the nature of the relief sought. Common sense dictates that losing a loved one, a provider like in this case can be difficult for concerned families. Which the families are dealing with this fact and the thought that because the previous application was struck with nothing coming from the applicants, I would like to believe that healing was reckoning for all concerned. Unfortunately, this is an emotive case, and the applicant's submitted they are tormented. Matters could and should have be handled differently, because the parties herein are bonded for life by blood some to a more extent than others and relatively so. I hold a view that courts are to be the last forum to resolve disputes, especially those like this current one and certainly hope the parties will find each other outside of this. I note that the Applicants are unemployed and same could have contributed to the period of bringing this application though not pleaded. Litigation in this court is costly. In my view this matter belongs elsewhere and not on this roll.

Section 18.14 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities[21] (The code) which provides that an "an attorney shall perform professional work or work of a kind commonly performed by an attorney with such a degree of skill, care or attention, or of such a quality or standard, as may reasonable be expected. The conduct of the Applicant's attorney herein is disturbing in a manner expected of a legal practitioner. There is definitely no skill of drafting, no care was applied to the necessary averments for the relief sought and the standard of the Applicant's papers is very poor and leaves much to be desired. For the legal practitioner/s to be rewarded for such work would be an injustice, more so considering the employment status of the Applicants. The complaints herein above raised fall squarely at the door of the legal practitioner/s who had they acted in the manner provided by this section, this court would not be making determinations of this nature. These could have been avoided.

Section 25.3 of the Code provides that "Counsel shall upon acceptance of a brief exercise personal judgment over all aspects of the brief and shall not permit any person to dictate how the matter is to be conducted. If the decisions mad or advice given by counsel are not acceptable to the instructing attorney or to the client, counsel must offer to surrender the brief, and if the instructing attorney elects to accepts the surrender, counsel must forthwith withdraw". The counsel by proceeding with the matter in its current status associated himself with the brief herein, thus cannot be absolved from responsibility. Involvement of counsel is always appreciated by this court as same has a benefit of assisting legal practitioners who may not necessarily be very conversant with the standard of this court. I say this because the counsel herein is a seasoned one. The Applicants should have enjoyed the benefit of having both attorneys and this counsel record on their behalf. However, the papers in particular where it matters the most as per the cause of action on exhumation and the subsequent concession by counsel on failure to have made out the cause during the hearing is regrettable. On the other hand, having listened to counsel for the Applicants, it was clear that he was at pains trying to argue the Applicants' case. However, argument is not evidence unfortunately. I cannot find based on the above that he acted in in *mala fide*.

Costs *de bonis propriis* are costs which a representative[22] is ordered to pay out of his or own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or

[21] Government Gazette No. 42337 published 29 March 2019
[22] See *Zalk v Inglestone* 1961 (2) SA 788 (W) at 795A.

unreasonable.[23] Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case.[24]

I can say the Applicant's legal representatives could have done better in this application. All things considered herein I do not find any *mala fides* on the part of the legal practitioners, thus a cost *de bonis propriis* order would not be appropriate.

[8] In the result the following order is made:

8.1. The 1st and 2nd Respondents are granted condonation for late filing of their answering affidavit.

8.2. The points *in limine* are upheld.

8.3. The Applicants shall pay the costs of this application jointly and severally, one paying the other to be absolved on a punitive scale of attorney and own client's scale.

8.4 Attorney/s and/or Counsel for the applicants shall not be entitled to the costs of this preliminary hearing.

R.P MDHLULI

ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For the Applicant:	**Adv J.L.H Letsoalo**
Instructed by:	**JK Depanyekga**

[23] *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 54.

[24] *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A); [1959] 4 All SA 439 (A) at 725B-C. For the difference between costs *de bonis propriis* and costs on an attorney and client scale see *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk en Andere v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 236F-H.

Attorneys For the 1st and 2nd Respondents:	**Adv PA Mabilo**
Instructed by:	**PH Nkosi Attorneys**
Date heard:	**16th January 2023**
Electronically circulated on:	**14th March 2023**