

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

CASE NO.: HC-MD-CIV-MOT-GEN-2020/00146

In the matter between:

JOLEEN CATHERINE SMITH (BORN BEUKES)

APPLICANT

And

ROSEMARY JOAN VAN WYK

1ST RESPONDENT

NAOMI CLARKE

2ND RESPONDENT

MARITZA AMANDA ISAACS

3RD RESPONDENT

Neutral citation: *Smith v van Wyk* (HC-MD-CIV-MOT-GEN-2020/00146) [2020] NAHCMD 212 (2 June 2020)

Coram: RAKOW, AJ

Heard: 21 May 2020 and 27 May 2020

Delivered: 2 June 2020

Reasons: 4 June 2020

Flynote: Practice – Urgent Ex Parte Application – Interested parties having been served and opposed same – Interim interdict – Requirements to be met

Summary: The applicant brought an urgent application before this court seeking the interdict of the deceased burial. In dispute primarily between the applicant and the respondents were the wishes of the deceased in terms of where he wished to be

buried and where the memorial service was to be conducted, with both the applicant and the respondents having different versions of the deceased wishes.

Held – The wishes of the deceased are considered hear-say evidence and not admissible. It can at most guide the persons undertaking the burial of the deceased as what he would have liked them to do, but is not binding in any way if it was not reduced to a testament or a will.

Held – The heirs must decide among themselves where they want to bury the deceased and in this instance, three of the four heirs decided to bury the deceased in Windhoek. This does not seem to be unreasonable or logistically an impossibility or against public policy.

ORDER

- a) The interim order is discharged.
 - b) The application is dismissed.
 - c) The applicant is ordered to pay the costs of these proceedings.
 - d) The matter is removed from the roll and is regarded as finalized.
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REASONS

RAKOW, AJ:

Introduction

[1] This is an *ex parte* application launched on an urgent basis before me for hearing on the evening of 21 May 2020. The court heard the application by the applicant and then gave a *rule nisi* order with the return date of the said order being 27 May 2020, with the opportunity to the respondents to come and show cause as to why it should not be made a final order. The respondents then opposed the granting of a final order and set out their objection. In essence, this is an application to stay a burial at Windhoek and to order that the deceased be buried in Rehoboth instead.

[2] The applicant initially approached this court for the following order:

(a) Condoning the Applicant's non-compliance with the forms and service provided for by the rules of the above Honourable Court and hearing this application as one of urgency in terms of Rule 73(3) of the rules of this Honourable Court;

(b) That a rule nisi be issued calling upon the First to the Third Respondents to show cause (if any) on a day to be determined by the Honourable Court why an order in the following terms should not be made final:

i. Interdicting and restraining the respondents from conducting a burial service and burying the late Johannes Kenneth Beukes at Gammans Cemetery, Pioneerspark, Windhoek Namibia;

ii. That the relief sought under paragraph 2.1 serve as an interim interdict with immediate effect, pending the return date of the above rule nisi.

(c) That on the return date of the above Rule Nisi the applicant shall seek that the Honourable Court confirm the Rule Nisi and issue and order directing that the late Johannes Kenneth Beukes be buried at Rehoboth Cemetery, Rehoboth, Hardap, Region, Namibia;

(d) That the Applicant be directed to cause this application and the interim order to be served on the respondents by the Deputy Sheriff of Windhoek on or before a date to be determined by this Honourable Court;

(e) That any of the respondents who may to oppose this application must pay the costs of this application on a scale as between attorney and own client;

(f) Further and or alternative Relief.'

Background

[3] The applicant and the three respondents are biological sisters from one father but different mothers, although their mothers were cousins. It seems that the three respondents are the daughters of the deceased from his first wife, Maria Beukes (nee de Klerk) and the applicant, the daughter of the deceased, from his second wife, Sophia Magrieta Beukes (nee Beukes). The deceased also had two sons from

his first wife but they are pre-deceased. It further seems that the deceased raised the children of his second wife which were born before their marriage and who stayed with them and at some stage also looked after the deceased.

[4] The deceased and his second wife got married on 6 April 1983 and resided initially in the house of his late father-in-law before they build a house on an erf of the same father-in-law. It further seems that through the years, the step-children of the deceased also contributed to the household of the deceased and their mother. The second wife of the deceased passed away on 23 March 2005 and was buried in the Rehoboth cemetery with the deceased, according to the applicant, purchasing a burial plot next to that of Sophia Magrietha Beukes, the second wife, for himself. The photograph attached to her affidavit then also shows the grave with the vacant space next to it, enclosed in a small fence. After his wife passed away, the deceased stayed with his step-son, Roger Timothy Beukes, in Rosh Pinah from 2005 to 2009 and when they moved to Windhoek, with them from 2010 to 2012. His sister, Ronnel de Klerk, bought the house where the deceased resided in Rehoboth from him and he permanently stayed with her, with the rest of the family taking him from time to time.

[5] During February 2019, the deceased was diagnosed with gangrene and his legs were amputated under the knees. At that time, he was still staying with Ronnel de Klerk, his step-daughter, in Rehoboth. His daughter Rosemary (the first respondent) came and fetched him around September 2019 to come and stay with her as she wanted to take care of him during his sick bed. During his life, he on more than one occasion expressed his wish to both Roger Timothy Beukes and Ronnel de Klerk to be buried in Rehoboth next to his deceased second wife.

[6] During September 2019, the deceased also called together his four biological daughters at the house of the first respondent. The second and third respondents were also present at the said meeting. The purpose of the meeting was to allow the deceased to convey his wishes in the event of his death. He stated his intentions clearly, and it was that one memorial service should be held in Windhoek at the residence of the first respondent, another must be held at the residence of the second respondent in Rehoboth and that his funeral service should be held at Erf 138 Block C Rehoboth, the house where he and his second wife stayed in Rehoboth, and that he should be buried next to his late wife Sophia Magrietha Beukes. That

such a meeting was held is not disputed by the respondents but what is disputed is that at no point did he ask to be buried next to his second wife.

[7] The first respondent however stated that the deceased called her earlier this year (2020) after he underwent an operation and indicated to her that since being buried in Rehoboth could potentially be an issue and since he wanted to stop the ongoing fights of where he should finally be laid to rest, he changed his mind and wished to be buried in Windhoek. She communicated this to the second and third respondents but not to the applicant. On 16 May 2020, Pastor Du Toit came to serve the deceased with Holy Communion. The deceased then indicated to Pastor du Toit that in the event of his death, he wanted the first respondent to make the arrangements for his funeral. He then passed away and she called her sisters together for a meeting wherein she informed them that she proceeded with the arrangements and obtained invoices and pictures of the burial site in Windhoek. The applicant raised her concern there regarding the fact that their father is to be buried in Windhoek and not in Rehoboth. The date for the funeral was set as 23 May 2020.

[8] The applicant states in her affidavit that a number of phone calls and text messages were sent between herself and her sisters. She also tried to involve social services and some church leaders to intervene and to convince her sisters not to proceed with the funeral in Windhoek and initially it appeared that they would be reasonable but it became clear to her on 20 May 2020 that the respondents had no intention of changing their minds, which then caused her to approach the court on an urgent basis on 21 May 2020.

Point raised *in limine*

[9] The first respondent argues that the application of the applicant was not an *ex parte* application and was not served on her or the other respondents before the hearing took place on 21 May 2020 at 19h00. She and the other respondents should have been served with the application and granted an opportunity to oppose the granting of the rule nisi and that the application should be dismissed for that reason. Alternatively that the applicant has no right to approach the honourable court requesting for the prayers as stipulated in her notice of motion as the interest she seeks to protect is not her own but that of her father and she suffers no prejudice,

patrimonial loss or any deprivation of right if their father is buried in Windhoek and not in Rehoboth.

[10] The matter was initially brought before court as an *ex parte* urgent application on the eve of a public holiday on the 21st of May 2020. During the application, the legal representative of the applicant was asked to address the court on two issues, being urgency and why the applicant is approaching the court on *ex parte* basis requesting an interim interdict. The applicant explained that the matter was urgent as her father passed away during the previous weekend and that she has been trying to negotiate with her sisters till the 20th of May 2020 regarding the funeral, when she realized that they were adamant in the funeral taking place in Windhoek on the 23rd of May 2020. She then gave her legal practitioner instructions to bring the said application for an interim interdict to stay the funeral of the 23rd of May 2020 temporarily until the matter could be heard and the respondents could be served with the necessary documents. The application was on an *ex parte* basis due to the urgency involved in the matter and because it was not foreseen that service could take place before the 22nd of May 2020 and that the respondents need time to reply to the application which would not have been possible if the matter was heard on the 22nd of May 2020 already.

[11] They addressed in their submissions to court the issues that should be considered in an interim interdict as set out in *Hix Networking Technologies v System Publishers (Pty) Ltd and Another*¹ as follows:

'The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

- (a) a prima facie right;
- (b) a well-grounded apprehension of irreparable harm if the relief is not granted;
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.'

[12] The applicant submitted that she is the biological daughter of the deceased and therefore have a prima facie right to bring the application and therefore have an interest in the manner and place where her father is buried; she submitted the

¹ 1997 (1) SA 391 (A) [1996] 4 All SA 675) at 398I – 399A which was cited with approval by this court in the matter of *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC).

irreparable harm that will be caused if the relief is not granted relates to the fact that her father will be buried contrary to his wishes. Regarding the balance of convenience favoring the granting of an interim interdict, it was submitted that the inconvenience that will be suffered if the burial proceeded, and the application successful, would be that the deceased will have to be exhumed, causing a great inconvenience; and lastly that there is no other satisfactory remedy available due to the urgency in the matter and the eminent burial set to take place in the near future.

[13] The court took these arguments into account when hearing the application on an ex parte basis as well as an urgent matter and when granting the urgent relief. From case law, it also seemed that this was the procedure followed in a number of South African cases for e.g. *Mankahla v Matiwane*² and *Gonsalves and another v Gonsalves and another*.³ The application was not served on the respondents as it came to court as an ex parte application and therefore served on the respondents the very next day, calling on them to come and show cause on the return date, five days later, why the interim interdict should not be confirmed, which they then did. They were therefore afforded the opportunity to be heard. I must also point out that the replying papers were filed slightly after the cut-off date of 12h00 and the explanation provided by the legal practitioner for the respondents is the difficulty they ran into with regard to the drafting of the reply and the commissioning of the papers.

Deciding the issue

[14] From the papers before court, it seems that the meeting of September 2019 is not disputed, however, the specific outcome of the said meeting regarding the burial of the deceased to be next to his second wife as well as the holding of the service at the family home (the version put forward by the applicant) is disputed by the respondent. On the other hand, the version of the first respondent that her father asked her to be buried in Windhoek in early 2020 is not supported by any other confirmation, except that she informed her sisters of the request.

[15] In *Human v Human and Others*,⁴ Heath J found himself in a similar position. He said the following:

2 1989 (2) SA 920 (CK).

3 1985 (3) SA 507 (T).

4 1975 (2) SA 251 (E).

'Pausing here, it would seem to me that there is a dispute of fact as between the applicant on the one hand and the first respondent on the other hand as to the express request of the deceased as to where he desired to be buried after his death. This dispute is incapable of being resolved on the papers before me now. I should point out too that I am unable to take cognisance of evidence purporting to convey to me post mortem the views of a deceased person expressed during his lifetime as to where he wished to be buried. This obviously offends against the hearsay evidence rule and it does not appear to fall within any of the recognised exceptions to that rule. I am faced with a conflict of fact. I have the positive evidence of the applicant and his witnesses attributing to the deceased an express desire to be buried in Vereenging on the one hand, and, on the other, I have the affidavit of the first respondent stating equally categorically that very recently and up to the time of his death, the deceased express a desire to be buried in Queenstown. But this evidence of the wishes of the deceased is not in proper testamentary form and does not dictate the legal position which is binding on the parties. At most, proof of his desire is of mere sentimental importance.(my emphasis) The crisp issue seems to be who, in the circumstances in which the parties find themselves, has the duty or the right to attend to the funeral arrangements and to determine where the deceased's body should be buried. This is not easy because there is a dearth of authority in our law on the matter. Authority is scant and completely lacking in the decisions of our Courts.'

[16] In *Mahala v Nkombombini and Another*,⁵ the learned judge said the following regarding the factual conflict that appears from the papers in a similar application:

'The issue before the Court is a vexing one. Both the applicant and first respondent wish to dispose of the body of their loved one, the deceased. This is understandable. It is a matter of regret that the parties could not have come to some agreement prior to coming to Court. As appears from my summary of the affidavits, there is a dispute of fact on the papers. But, due to the urgency of the matter, there is clearly no time to refer these disputes to oral evidence for adjudication. (My emphasis) The Court must decide the matter on the affidavits before the Court. In this regard, the general rule, as stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H*, operates. That rule has it that, where, in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order may, generally speaking, only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. That approach is possibly not entirely satisfactory for a matter such as the present. As was pointed out in *Trollip v Du*

⁵ 2006 (5) SA 524 (SE).

Plessis en 'n Ander 2002 (2) SA 242 (W) at 245E - F, a more robust approach is sometimes required, and the Court should then grant the order if it is satisfied that there is sufficient clarity regarding the issues to be resolved for the Court to make the order prayed for.'

[17] The wishes of the deceased are therefore considered hear-say evidence and not admissible. It can at most guide the persons undertaking the burial of the deceased as what he would have liked them to do, but is not binding in any way if it was not reduced to a testament or a will. The court will further not direct the matter for oral evidence to be lead, following a more robust approach as suggested above and for the reasons that will come clear here-after.

Who must bury the deceased?

[18] In the cases of *Saiid v Schatz and Another*,⁶ and *Human* (supra), it was held that, in the absence of any testamentary direction by the deceased as to his burial, the duty of burying him and therefore the corresponding right to do so was that of the heir(s). In *Mankahla v Matiwane*,⁷ the views in the above cases were supported and the following said:

'It was further stated that the Court was unable to take cognisance of oral evidence purporting to convey post mortem the wishes of the deceased during his lifetime as to where and by whom he wished to be buried as this offended against the hearsay rule and did not appear to fall within any of the recognised exceptions. Taken into account that the wishes of the deceased were not reduced to a will, and were expressed to his children, allegedly at different stages, one must take it at most as proof of his desire and therefore of mere sentimental importance.'

There was further no evidence put before court of any traditional law regulating these burials and therefore, the court will rely on the Common Law position in determining this issue.

[19] What is then the position in our law, who must take the responsibility for the decision of the burial of the deceased? In *Saiid v Schatz and Another*,⁸ Moll J quoted

6 1972 (1) SA 491 (T).

7 1989 (2) SA 920 (CK).

8 Supra.

the following principles with approval at 494B – C regarding the Common Law position:

'It is taken for granted that the heir (or in the modern law the executor) must carry out all the terms of the will as far as possible. It therefore follows that in our law directions in the will as to the disposal of the body must, if possible and lawful, be followed.'

This is a quotation from (1951) 68 South African Law Journal at 403. Reference is then also made to Voet as per Gane's translation and reads as follows:

'If the deceased did not impose the duty of burial on anyone, the matter would affect those who have been named in the last will as heirs. If no one has been named, it affects the legitimate children or the blood-relations, each in their order of succession. If they are also wanting, it is the duty of the magistracy to take care that the deceased is buried.'

[20] In *Mankahla v Matiwane*,⁹ the right or obligation to make the funeral arrangements for a person who has died was summarised as follows:

'(a) If someone is appointed in a will by the deceased then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes.

(b) The deceased person can appoint somebody to attend to his burial in his will or in any other document or verbally, formally or informally, and in all these instances effect should be given thereto insofar as it is otherwise legally possible and permissible.

(c) A deceased can die intestate, but can appoint someone to attend to his burial in a document or verbally.

(d) In the absence of a testamentary direction, the duty of, and the corresponding right, to see to the burial of the deceased is that of the heirs, i.e. those appointed as heirs in the will of a deceased.

(e) The aforementioned principle that heirs (appointed as heirs), in the absence of any provision in the will as to the burial of the deceased, are entitled and obliged to attend to the burial of the deceased applies similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to his burial

⁹ Supra.

arrangements, the intestate heirs would be in the same position as testate heirs; there being no reason why the position should be different.

(f) It also follows that persons obliged and entitled to see to the burial arrangements are also entitled to arrange where and when the deceased is to be buried.'

[21] In *Trollip v Du Plessis en 'n Ander*,¹⁰ dealing specifically with a situation like in the present matter where there is a number of heirs which cannot agree on the funeral arrangements and the place of the burial, it was stated that:

'Where a deceased leaves a will, but without explicit indication as to who shall be responsible for the burial arrangements, it could well be the implicit intention of the testator that such arrangements be effected by those who inherit his earthly goods. The same would apply, presumably, where the deceased dies intestate. There can be little problem where there is a single heir. Problems arise, however, where - as in the present matter - there is a multiplicity of heirs. In such circumstances, there should be no hard-and-fast rules. Each case is to be decided on its own particular circumstances. Common sense shall largely dictate the decision of the Court. The Court shall have regard to the family relationships of the deceased, as well as all other relevant circumstances. The Court shall, for example, take account of the practical considerations. This reflects the approach adopted in the Transvaal in *Trollip's* case (supra). The learned Judge stated that fairness in the particular circumstances of the case was decisive (at 245I). He added that the claim could not be evaluated according to the mathematical proportions of heirship, as if there were a co-shareholding in the body of the deceased (at 245J). To respect the wishes of the deceased was both sensible and fair

Held, further, that it was within the bounds of reasonable fairness to respect the wishes of the deceased, whether expressed in a testament or not. If no such preference was expressed, resort could be had to the heirs. It was not necessary for the deceased to have expressed an instruction as opposed to a preference before it was decided what would have caused offence. In this context it counted in the respondents' favour that had been a member of the church from which they intended burying her. If the applicant were to be successful the funeral would be held in an unfamiliar venue and church. The applicant also never averred that he would suffer emotional trauma in respect of the respondents' plans for the funeral.'

¹⁰ 2002 (2) SA 242 (W).

[22] Lastly, we have to deal with one more question – what if the heirs cannot agree on the place of burial like in this instance with the elder sister seemingly having the support of her two other sisters and the youngest sister having a totally different view. In *Gonsalves and Another v Gonsalves and Another*,¹¹ Kirk-Cohen J said the following about similar facts:

‘It is common cause that, as stated by Voet, the heirs must decide. They have equal rights and two wish him to be buried in the Transvaal and one in the Free State. Mr De Bruin in argument said that one must respect the view of the minority. That is true - but one must also respect the view of the majority. In my view it is implicit in the passage of Voet that the majority view must prevail. If reasonableness or other factors are to be taken into account I am of the opinion that, on the facts before me, it cannot be said that the majority view is unreasonable or in any way assailable. If one takes into account such matters as Mr Visser has mentioned such as public policy, a sense of what is right, convenience, reasonableness, the area where the deceased lived prior to his death, where the bulk of his friends and relatives live, the financial implication of removing the body to the Transvaal (which the applicants have tendered to pay) and the fact that no reason whatsoever has been put forward why the deceased should be buried in Frankfort, reasonableness appears to be on the side of the applicants.

...

In my view, therefore, it is clear that the precepts of Voet must be read subject to the laws of evidence; those precepts do not alter or constitute an exception to the law of evidence. The verbal statement of the deceased is inadmissible and the view of the majority of the heirs must prevail.’

[23] The court therefore came to the conclusion that the heirs must decide among themselves where they want to bury the deceased and in this instance, three of the four heirs decided to bury the deceased in Windhoek. This does not seem to be unreasonable or logistically an impossibility or against public policy. I therefore make the following order:

- a) The interim order is discharged.
- b) The application is dismissed.
- c) The applicant is ordered to pay the costs of these proceedings.
- d) The matter is removed from the roll and is regarded as finalized.

¹¹ 1985 (3) SA 507 (T).

E Rakow
Acting Judge

APPEARANCES

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