HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: SHELTON CHALO CHAINDA V PATRICK NZUNDAMO	**Case No:** HC-MD-CIV-GEN-2022/00004
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	**Date of hearing:** 12 JANUARY 2022
	Date of order: 12 JANUARY 2022

Neutral citation: *Chainda v Nzundamo* (HC-MD-CIV-GEN-2022/00004) [2022] NAHCMD 6 (12 January 2022)

Results on merits:

Merits not considered.

Reasons for orders:

Introduction

[1] On the morning of 12 January 2022, the applicant filed an application on an urgent basis seeking final interdictory relief against the respondents. The applicant sought to restrain the first,

second and fourth respondents from proceeding with the scheduled burial of late Twambo Chainda on 13 January 2022 at Mazungendava Cemetery in the Katima Mulilo District, in the Zambezi Region.

[2] In addition thereto, the applicant sought permission to bury the late Twambo Chainda at Makanga Village on 14 January 2022 or on any other date elected by the applicant.

[3] The timelines for the opposition of the application were so truncated that it was impossible for the respondents to comply with the same and the result was that the answering papers were only filed by 19h45 on the evening of 12 January 2022 and the matter could only be heard by 20h30 after the applicant filed his replying papers.

[4] After having heard Mr Shimakeleni on behalf of the applicant and Ms Ambunda-Nashilundo on behalf of the first, second and fourth respondents on the matter of urgency as well as the merits of the application, I made the following order:

'**IT IS HEREBY ORDERED THAT:**

1. The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.
2. Matter is removed from the roll and regarded as finalized.
3. The reasons will be released on Monday, 17 January 2022 at 10h00.'

Herewith my reasons for the order made on 12 January 2022:

Background

[5] On 5 January 2022, a horrific motor vehicle accident between Omega 3 and Kongola in the Zambezi region claimed the lives of five members of the same family. Amongst the victims was 16 year old Twambo Chainda and her mother Namaligorwa Henrietta Nzudamo, as well as a younger sibling.

[6] There were discussions held between the paternal and maternal families as to the place of burial in respect of the late Twambo Chainda ('the deceased'). The applicant, who is the biological

father of the deceased, wanted the deceased to be buried at Makanga Village instead of the Mazungendava Cemetery with her mother and the rest of accident victims.

[7] The maternal family insisted that the deceased be buried with the rest of her family, resulting in the current application.

[8] The first and second respondents opposed the application, however Ms Ambunda-Nashilundo also argued the matter on behalf of the fourth respondent after indicating in court that she has instructions to act on behalf of the fourth respondent as well.

[9] The respondents raised a number of points *in limine*, *inter alia*: non-joinder and inadmissible hearsay. The respondents also strongly argued that the application is not urgent in nature.

Urgency

[10] This application was set down for 15h00 on the afternoon of 12 January 2022. Ms Ambunda-Nashilundo argued that the applicant failed to comply with the requirements of rule 73(4) read with PD 27(4)[1] as the support of the application, with the applicant merely stating the ground for urgency was the fact that the burial was scheduled to take place on 13 January 2022. Counsel argued that the applicant failed to set out explicitly the reasons why the matter should be heard at a different time.

[11] I agree that the applicant did not show on the papers why the matter could not be heard at 09h00 as provided for by the rule and the relevant PD.

[12] The applicant knew since 6 January 2022 what the intentions of the maternal family were regarding an intended mass burial and intended burial site. Apart from averring that the burial would be on the 13th of January 2022, the applicant failed to explicitly state in his founding papers what

[1] (4) Where an urgent application is brought to court on a court day at a time other than the time determined by the rules or on a day not being a court day, the applicant must in addition to filing the certificate of urgency contemplated in rule 73(1), make out a case that the application be heard at any other time than at 9h00 on a court day.

circumstances rendered the matter urgent.

[13] Even if the court accepts that the date of the burial was imminent and thus causing the matter to be urgent, the applicant failed to explicitly state the reasons why he could not be granted substantial relief at a hearing in due course.

[14] In *Tjurisa v Noabeb,*[2] Angula DJP pointed out in a matter similar to the one before me that there is indeed an alternative remedy at the disposal of the applicant, as the applicant can apply for an order for leave to exhume and rebury the remains of the deceased.

[15] I do not wish to appear unsympathetic to the plight of the applicant but his papers were not in order as would become clear from a number of further issues I will briefly touch on hereunder.

Non-Joinder

[16] One of the points *in limine* raised was the non-joinder of a number of people that should have been added to the proceedings as interested parties. Specific reference was made to the elder brother and uncles of the applicant who was part of the negotiations between the parties.[3] According to the applicant, these family members agreed with the respondents that the deceased's burial be held at the Mazungendava Cemetery. These family members of the applicant are clearly interested parties that should have been joined to the proceedings.

[17] The applicant cited the Nzundamo family as the fourth respondent, which is an undefined group of people. The applicant then proceeded to refer to state that the family includes the first and second respondents, Alfred Kabala, Cacious Muyoba and Lyons Mutua only. These five gentlemen do not constitute the family and neither were any of these gentlemen cited in a representative capacity. The citation of the fourth respondent is in my view, not in compliance with the Rules of Court.

[2] HC-MD-CIV-MOT-GEN-2018/000219 [2018] NAHCMD 217 (13 July 2018).

[3] Brother Allen Chainda and Uncle Regan Mukena and Vasco Nghosi.

[18] I am of the view that all the necessary and interested parties were not before court.

Factual disputes

[19] Having regard to the papers before me, it is clear that there are substantial factual disputes between the parties. The applicant's version is that the deceased was due to be buried at Makanga Village and the arrangements were made by his family's burial preparatory committee, who worked together with the burial preparatory committee. The applicant stated that his family's burial preparatory committee was dissolved unilaterally by the second and fourth respondents and he was side-lined by the maternal family in spite of meetings held on 8 and 9 January 2022.

[20] The applicant strongly relies on his rights as a sole surviving parent and sole heir to the deceased in deciding the burial place of the deceased.

[21] In the answering papers, the first respondent stated that the applicant approached the maternal family with a request to bury the deceased at his village at Makanga, but this request was refused because the applicant failed to pay the damages due for the deceased after he impregnated the deceased mother out of wedlock and that the applicant was made well aware of this customary practice and rule.

[22] The first respondent further stated that during the meeting on 9 January 2022, it was agreed between the families that the deceased would be buried at Mazungendava cemetery and that the applicant's family agreed to make a contribution of N$ 10 000 to the burial arrangements of the deceased.

[23] The first respondent argued that the applicant had no sole guardianship over the deceased child and is not the sole heir of the deceased, as the maternal family would theoretically also be entitled to inherit intestate. Therefore, if the decision regarding who should bury the deceased is based on fact that the applicant is the heir to the estate of the deceased, then the wishes of the heirs through the representation of the deceased mother should also be considered, which was not done.

[24] The first respondent stated that the applicant and his family made a joint decision that the deceased should be buried at Mazungendava cemetery and that the applicant is bound by the decision.

[25] In his confirmatory affidavit, the elder brother of the applicant, Allen Mukelebai Chainda, stated that he was tasked to approach the maternal family to seek permission to bury the deceased at Makanga Village. This was necessitated by the fact that the applicant failed to pay the customary damages which were due to be paid for the deceased since 2006. Mr Chainda confirm the maternal family refused the permission sought and in light thereof, the Chainda family held a family meeting, which the applicant attended, and resolved that the deceased would be buried at Mazundengava cemetery.

[26] Mr Chainda stated that he was given the authority by the applicant to negotiate on his behalf and on the 9th of January 2022, the applicant was present during the family meeting.

[27] In *Mahala v Nkombombini and Another,*[4] 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

[4] 2006 (5) SA 524 (SE).

satisfactory for a matter such as the present. As was pointed out in *Trollip v Du 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.'

[28] The *Plascon-Evans* Rule holds that when factual disputes arise in circumstances where the applicant seeks final relief, for example in interdicts, as is the instant case, the relief should be granted in favour of the applicant only if the facts alleged by the respondent(s) in its answering affidavit, read with the facts it has admitted, justify the order prayed for. The denial of the respondent of factual allegation in the founding affidavit must be real, genuine and bona fide before it can be considered prohibitive to applicant being granted final relief.

[29] In his replying papers, the applicant attempted to make out that because there are slight contradictions in the answering affidavit of the first respondent, it should be rejected but does not make out a case why the denial of the averments in the founding affidavit is neither real nor genuine or bona fide.

[30] The bona fides of the respondents were confirmed by the confirmatory affidavit of Mr Allen Chainda, elder brother of the applicant.

[31] I am not convinced that the applicant is entitled to final interdictory relief.

[32] At this point, it is also necessary to note that although the applicant claims final relief, he failed to deal with the requirements for final relief, i.e.: a) clear right, b) an act of interference; and c) no other remedy. It appears that the papers were drawn with an interim interdict in mind and that counsel then decided to claim final interdictory relief. This further enforces my view that the applicant is not entitled to final interdictory relief as sought.

Other issues

Inadmissible hearsay

[33] The applicant made certain averments in his founding affidavit wherein he made legal submissions and has done so on the advice of his legal practitioner, yet no confirmatory affidavit was filed by the legal practitioner of record to confirm the allegations relating to him and resultantly, constitute inadmissible hearsay.

Customary practice

[34] In conclusion, I must just remark that the respondents relied strongly on customary practices regarding the payment of damages as discussed above and although I made reference to it in my earlier discussion, it should be clear that my decision is not reliant on those averments at all. The matter of *Van Breda v Jacobs*[5] is clear that the existence of a custom must clearly be proven and the onus of proving such evidence lies upon the person alleging it. The first respondent and Mr Allen Chainda are no evidenced experts in customary law and I will therefore make no findings in this regard.

'Oudekraal Principle'

[35] The applicant relies on the 'Oudekraal Principle' in support of an argument that the burial at Mazundengava cemetery would be contrary to the decision of the fifth respondent, who on the burial/removal order stated that the late Twambo Chainda shall be buried at Makanga. The applicant argued that the burial/removal order by the fifth respondent, an administrative body, is an administrative decision which has not been set aside by any court of law. Thus the decision by the fifth respondent that the deceased must be buried at Makanga remains valid. There is unfortunately no merit in this argument as the burial/removal order also provide that the 'authority also covers the removal of the body, if necessary from or through any urban area to any other area for the purpose of burial'. The place of burial thus not set in stone and could be changed without the intervention of the fifth respondent and the 'Oudekraal Principle' does not apply under the circumstances.

Judge's signature	**Note to the parties:**

[5] 1921 AD at 330.

	Not applicable.
Counsel:	
Applicant	**Respondents**
Appolos Shimakeleni Of Appolos Shimakeleni Lawyers	Lotta Ambunda-Nashilundu Instructed by Inonge Mainga Legal Practitioners