

Sokani & another v Sokani & another
[2008] JOL 22085 (Ck)

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Case No: 329 / 08
Judgment Date(s): 04 / 06 / 2008
Hearing Date(s): 28 / 05 / 2008
Marked as: Unmarked
Country: South Africa
Jurisdiction: High Court
Division: Bhisho
Judge: Dhlodhlo ADJP
Bench: AEB Dhlodhlo ADJP
Parties: Nowandile Cynthia Sokani (1At), Luyanda Sokani (2At); Nobuntu Sokani (born Mbulawa) (1R), Doves Funeral Parlour, East London (R)
Appearance: Mr M Notyesi, Mvuso Notyesi Inc (At); Mr MG Ndzondo, Nomjana Attorneys (R)
Categories: Application – Civil – Substantive – Private
Function: Confirms Legal Principle

Key Words

Customary law – Burial rights – Wishes of deceased

Mini Summary

The dispute between the parties in the present matter, centred around the right to bury a deceased person to whom both the first applicant and the first respondent alleged they had been married. The applicants sought a declaratory that they had the sole burial rights in respect of the deceased, and an interdict preventing the first two respondents from interfering with those rights.

Held that the applicants conceded that the first applicant was no longer married to the deceased at the time of his death. The deceased died without expressing his burial wish in writing. A person can appoint someone to attend to his burial in his will or in any other document or verbally. The appointment can be formal or informal. The wish of the deceased should be given effect thereto if it is legally possible and permissible.

The major dispute of fact related to the alleged verbal statements of the deceased in which he allegedly expressed his burial wish. The evidence in this case weighed in favour of the first respondent. The applicants were therefore unsuccessful before the court.

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DHLODHLO ADJP

[1] On 25 April 2008 this Court issued a rule *nisi* calling upon the two respondents to show cause why an order in the following terms should not be granted:

"1.1
that the applicants be and are hereby declared the only rightful persons to bury the deceased, Welsh Telegram Sokani at Lutsheko family grave yard, Ngqeleni forthwith;

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1.2
that 1st respondent and 2nd respondent and / or any other person acting in concert therewith be and are hereby interdicted and restrained from interfering with the applicants in the exercise of their duties in terms of paragraph 2.1 above forthwith;

1.3
that the 1st and 2nd respondents and / or any other person acting in concert therewith be and are hereby interdicted and restrained from collecting, obtaining, accepting and / or burying the body of the deceased at any place whatsoever;

- 1.4 that the second respondent be and is hereby interdicted and restrained from releasing the body of the deceased to the 1st respondent or any other person acting in concert with her, forthwith;
- 1.5 that the 2nd respondent be and is hereby ordered to release the body of the deceased to the applicant, forthwith;
- 1.6 that the sheriff of East London Fleet Street Police Station and / or Mdantsane Police Station alternatively the station commissioners of East London Fleet Street Police Station and / or Mdantsane Police Station and / or their nominee members of the South African Police Services be and are hereby directed to serve these papers upon the respondents."

The second respondent is Doves Funeral Parlour in East London where the body of the deceased is kept.

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[2] The first applicant, Nowandile Cynthia Sokani, claims to have been the wife of Welsh Telegram Sokani, hereinafter referred to as the deceased, and that they entered into a civil marriage out of community of property at Ngqeleni magistrate's office on 7 January 1971. According to her she was still married to the deceased at the time of his death on 9 April 2008. A copy of an abridged civil marriage certificate confirms that the marriage was entered into on the said date.

[3] The second applicant, Luyanda Sokani, born in 1969, is the elder of the two surviving children born of the marriage. The other child is also a boy named Thembinkosi who was born in 1972.

[4] It appears from papers filed of record, including a deed of settlement signed at Mthatha by the deceased and the first applicant on 12 March 1991 and an order dated 27 February 1992 issued by the then Supreme Court of Transkei sitting at Mthatha in case number 662/86, that the marriage between the deceased and the first applicant was dissolved on the latter date. After perusing these documents, counsel for the applicants abandoned his argument that the first applicant was the wife of the deceased at the time of the latter's death on 9 April 2008.

[5] The first respondent also claims to have been the wife of the deceased from 2 February 1982 when they entered into a civil marriage in community of property in Mdantsane to the time of his death. A copy of a civil marriage in community of property bearing the names of the deceased and those of the first respondent dated 2 February 1982 at Mdantsane confirms this fact. She states that she was not aware of the facts that the deceased was married by civil rites to the first applicant when she (the first respondent) got married

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to him and that that marriage was dissolved in 1992. No child was born of the relationship between the first respondent and the deceased.

[6] The applicants rely on the following facts in support of their case:

- 6.1 As already stated, the first applicant claims to be the only wife of the deceased. According to her argument the first respondent could not have entered into a valid marriage while hers by civil rites was still subsisting.
- 6.2 The second applicant is suing in his capacity as the elder son and one of the two intestate heirs of the deceased. The younger brother also has the right to attend to the burial of the deceased.
- 6.3 The deceased expressed his wish on various occasions that, should he die, he be buried in the family graveyard at Lutsheko village in the district of Ngqeleni where his father and mother as well as his first born daughter were buried.

[7] In her answering affidavit the first respondent avers that she was the lawful wife of the deceased and that they lived together in their house at Mbekweni near Mdantsane for 27 years until his death. It was only after his death that she discovered that the deceased divorced the first applicant in 1992.

[8] The first respondent does not deny that the second applicant is one of the heirs of the deceased. She, however, denies that there is a family graveyard at the deceased's rural home at Lutsheko.

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[9] In her founding affidavit the first applicant states that the deceased's parents are deceased and that they were buried in the family graveyard at Lutsheko village in Ngqeleni where all their deceased family members were buried. She states that during his lifetime the deceased had always expressed his wish to be buried in the family graveyard next to the graves of his parents and that of their deceased daughter. According to the applicants the deceased took ill in 2006 and had to undergo medical examinations. When his health deteriorated in 2007 he stayed in East London in order for him to be close to medical doctors. The first applicant states that the deceased continued to express his wish to her that he be buried in the said family graveyard. She states that the said wish was expressed to his two sons and his twin sister Masukude Xhego. She adds that Mr Sikwandu Tanzi, who was the deceased's friend, told her that when he saw the deceased on 29 March 2008 he (the deceased) "urged him to ensure that if he dies, he should ensure that he is buried at Lutsheko in his family grave yard in accordance with the custom and tradition in the family". She states that they did not understand why the deceased repeatedly expressed his wish to his family members and his friends until they heard that he was staying with a girlfriend in East London, namely, the first respondent, "who was so abusive and bully on my husband. We therefore believe that my husband was in fear that the first respondent would cause problems when he passes away." The first respondent denies that she ill-treated the deceased while they were living together.

Throughout her affidavit the first applicant refers to the deceased as her husband.

[10] In their confirmatory affidavits the second applicant, his younger brother Thembinkosi Sokani, the deceased's twin sister Masukude Xhego and

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Sikwandu Tanzi, who states that he was the deceased's friend, confirm the contents of the first applicant's affidavit.

[11] The first respondent states that she fell in love with the deceased in 1980 and that they then lived together as husband and wife until the deceased took ill in 2007 and subsequently died on 9 April 2008. They entered into what was purported to be a civil marriage in community of property on 2 February 1982. At that stage she did not know that the deceased was still married to the first applicant. She asks the court to condone her adultery. She believes that she is the lawfully wedded wife of the deceased, that she has the sole right to decide, where, when and how the deceased should be buried and that both the first and the second applicants have no right to attend to the burial of the deceased. She denies that the deceased spent some weekends at his rural home at Ngqeleni and avers that he spent all weekends with her as he had no bed at his parental home at Ngqeleni. She further denies that there is a family graveyard at the deceased's parental home. Finally, she avers that the deceased told her that his wish was that his body be buried in the Cambridge cemetery in East London after his death. She lists the following undisputed facts in support of her case:

11.1 She lived with the deceased at their home on site number 2251 Mbekweni / Postdam for 27 years.

11.2 Small Projects Foundation sold and ceded the said property to the deceased and her as "married in community of property to each other". This is in terms of a Deed of Transfer which was done and executed at the office of Registrar of Deeds at Bhisho on

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1 November 1996. A photograph of the house is attached to the Deed of Transfer.

11.3 On his admission at Cecilia Makiwane Hospital on 19 December 2007 the deceased gave her name as his next-of-kin / friend. This is confirmed by a copy of an "In-Patient Admission" form.

11.4 When the deceased took out a funeral policy he appointed her as the beneficiary. When the application was heard benefits thereof had already been paid out to her.

11.5

At the deceased's place of employment she (not the first applicant) is registered as the beneficiary and is entitled to benefit from the deceased's pension money and leave gratuity.

[12] The deceased died without expressing his burial wish in writing. There is no indication that he left a will. Facts as regards the burial wish of the deceased are in dispute. Counsel have not suggested that the matter be referred to oral evidence. The deceased died on 9 April 2008. When the matter was before me on 28 May 2008 his body had been lying in the second respondent's parlour for about 50 days. I doubt that during his lifetime he foresaw the possibility that his body would be kept at a mortuary for so long.

[13] Mr *Ndzondo*, who appeared for the first respondent, urged the court to adopt a robust and common sense approach and not to hesitate to decide issues on affidavit.¹

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[14] In a recent judgment involving the right to bury a deceased person,² wherein material facts were in dispute, Erasmus J said:

"It is a matter of regret that the parties could not 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. The Court must decide the matter on the affidavits before the court . . ."³

The learned Judge then referred to cases including *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴ wherein Corbett JA (as he then was) said:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . ."

[15] In the present case counsel for the two applicants, Mr *Notyesi*, has conceded that the first applicant was no longer married to the deceased at the time of his death. It can be said that she has no valid claim to the right to bury the body of the deceased.

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[16] The first respondent does not dispute the fact that the second applicant, Luyanda Sokani and his younger brother, Thembinkosi Sokani, are biological sons of the deceased. Both attained the age of majority some years ago.

[17] In several cases it has been held that a deceased person can appoint someone to attend to his burial in his will or in any other document or verbally. The appointment can be formal or informal. In all these instances the wish of the deceased should be given effect thereto if it is legally possible and permissible.⁵

[18] The major dispute of fact relates to the alleged verbal statements of the deceased in which he allegedly expressed his burial wish. Burial wishes expressed in this fashion to different persons usually cause problems. In *Mabulu v Thys & another*⁶ Zietsman JP said:

"I agree that the wishes of a deceased person concerning his burial should be acceded to where there is clear proof of his wishes. The difficulty arises where the alleged wishes are disputed. In such a case the deceased person who is alleged to have expressed the wishes cannot be questioned about them and the whole difficulty of trying to test the correctness of hearsay evidence arises."

In that judgment, the applicant stated in his replying affidavit that he could not accept the fact that his mother would have expressed a wish to the first

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respondent. The applicant contended that if the deceased had some special wish concerning her burial she would have convened a meeting of the Mpandla clan and would have declared her wishes in the presence of her sons and the members of the clan present.²

The same can be said in the present case of the alleged verbal wishes allegedly expressed by the deceased to different people at different times, at different places and on different dates. The deceased had his parental home at Ngqeleni in the former Transkei. His living next-of-kin according to the papers before this Court are his two biological sons and his twin sister Masukude Xhego. The deceased could have summoned them to come to him at Cecilia Makiwane Hospital in Mdantsane where he was a patient from 19 December 2007 to 9 April 2008 (the date of his death). He would then express his burial wish to them.

[19] Section 3(1)(c) of the Law of Evidence Amendment Act⁸ empowers the court to admit hearsay evidence in the interests of justice. In my view, the provisions of this section should be resorted to if the court is satisfied that the verbal statements allegedly made to the first applicant and those whose names she mentions in her answering and replying affidavits were in fact made by the deceased. I am not satisfied that the deceased expressed his burial wishes to these persons, especially the first applicant who was no longer his wife.

[20] As it has been stated, the first respondent was not legally married to the deceased. It cannot be said that she is one of the intestate heirs of the deceased. The intestate heirs are the two biological sons of the deceased. Under normal circumstances the two sons would be entitled to attend to the

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burial of their father. However, the undisputed facts I have referred to in this judgment under paragraph [11] weigh heavily in favour of the first respondent. It is more probable that the deceased expressed his wish to her that his body be buried in the Cambridge cemetery in East London after his death and that she would attend to the burial. In the circumstances the rule should be discharged. The two sons of the deceased should not be denied the right to attend and participate in the burial of their father.

[21] Concerning costs, Mr *Notyesi* submitted that if the court discharged the rule it should order that the costs be paid from the estate of the deceased. He argued strongly that the second applicant's application was brought to this Court on reasonable grounds. Mr *Ndzondo* urged the court to award costs to the second respondent and left it to the discretion of the court to decide where the costs should come from.

[22] On 28 May 2008, having considered the undisputed facts referred to in paragraph [11] of this judgment, I made the following order *ex tempore*:

22.1

The rule *nisi* granted by this Court on 25 April 2008 is discharged with costs on the party and party scale.

22.2

The first respondent, Nobantu Sokani, is entitled to attend to the burial of the deceased, Welsh Telegram Sokani, and to remove the body of the said Welsh Telegram Sokani from the premises of the second respondent in order to bury him.

22.3

The two sons of the deceased, namely Luyanda Sokani and Thembinkosi Sokani, born of the deceased's marriage to the first

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Applicant, Nowandile Cynthia Sokani, are entitled to attend and participate in the burial of the deceased in the Cambridge cemetery in East London on a date to be agreed upon by the first respondent, Nobantu Sokani, and the said two sons of the deceased.

22.4

The first respondent's taxed costs are to be paid from the estate of the deceased.

Footnotes

See Farlam, Fichardt, Van Loggerenberg <i>Erasmus Superior Court Practice</i> B1-48-49 and cases cited.	1
Footnote	x
<i>Mahala v Nkombombini & another</i> 2006 (5) SA 524 (SE) [also reported at [2006] JOL 17158 (SE)–Ed].	2
Footnote	x
At 527H–I; see also <i>Gabavana & another v Mbetse & others</i> [2000] 3 all SA 561 (Tk) [also reported at [2000] JOL 7181 (Tk)–Ed].	3
Footnote	x
1984 (3) SA 623 (A) at 634H–I.	4
Footnote	x
See for example <i>Mankahla v Matiwane</i> 1989 (2) SA 920 (Ck); <i>Human v Human & others</i> 1975 (2) SA 251 (E); <i>Tseola & another v Maqutu & another</i> 1976 (2) SA 418 (Tk).	5
Footnote	x
1993 (4) SA 701 (SE) at 703A–B; see also <i>Mnyama v Gxalaba & another</i> 1990 (1) SA 650 (C).	6
Footnote	x
At 703F–G.	7
Footnote	x
Act 45 of 1988.	8