IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

EASTERN CAPE LOCAL DIVISION, MTHATHA

Case no. 940/2013

In the matter between:

MZUPHELA NOQAYI	**Applicant**
and	
HARRISON ZOLA SKEME	**First Respondent**
GXOYI FUNERAL PARLOUR	**Second Respondent**
SINEKHAYA FUNERAL PARLOUR	**Third Respondent**

JUDGMENT

STRETCH J:

1. This is an opposed application which was argued before me late on Thursday, 17 April 2014 (preceding the Easter long-weekend) about burial rights with respect to the body of one Misiwe Enslinah Noqayi ("the deceased").

2. Due to the nature of the matter, and particularly the fact that the deceased had already passed on some three weeks before, the parties

requested that an order be handed down on the Tuesday following the Easter weekend, with judgment to follow in due course.

3. On Tuesday, 22 April 2014 this Court handed down an order, dismissing the application with costs, and indicated that judgment would follow.

4. What follows is my judgment setting forth the reasons for the order which was handed down.

5. A careful reading of the affidavits and annexures delivered in this application reveals that it is common cause; alternatively, not seriously disputed, that:

   (a) The applicant is the deceased's brother;

   (b) The first respondent is the man with whom the deceased was cohabiting at Theko Kona, Centane, which is the first respondent's family home, when she died;

   (c) The deceased had no children and she died intestate;

   (d) The deceased and the first respondent met and fell in love some 30 years previously;

   (e) When they met the deceased was engaged in a customary union with another man;

   (f) During 1985 the first respondent was employed with Murray and Roberts and owned a house at Mdantsane where he and the deceased lived together as husband and wife without any interference from the applicant or from the deceased's natural family;

(g) During 1989 the first respondent and the deceased continued to live together as husband and wife at Qongqotha on a site sourced by the deceased's sister, without any interference from the deceased's family;

(h) When they met the deceased also assumed the role of custodian of and guardian to the first respondent's 12 year old son whose mother had died,

(i) The first respondent's family was also considered to be the deceased's family;

(j) In 1995 the first respondent retired and went to stay with the deceased permanently at Qongqotha;

(k) The applicant and the first respondent conducted ceremonies together and shared views amicably;

(l) During 2011 the first respondent and the deceased moved to his home at Theko Kona in Centane as they wanted to be closer to the first respondent's natural family, without any objection from the applicant or the deceased's natural family;

(m) From 1985 onwards neither the applicant nor the deceased's family expressed dissatisfaction with the relationship between the first respondent and the deceased, and regarded them as husband and wife;

(n) The deceased's family were informed when the deceased became ill, which illness commenced in 2007 and was serious from 2013 until she passed on;

(o) During her illness, the deceased's nephew would take her to visit her doctor at Qongqotha, whereafter she would ask him to return

her to her "marital" home where she was living with the first respondent at Theko Kona;

(p) When she was hospitalised both her natural family and the first respondent's family visited her and all exchanges were uneventful;

(q) It was the deceased's express wish that she should be buried by the first respondent at this place where she had been cohabiting with him and she mentioned this to the applicant;

(r) The deceased died of natural causes on 23 March 2014 when she was 72 years old;

(s) Her body was under the control of the first respondent and held by either the second or the third respondents pending the outcome of the application;

(t) When the applicant delivered his application on 4 April 2014, the first respondent and the deceased's niece Ndiliswa (who had been raised by the first respondent and the deceased after her mother's death), had commenced preparations for the deceased's funeral to be held on 6 April 2014 at the place where she had been living with the first respondent, which arrangements included the preparation of her grave, the erection of her tombstone, the purchase of consumables, payment to the funeral parlour to facilitate the burial and notifications to the relatives (some of whom had already arrived);

(u) During the 30 years that the first respondent and the deceased lived together, there had never been a quarrel between the first respondent and the applicant or the applicant's family regarding the deceased;

(v) The first respondent was taken by surprise when the applicant demanded her body and her identification documents when she died, without the families having engaged in any discussions;

(w) When the deceased's niece was requested by the first respondent to depose to a confirmatory affidavit in this regard, she declined out of fear for the applicant;

(x) After the deceased died, and particularly on 24 and 25 March 2014, the first respondent refused to release her body to the applicant's family, informing them that he was entitled to bury her;

(y) From 25 March up until 4 April 2014, the applicant did nothing to advance his claim to the deceased's body, nor has he indicated when he intends burying the deceased or whether he has incurred any funeral expenses;

(z) There is no indication that the applicant is supported by the rest of the deceased's family in launching this application, despite his averment that he is the kraal head of that family, and that he has been "appointed by the Noqayi family members to be the person responsible for the Noqayi house";

(aa) In his founding papers the applicant failed to disclose important information relating to how the first respondent came to live with the deceased, and how long they lived together;

(bb) Death threats referred to by the applicant in his founding papers did not emanate from the first respondent;

(cc) The ultimate purpose of the application was to seek finality pertaining to the rights of either the applicant or the first respondent to bury the deceased.

6. The first respondent has also, on the papers, alleged that the applicant has not met the requirements for an interim interdict, in that he has failed to establish that he has *locus standi* (and accordingly a *prima facie* right), that he has not shown that irreparable harm would ensue if he was not granted the relief sought, that he has failed to show that the balance of convenience favours him and that he has also not shown or made the averment that he had no other remedy but to approach this court. It is also contended that the applicant has failed to make out a case for urgency.

7. When this matter first came before my sister Dawood J, an interim interdict was granted restraining the first respondent from interfering with the deceased's body, directing the second respondent to retain the deceased's body and suspending the funeral which the first respondent had arranged for 6 April 2014, pending the outcome of these proceedings.

8. When the matter was argue before me I was advised that, due to the nature of these proceedings, the parties had agreed to argue the question of final relief.

9. It is contended on the applicant's behalf that the first respondent should be interdicted from burying the deceased's body because a valid customary marriage between the applicant and the first respondent, as provided for at section 2 of the Recognition of Customary Marriages Act 102 of 1998 ("the Act") did not exist. It is further contended that in the

absence of such a marriage, the deceased "belongs" to her natural family, and not to the person she cohabited with.

10. Despite this contention, the parties agree that the deceased's own wishes are of paramount importance in a dispute of this nature.

11. The applicant's counsel has argued, in line with the applicant's case, that there was never a customary marriage between the deceased and the first respondent. My understanding of the argument as it enfolded, is that even if a putative marriage existed this union can only be considered as a valid customary marriage if at least seven requirements are met, which requirements are fully listed in the applicant's heads of argument. Failure to meet even one of these requirements, so it is argued, invalidates the union as a marriage.

12. The parties agree then that one issue for determination is whether there was factually a valid marriage. As I have said however, counsel for the first respondent has also highlighted the following crisp legal issues which have been raised on the papers. They are, whether the applicant has established the following:

    (a) That he has the requisite *locus standi in iudicio*;

    (b) That the application is urgent;

    (c) That he has met the requisites (in this instance) for a final interdict.

13. It is not clear from the papers whether the prerequisites for a customary union were established. On the contrary, there are so many

material disputes of fact in this regard, that the existence of such a marriage is incapable of determination on the averments contained in the papers.

14. Counsel for the first respondent has urged me, to infer from the conduct of the parties which has not been denied or placed in dispute, that a valid customary marriage indeed existed and/or that it was the deceased's wish to be buried at the place where she was living with the first respondent.

15. For the reasons which follow, I am of the view that it is not necessary for this court, in determining whether the application should succeed, to make a finding as to the validity of the union between the parties, notwithstanding the fact that I am alive to and respect the customs and traditions which prevail with respect to rights of burial.

The applicant's locus standi

16. It is trite that it must appear *ex facie* the papers that the parties to an application have the necessary legal standing (see *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA)).

17. The phrase '*locus standi in judicio'* 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. In certain instances however, due to the operation of either statute or rules of common law, restrictions are place on a

natural person's capacity to litigate. Thus there are some natural persons who either cannot sue or cannot be sued. 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 to litigate. It means that there is a legal *nexus* between the applicant and the subject matter of the interdict. Both the legal capacity to bring the interdict and the legal connection between the applicant and the subject matter constitute essential elements of *locus standi* in an application for an interdict. The interest must either be a financial one or a legal one. A mere moral interest is insufficient to ground the interdict (see Prest: *The Law and Practice of Interdicts*: Juta & Co, Ltd 1996 ed at 297 to 298; *Nonkenge v Gwiji & others* 1993 (4) SA 393 (Tk) at 396C-D).

18. With regard to the question of *locus standi* and accompanying authority, the applicant has made the following averments in his founding affidavit:

(a) That he is the elder brother of the deceased and the oldest son of the late Edward Noqayi house (the founding affidavit is silent on who Edward Noqayi is);

(b) That he is the kraal head appointed by the Noqayi family members as the person responsible for the Noqayi house and as such responsible for the deceased's funeral arrangements and her burial;

(c) That the deceased was never married and that she died intestate without any offspring which means that her burial was a matter to be determined by her family members;

(d) That the deceased accordingly "belongs" to the Noqayi family and must be buried "there" (presumably at the homestead of her natural family, although the papers once more do not say this in so many words).

19. In his replying affidavit, the applicant says the following:

(a) That the Edward Noqayi to whom he referred in his founding affidavit is the deceased's father, and also his father;

(b) That he has *locus standi* by virtue of the fact that he is an heir to the deceased.

20. This last averment was made by the applicant in response to the first respondent's accusation that the applicant has no *locus standi* because the first respondent was married to the deceased by way of customary union when she died.

21. The first respondent has also said in his affidavit and again in argument before me that the applicant lacks the necessary authority to bring the application, as there are no confirmatory or supporting affidavits from his family members, and that his founding affidavit does not reflect an averment either that the deceased's parents had pre-deceased her, or that there was any meeting amongst the deceased's family members where authority was bestowed on the applicant to launch the application. More importantly, the first respondent has argued that it is the applicant's case that the deceased could not have married him as she was married to another man, and that he (the applicant) has not

averred that this marriage has in any way come to an end or that it has been dissolved.

22. Counsel for the applicant has prevailed upon me to consider substance rather than form in a matter of this nature, particularly when the papers have been hastily compiled. Indeed, this has generally been the approach taken by the courts in the past. By way of example, in *Baeck & Co SA (Pty) Ltd v Van Zummeren & another* 1982 (2) SA 112 (W), in an application for an interdict and other relief, the first respondent had averred that the applicant did not have *locus standi* in terms of the articles of association of the applicant company to institute the proceedings. The applicant sought to cure the defect by ratification having retrospective effect. Goldstone J held that the fact alone that the question of ratification had been raised for the first time in reply, in the absence of prejudice to the first respondent, was not fatal to the success of the application: the court had a discretion to come to the aid of the applicant. Thus the ratification of the unauthorised act by the applicant did operate retrospectively to cure the original lack of authority.

23. I am of the respectful view that the approach of Goldstone J on the facts of that matter was indeed appropriate and that the modern tendency has been to try the true issues (rather than come to decisions on technical points) by following a sound practical approach rather than a formalistic one, particularly when such an approach does not prejudice the parties (see in this regard *Moosa & Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 181A-C).

24. However, the facts before me are very different to those in the *Baeck* matter.

25. In the dispute before me, the applicant avers in his founding papers that he has legal standing because the deceased died unmarried, intestate and without any offspring, and that he is the eldest of her siblings. However, in his reply the applicant avers that the deceased was married by way of customary union to someone else from whom she had not been separated, and as such could not have married the first respondent.

26. There are no averments in the founding or the replying papers that this marriage alluded to by the applicant was dissolved at any stage (although this is the first respondent's case). In my view the applicant, who bears the onus of proving his case on a balance of probabilities, has, on his own version, not established his legal standing on oath. In fact, what the applicant is attempting to do is to approbate in his founding papers and to reprobate in reply. This in my view is not only disingenuous on his part but leaves this court with some measure of doubt as to whether an undisclosed party (on the applicant's own version) will not be prejudiced if his application is successful.

27. It is indeed so that the duty and the right to attend to burial arrangements and the selection of the place of burial can be contentious issues and give rise to heated litigation. For this very reason I am of the view that any applicant who wishes to interdict a spouse (who *de facto* has been cohabiting with the deceased at the very least as if they were

husband and wife) from burying his cohabitee must approach this court with clean hands and establish and maintain his legal standing to do so with some degree of certainty and continuity, failing which this court may well be constrained to infer that the application is nothing less than vexatious and malicious.

28. I am accordingly of the view that the applicant, on his own version, has failed to make out a case that he has the requisite *locus standi* to bring this application.

Urgency

29. The applicant avers in his founding papers that:

(a) The deceased died on 23 March 2014. This is common cause.

(b) The date for the deceased's funeral had been set for 6 April 2014. It is common cause; alternatively, not disputed that this was a date set by the first respondent and his family.

(c) On 2 April 2014 he and certain of his family members went to the mortuary to prepare the deceased's body only to be told that the deceased's body had been removed by the first respondent and had been taken to the second respondent, being Gxoyi Funeral Parlour.

(d) Endeavours to exact an explanation from the first respondent as to why he did this "without" the applicant's family were in vain.

(e) The applicant accordingly brought this application two days later, on 4 April 2014 at 11h30, the papers having been issued the day

before, and having been served on the first respondent shortly before 20h00 on that day.

30. There is no reference made in the founding papers, either directly or indirectly, to the question of urgency.

31. The first respondent's version with respect to this aspect, is the following:

(a) He advised the applicant and his family about the death of the deceased the day after she died, on 24 March 2014, but he refused to release her body to them, despite demand. The applicant alleges (albeit belatedly in reply only) that the first respondent at that time had promised to release the deceased's body to him but when arrangements were made to fetch the deceased's body, the first respondent refused which resulted in the application being launched. The applicant's papers are silent on when the first respondent made this promise, when the arrangements were made to collect the body, and when the first respondent refused. These in my view, are essential averments when an application is purportedly brought on an urgent basis. At the very least, the applicant could have attempted to cure any defect in his founding papers relating to the question of urgency in his reply. He did not do so.

(b) On the following day, being 25 March 2014, the applicant demanded the deceased's body. The first respondent refused to release the body. This is common cause; alternatively not disputed on the papers.

(c) Thereafter the applicant left and did not say anything until the first respondent received the court order on 4 April 2014, interdicting him from burying the deceased two days later. This too, is common cause; alternatively not placed in issue.

32. The role of urgency in applications for interlocutory interdicts (as this matter started out), cannot be over-emphasised. Indeed, it is the cardinal aspect of most interlocutory applications (Prest *supra* 254).

33. On the score of lack of urgency alone, many applications for interim interdicts have been dismissed. An applicant cannot create his own urgency by simply waiting until the normal rules of this court no longer apply. Indeed, his own dilatoriness, even though unintentional, may be fatal to his application (*LAWSA* 111 para 136). Rule 6(12) of the rules of this court provides that in every affidavit filed in support of an urgent application (that is the applicant's founding affidavit), it is mandatory for the applicant to set forth specifically the circumstances which he avers render the matter urgent and the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course.

34. *Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another* 1977 (4) SA 135 (W) is considered to be a leading authority on the question of urgency. In that matter Coetzee J said the following (at 136G-137G):

> 'Mere lipservice to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and the day for which the matter be set down.'

35. As a general rule specific averments of urgency must be made and the facts upon which such averments are based must be set forth in the affidavit where it is not otherwise apparent that the matter is urgent. It does not follow that an application is necessarily defective if the form referred to in the rule is not strictly adhered to. It is generally the substance of an affidavit and not its form in matters of this nature which should weigh heavily with the court seized with making a decision as to whether any relief ought to be granted, particularly when provision is made in the papers for interim relief based on the averments set forth in the applicant's affidavit only, which is usually the manner in which applications of this nature are couched.

36. In my view, if the only reasonable inference from the averments set forth in the founding affidavit is that the matter is one of urgency, then the applicant will have temporarily complied with the requirements of the sub-rule, even though he does not make a specific averment that it is urgent (see *Sikwe v SA Mutual Fire & General Insurance Co Ltd* 1977 (3) SA 348 (W) at 440G-441E).

37. In the premises then, Dawood J no doubt, and correctly in my respectful view, exercised her discretion in favour of the applicant by allowing him to deviate from the rules and obtain interim relief, in the main due to the fact that the applicant had averred in the founding papers that he unsuccessfully tried to have access to the deceased's body on 2 April 2014 and that the application was urgent as there were plans to bury her on 6 April 2014. What the applicant did not disclose to the court is that he had already been refused access to the deceased on 25 March

2014 and that he thereafter failed to take any further steps. These undisputed facts were raised by the first respondent on the question of urgency when he was afforded an opportunity to respond to the applicant's *prima facie* urgent application.

38. As this court is seized with the determination of final relief, and as the first respondent has raised the question of urgency both in his answering papers and during argument before me, it is necessary for me to traverse this aspect now that all the papers have been delivered.

39. The applicant, having been afforded the opportunity at least by the first respondent to deal with the question of urgency in reply, once again brushed over this aspect of his own case by simply alluding in general to the view that "burial on its own is urgent."

40. This does not traverse the issue. While this court would have been inclined to place substance above form if the applicant made some concerted effort to deal with the question of urgency (even as belatedly as in a reply), it cannot make the applicant's case for him.

41. On a conspectus of the evidence as a whole, and particularly those averments which have been made by the first respondent which have not been disputed by the applicant, I am constrained to conclude that the applicant has not discharged the onus on a balance of probabilities of proving that his application is an urgent one, and that the application falls to be dismissed on that aspect alone.

The requisites for a final interdict

42. The requisites for the right to claim a final interdict are:

    (a) A clear right;

    (b) An injury or an act of interference actually committed or reasonably apprehended; and

    (c) The absence of similar protection by any other ordinary remedy.

    See *Setlogelo v Setlogelo* 1914 AD 221 at 227

43. A final interdict is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs (Jones & Buckle *Civil Practice* 81).

44. With respect to the first requisite, a clear right, the phrase used by Van der Linden is *een liquide regt* (Van der Linden *Koopmans Handboek* 3.1.4.7; *Judicieele Practijcq* 2.19.1). This has been translated as a 'clear right' (for example in *Setlogelo supra* at 227), although the author Nathan suggests that a more precise rendering would be a 'definite right' (Nathan *Interdicts* 6n1).

45. Following this suggestion, Erasmus J in *Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56, said that 'eintlik is dit 'n reg wat duidelik bewys is'. The word 'clear' relates to the degree of proof required to establish the right and should strictly not be used to qualify the right at all (Jones & Buckle *supra* 85n607). The existence of a right is a matter of substantive law. Whether that right is clearly established is a matter of evidence. In order to establish a clear

right an applicant has to prove on a balance of probability the right which he seeks to protect (see *Nienaber v Stuckey* 1946 AD 1049 at 1053-4).

46. As I have said before, in my view the applicant has both approbated and reprobated on this aspect. On the one hand he says that he is the deceased's only rightful heir. On the other hand, and presumably for no other purpose but to derail the claim which the first respondent alleges he has, he says that the first respondent could not have married the deceased because she was already married. With this intimate knowledge at his disposal, I am of the view that the applicant, in order to establish this definite right, ought to have excluded the possibility that someone else may claim to be an heir. This he ought to have done at the outset by adducing such evidence in his founding affidavit. Indeed, the applicant, in his founding papers, did not even make an averment that he had legal standing as an heir because the deceased's natural parents were both deceased, or at all. It is not sufficient for his counsel to argue from the bar, as happened in this case, that this is common cause. It is for the applicant to clearly prove his right in the founding papers by adducing acceptable evidence of this right on oath. This he did not do and in my view has failed to establish the first of the three requisites.

47. It has been contended on the first respondent's behalf that the applicant has also failed to establish the second requisite, being an act of interference. This is so, argues counsel for the first respondent, because the applicant has merely alluded to "death threats" without clarifying

who was threatening whom. With regard to this aspect, it has been argued on the first respondent's behalf that the applicant has not proved that he will suffer an injury if the deceased is buried from the first respondent's home.

48. I do not believe that the issue is that simple. In his comment on this requirement, Van der Linden makes it clear that by using the phrase *eene gepleegde feitelikheid* ('an act of interference') it is intended to mean an act which constitutes the invasion of another's right (K*oopmans Handboek* 3.1.4.7; *Judicieele Practijcq* 2.19.1).

49. Although the words 'injury actually committed or reasonably apprehended' were used in *Setlogelo*, the word 'injury' is not an exact or even appropriate equivalent for *eene gepleegde feitelikheid,* and the authorities clearly use the word as meaning an act of interference with, or an invasion of or an infringement of the applicant's rights together with resultant prejudice (see in this regard *Von Molkte v Costa Areosa (Pty) Ltd* 1975 (1) SA 255 (C) at 258D-E; *Rossouw v Minister of Mines and Minister of Justice* 1928 TPD 741 at 745).

50. The apprehension must be induced by some action performed by the respondent (*Goldsmid v The SA Amalgamated Jewish Press Ltd* 1929 AD 441).

51. In my view the action performed by the respondent was his refusal to release the deceased's body, together with the undisputed fact that he was making arrangements to bury the deceased himself at his home. I

am of the view that this in itself on the applicant's case is sufficient to establish an act of interference or an injury reasonably apprehended. It goes without saying that the resultant prejudiced would be the fact that the applicant and his family would be deprived of their perceived rights in terms of customary law (provided of course that the other requisites have been met) to perform the last rites and to bury their own, in the absence of any compelling arguments to the contrary.

52. In the premises I cannot uphold the first respondent's contention that the applicant failed to establish the second requisite.

53. Turning to the third requisite, the first respondent has not contended that the applicant has another remedy and rightly so in my view.

54. It is however so that all three of these are requirements must be met for a final interdict to be granted. As this is not the case the application falls to be dismissed on this leg as well.

55. There is one further aspect which deserves mention. It has been contended on the first respondent's behalf, it being common cause between the applicant and the first respondent that the wishes of the deceased are paramount, that this court ought to find that it was the deceased's express wish that she be buried by the first respondent at his family home; alternatively, that this court ought to infer from the deceased's undisputed conduct over a long period, that this was indeed her wish.

56. In *Sekeleni v Sekeleni & Another* 1976 (2) SA 176 (Tk) at 179H-I, Lombard J took the view that if the deceased has appointed or named somebody to attend to his funeral, effect should be given thereto irrespective of whether such appointment is contained in his will or in any other document or even if it was verbally made. This view, on the one hand, has been rejected on the basis that a court cannot take cognisance of evidence purporting to convey *post mortem* the views of the deceased person during his lifetime as to where he wished to be buried (see *Tseola & another v Maqutu & another* 1976 (2) SA 418 (Tk) at 422 C-F).

57. It has, on the other hand, been accepted as being the correct approach and has been supported by authority to that effect. In *Mnyama v Gxalaba & another* 1990 (1) SA 650 (C), Conradie J did not agree that statements as to where the deceased desires to be laid to rest did not come under an exception to the old hearsay evidence rule. Whatever may have been the position under the old law, the Law of Evidence Amendment Act 45 of 1988 (which came into operation on 3 October 1988), made all this obsolete but not irrelevant. In other words, in deciding what is in the interests of justice this court may have regard not only to certain specified matters (such as the purpose for which the evidence is tendered and its probative value), but any other factor which in the opinion of the court should be taken into account (see Prest *supra* 308).

58. As it so happened, the learned judge in *Mnyama* came to the conclusion that the second respondent's evidence of an alleged wish expressed by the deceased (who was married to the second respondent by way of

customary union) was not sufficiently cogent and that the counter-application for the delivery of the deceased's body to her for burial could not succeed. In the result it was found that the applicant, who was the eldest brother of the deceased, had *locus standi* to bring the application and to make the necessary arrangements for the funeral. It suffices to say that when that matter was heard, the Act making provision for the retrospective validation of customary marriages had not yet come into operation.

59. Unlike the aforementioned case, *Mahala v Nkombombini & Another* 2006 (5) SA 524 SECLD was heard well after the coming into operation of the Act. In this matter the applicant, alleging that she was the surviving customary law wife of the deceased, sought a declarator that she was entitled to bury the body of the deceased and that this would have accorded with the wishes of the deceased. The first respondent was the deceased's mother. She denied that the applicant had been the customary law wife of the deceased and claimed that it was she who was entitled to bury the deceased, and that this would have accorded with the wishes of the deceased. It appeared from the papers that the applicant (as with the first respondent in the matter before me), had made arrangements for, and had incurred expenses in respect of the burial of the deceased the day following the hearing of the application.

60. A.R. Erasmus J adopted a robust approach and held, on the facts and for purposes of the application only, that the applicant had entered into a customary union with the deceased (at 528E).

61. The learned judge held further, that in the light of the recent constitutional development in the law, in particular the fact that the principle of primogeniture was in violation of the right to equality guaranteed under section 9(3) of the Constitution, the court should not follow existing authority which was to the effect that it was the heir of the deceased, who was necessarily male, who had the right to bury the deceased. The issue, it was held, was to be decided on general principles (at 528F-H, 529C and 529E-H).

62. Of significance is the learned judge's finding that the approach should instead be adopted that, where there were multiple heirs, there should be no hard-and-fast rules. Each case had to be decided on its own particular circumstances and facts, and common sense ought to prevail at the end of the day. In coming to this conclusion, the learned judge was of the view that the family relationships of the deceased as well as all other relevant facts and circumstances including purely practical considerations ought to be taken into account. The judge held that having regard to the constitutional provisions recognising and giving effect to the status of women in society, the wishes of the deceased's widow carried great weight, although some regard also had to be given to the wishes of the deceased's broader family (at 529J-530B and 530E-F). It was ultimately held that having regard to the fact that it would have been the deceased's wish that he be buried by the applicant, the application had to succeed (at 530H-531C).

63. Unfortunately the learned judge did not deem it necessary to go into any more detail on the finding that it was the deceased's wish that he be

buried by the applicant, save to say that the probabilities favour this conclusion.

64. In the matter before me I have been asked to come to a similar conclusion.

65. In deciding this question, I am mindful of the dangers attached to accepting evidence pertaining to the expressed wishes of the deceased. I respectfully agree with Conradie J in *Mnyama* that:

(a) One of the factors which should be taken into account in the exercise of this immense discretion to accept this evidence or reject it, is the fact that hearsay evidence of the kind in question has historically been received by our courts by way of an exception to the hearsay rule.

(b) However, the correct way to treat the hearsay part of the evidence is to firstly admit the evidence as having sufficient probative value to qualify for this court's consideration, and secondly, to then analyse the evidence to establish whether it has sufficient cogency to warrant its acceptance, always bearing in mind the available facility for fabrication of hearsay evidence and/or innocent misreporting.

66. In applying this useful twofold test referred to by Conradie J, I am of the view that the application of the second leg would of necessity involve the taking into account of probabilities (that either support or reject an inference that it was the deceased's wish that she be buried by the first

respondent) which have sufficient cogency to warrant either acceptance of or rejection of the argument.

67. As I have said, the first respondent's counsel has prevailed upon me to take into account the undisputed facts and circumstances which prevailed before the deceased died as support for a conclusion that it was indeed her wish that she should be buried by the first respondent at the place where she was living before she died. These circumstances are the following:

(a) The deceased and the first respondent were cohabiting as man and wife at the first respondent's family home in Centane when she died.

(b) They met, fell in love and commenced cohabiting as man and wife some 30 years before she died, when the deceased was a mature woman in her early forties.

(c) The cohabitation continued undisturbed for a continuous period of 30 years at three different venues which excluded the applicant's home.

(d) The deceased had been custodian to and guardian of the first respondent's son who was 12 years old when they met and who treated the deceased as his mother.

(e) The deceased and the first respondent had been living at his family home at Centane for over two years when she died.

(f) The applicant and his family regarded the deceased and the first respondent as husband and wife.

(g) The deceased was ill for almost seven years (the illness having been particularly serious during the last year of her lifetime)

before she died. Notwithstanding this, she did not return to the applicant's home but visited a doctor whom she had retained at a place where she and the first respondent had cohabited previously, and on each occasion after these visits returned to stay with the first respondent at his family home.

(h) Likewise, during this period and before, no efforts or arrangements were made by the applicant and/or any other members of her natural family for her to return to their family home, notwithstanding visits from her biological family when she was hospitalised immediately prior to her death.

(i) A member of the applicant's own family was busy making arrangements for the deceased's funeral together with the first respondent when the applicant launched this application.

(j) Most significantly, the averment made on oath by the first respondent in his answering affidavit, that it had always been the wish of the deceased that she be buried by the first respondent at her "marital" home at Centane, and that the deceased had told the applicant this, has not been disputed by the applicant or anyone else, notwithstanding the fact that the applicant had the facility to do so by delivering a replying affidavit, which he indeed did, explicitly traversing the averments made by the first respondent.

68. In the premises, even if there was no valid customary marriage, and even if I am wrong in my conclusions that the applicant has failed to establish urgency, his *locus standi*, and that he has a clear right to the final relief sought, I am nevertheless persuaded that the deceased's

admitted conduct, considered together with all the other issues which have been pertinently raised by the first respondent, and which have not been disputed or denied by the applicant, support an overwhelming inference that it was indeed the deceased's wish to be buried at the home which she was sharing with the first respondent when she died.

69. I have not been requested by either of the parties to depart from the general rule that costs follow the result, and am, in the absence of such a request, not disposed to do so notwithstanding the unfortunate and sensitive nature of this dispute.

70. These are accordingly the reasons why I dismissed the application with costs on 22 April 2014.

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I T STRETCH
JUDGE OF THE HIGH COURT

Date of application : 17 April 2014

Date of judgment : 24 April 2014

Appearances:

For the applicant: Mr Nabela instructed by Caps Pangwa Attorneys, Mthatha.

For the first respondent: Mr Mhambi instructed by Mlindazwe & Associates, Mthatha.