

(Inlexso Innovative Legal Services)



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION HELD AT JOHANNESBURG

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CASE NO: 10015/2020

DATE: 2022.03.25

DELETE WHICHEVER IS NOT APPLICABLE  
 (1) REPORTABLE: NO  
 (2) OF INTEREST TO OTHER JUDGES : NO  
 (3) REVISED

In the matter between

THAMI PATRICK MTSHALI

Applicant

and

20 THABI MNYANDO

Respondent

**J U D G M E N T**

**CRUTCHFIELD, J:** This application comes before me by way

of urgency on 25 March 2022. The applicant seeks an order effectively permitting him to bury the deceased, being his late sister. The first respondent opposes the application and seeks an order dismissing the applicant's application.

[1] The applicant is Thami Patrick Mtshali. The first respondent is Thabi Mnyando, that being the name under which she was cited in the papers.

[2] It was common cause between the parties that the deceased left a daughter of 16 years of age, who will be referred to in these proceedings as 'the daughter'.  
10 Furthermore, it was common cause between the parties that the daughter resided with the first respondent, the deceased's aunt. The first respondent alleged that a family meeting of the deceased's family members took place in order to discuss and agree upon the funeral arrangements that should apply in respect of the deceased. The applicant alleged that the family meeting was inconclusive and that the deceased left the meeting prior to finality being achieved. The first respondent  
20 alleged that a decision was taken at the family meeting in terms of which the deceased would be buried in the Durban Municipal Cemetery where her parents were buried.

[3] The applicant alleged that he wished to bury the deceased in Mondno, Vryheid, in the family burial ground

where the deceased's parents were buried. The first respondent denied that the deceased's parents were buried in a burial ground in Mondno, Vryheid, and alleged that they were buried in the Durban Municipal Cemetery.

[4] Furthermore, the applicant alleged that the burial site in Mondno, Vryheid, was a family clan burial site, whilst the first respondent denied that a family clan burial site existed.

[5] This being an urgent application in which final relief is sought it is the allegations of the first respondent that must prevail.

[6] It was common cause between the parties that the deceased died intestate. Furthermore, that there was no document of the deceased in which she indicated the arrangements that she wished to apply in respect of her burial or in which she articulated the person to take charge of the burial arrangements. The applicable law in this matter and in similar matters is referred to in the decision of Phistos Ntoagae and Troy Makabanyane and Others. The matter is an unreported decision of the North West Provincial Division, Mahikeng, case number M420/2015 heard on 10 October 2015 and in which the reasons for the judgment were given on 12 November 2015. The learned judge stated in paragraph 13 of the judgment that the authorities in respect of decisions of

this nature are collated in the matter of *Gabavana and Another v Mbetse and Others* [2000] 3 ALL SA 561 (TK) ('*Gabavana*'). The learned judge referred to the fact that the decisions collated in *Gabavana* indicated that it is the heir of the deceased's estate who is the person who decides on the arrangements surrounding the burial of the body.

[7] The heir to the deceased's estate is the deceased's only child being the 16-year-old daughter residing with the first respondent, the deceased's aunt.

[8] The daughter is a minor but given her age, she is able to contribute to the decision where the deceased is buried. The daughter is residing with the first respondent. I was not informed that the daughter has a custodian parent allocated to her subsequent to the death of the deceased or that a guardian has been appointed to her subsequent to the death of the deceased. In the circumstances, and in the light of the fact that it is with the first respondent that the daughter is residing I am of the view that the first respondent should be the party who takes charge of the burial arrangements in respect of the deceased and organises the funeral.

[9] I was assured by counsel for the first respondent that notwithstanding this litigation, the applicant would be welcome at the funeral of the deceased, his sister, and I

expect the first respondent to make good on that assurance and permit the applicant to attend the funeral, to be included in the mourning of the deceased that follows the funeral and to participate fully as the deceased's brother and the daughter's uncle.

[10] I am trusting the first respondent to make good on those promises and to allow the applicant to attend and participate fully in the funeral of his sister. In the result, the appropriate order will be granted.

10 [11] As to the costs of this application both parties sought costs and it is appropriate in the circumstances that the costs follow the merits of the application.

[12] In the circumstances, I grant the following order:

ORDER

1. The applications is dismissed with costs.

I hand down the judgment.

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**CRUTCHFIELD, J**

**JUDGE OF THE HIGH COURT**

**DATE: 25 March 2022**

