

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- | | |
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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **18th August 2022** Signature:

CASE NO: 26584/2021

DATE: 18TH AUGUST 2022

In the matter between:

ZWANE, GLADYS NANTULI

Applicant

and

JOHANNESBURG CITY PARKS & ZOO

First Respondent

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Second Respondent

MOLEFE, TILLY JOYCE

Third Respondent

Coram: Adams J

Heard: 15 August 2022

Delivered: 18 August 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 15:30 on 12 August 2022.

Summary: Administrative law – City of Johannesburg Cemeteries and Crematoria By-Laws, 2004 – ‘Holder of Private Rights’ in graves – erection of ‘memorial work’ on grave – on written consent of ‘officer-in-charge’ – removal of memorial work from grave – only by ‘Holder of Private Rights’ – permission to be granted to applicant even if she is not registered as holder of private rights – common sense to be applied in applying By-Laws.

ORDER

- (1) The applicant be and is hereby declared to be the ‘Holder of Private Rights’, as defined in section 8(1)(b) of Chapter 2 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, in and in respect of the grave of her deceased husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.
- (2) The first respondent, the second respondent and the Officer-in-Charge of the Westpark Cemetery are hereby ordered and directed to, within ten days from date of this order, enter the name of the applicant in the Register contemplated in section 8(1)(a) of Chapter 2 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, as being the ‘Holder of Private Rights’ in and in respect of the grave of her deceased husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.
- (3) The applicant is hereby granted permission to dismantle and remove from the grave of her late husband any and all existing memorial works on the said grave of her later husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.
- (4) The applicant is hereby granted permission to erect a new ‘memorial work’ in the form of a tombstone or a headstone (‘the tombstone’) on the grave of her deceased husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.

- (5) The first respondent, the second respondent and the Officer-in-Charge of the Westpark Cemetery are hereby ordered and directed to, within ten days from date of this order, provide the applicant with a written consent, in terms of section 27(1) of Chapter 6 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, to dismantle and remove the existing grave marker from the grave of her late husband.
- (6) The first respondent, the second respondent and the Officer-in-Charge of the Westpark Cemetery are hereby ordered and directed to, within ten days from date of this order, provide the applicant with a written consent, in terms of section 24(4)(a) of Chapter 6 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, to erect the said tombstone.
- (7) Each party shall bear her / his / its own costs of this opposed application.

JUDGMENT

Adams J:

[1]. The applicant, who is the surviving wife of the deceased, one Simon Mkhunjulwa Zwane ('the deceased'), who died on 21 January 2019, seeks an order that she be permitted to erect a tombstone on the grave of her deceased husband. The said grave already has what can best be described as a 'grave marker', which is a very basic plaque on which is printed, in a rather rudimentary manner, the name of the deceased, his date of birth and the date on which he died. The first and second respondents, who shall be referred to collectively in this judgment as 'the City of Johannesburg', were not prepared to agree to the erection of the tombstone, because, so they argue, to do so would offend the principle of legality in that it would amount to a contravention of the City of Johannesburg, Cemeteries and Crematoria By-Laws, 2004 ('the City By-laws'), which provide that a 'memorial work' on a grave can only be dismantled and removed by the registered 'holder of private rights' in respect of the grave, which is in fact the third respondent, who is the sister of the deceased.

[2]. By all accounts, and having regard to the fact that the applicant is the surviving spouse of the deceased, she has every right to erect a tombstone on the grave of her deceased husband. What is more is that the third respondent and the other family members of the deceased apparently has no objection to the applicant erecting the tombstone. At the very least, their quiescence can and should be interpreted as acquiescence. Applying common sense and some basic logic, it has to be accepted that the applicant should not have been prevented from erecting the tombstone upon her request to do so.

[3]. This was not to be the approach adopted by the City of Johannesburg, which opted rather for a legal and an overly technical approach. They took the stance that the applicant did not seek to review and set aside the registration of the third respondent as the registered rights holder in respect of the grave of the deceased, and therefore she was precluded from erecting the tombstone. The registration of the third respondent as a rights holder, so the City contends, is an administrative action and remains valid and effective until set aside. The City relies in that regard on the *Oudekraal Estates*¹ matter.

[4]. The City also appears to be of the view that the applicant ought to have approached the family of the deceased, with whom she has a very acrimonious relationship, in order to get their consent for the erection of the tombstone. The applicant's explanation that she has this very acrimonious relationship with the family of her later husband, was not accepted by the City, which remained adamant that the applicant cannot be permitted to erect the tombstone until such time as she was registered as the 'rights holder' in respect of the grave. This rigid and inflexible approach on the part of the City persisted, notwithstanding the fact that the third respondent opted to play no part in these proceedings even after being served with the application on 5 June 2021.

[5]. The question is simply this: Why was the City so reluctant to take it upon themselves, upon request of the applicant, to register the applicant as the 'holder of private rights'. She clearly qualified to replace the third respondent as such. And, what is more, it can safely be inferred that the third respondent has no objection to the transfer of the rights to the applicant.

¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

[6]. The City therefore opposes the applicant's application on the basis that, in terms of section 27(1) of chapter 5 of the City By-Laws, it is only the holder of the private rights who may dismantle or disturb any memorial work on a grave. As such, so goes the argument on behalf of the City, the current memorial on the grave of the deceased cannot be removed or replaced unless this is done by the third respondent, as the registered holder of rights. Because the existing 'memorial work' cannot be removed, so the City contends, a new headstone can also not be erected. Therefore, so the argument is concluded, if the City does not oppose this application, it would be contravening its own By-laws, by which it is bound.

[7]. The City takes their argument, based on the rigid and inflexible approach, a step further and contends that in bringing this application, the applicant was ill-advised. She should have applied for a review and setting aside of the previous administrative decision, that being the registration of the third respondent as the 'holder of private rights', so the City argues, in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA'). The applicant would not be able to do so, in any event, as the PAJA review grounds do not exist. It cannot, for instance, be said that decision of the public official is wrong or irrational, so the City submits, and therefore the decision must stand.

[8]. In sum, the submission on behalf of the City is that, in terms of its By-Laws, the current gravestone cannot be removed by anyone other than the third respondent as the 'holder of private rights' and, in any event, not without her consent. In effect, so the argument goes, the relief sought by the applicant seeks to take away the third respondent's rights as a rights holder in respect of the grave. The applicant should, as a first port of call, have approached the third respondent, who is the registered rights holder. The applicant has not done so, and therefore, so the argument on behalf of the City is concluded, is not entitled to the relief claimed in this application.

[9]. There are two difficulties with the approach adopted by the City.

[10]. Firstly, the said approach is not supported by the wording of the By-laws, which, properly interpreted, give the City, as the custodian of any and all

cemeteries within its jurisdiction, the discretion to permit and allow the erection of a 'memorial work' on a grave in a cemetery. This is so, if regard is had to the wording of the relevant section, irrespective of who the 'holder of private rights' is in respect of the grave in question. The relevant section 24 of the City By-Laws reads as follows:

'Erection of memorial work

24. (1) A person intending to erect a memorial work must make and complete an application on the prescribed application form to the officer-in-charge.
- (2) Such application must be made not less than five working days before the date of erection.
- (3) Memorial work may only be erected during working hours, but may, with the approval of the officer-in-charge, be erected outside working hours.
- (4) No person may –
- (a) erect memorial work, or bring material into a cemetery for the purpose of erecting memorial work, without the written consent of the officer-in-charge;
 - (b) remove memorial work for additional inscriptions or other alterations without the consent of the officer-in-charge; or
 - (c) erect a memorial work on a Saturday, Sunday or a public holiday, without the written consent of the officer-in-charge.
- (5) The Council is not liable for damage to memorial work resulting from any subsiding soil.
- (6) A person erecting memorial work must at the request of the officer-in-charge produce the written consent.
- (7) Memorial work or material to be used in the erection of such work, may not be conveyed in a cemetery or crematorium in a manner that may damage the roadways, pathways, lawns, grounds or other memorials.
- (8) Any surplus material or rubble, resulting from the erection of any memorial work, must be removed by the person responsible for such erection, immediately after its completion.'

[11]. As already indicated, on a proper interpretation of this provision, the City, through its 'officer-in-charge', retains an absolute discretion to grant permission to any person to erect a memorial on a grave. And in that regard, the fact that the applicant is not the 'holder of private rights', although a relevant consideration, is not the do all and the end all of the matter. It therefore, in my

view, does not avail the City to rely on the provision that only a holder of private rights can remove an existing memorial, to refuse the applicant permission to erect the new tombstone. The City should therefore have acceded to the applicant's request.

[12]. The second reason why the approach of the City is not sustainable, relates to the definition of a 'holder of private rights' in the By-Laws as applied to the facts in this matter. And those are: (1) the applicant paid the prescribed fees in respect of the grave – this is undisputed and unchallenged; and (2) the applicant is the executrix in the estate of the deceased. This, in my view, means that the applicant is in fact a 'holder of private rights' in respect of her deceased husband's grave, as defined in the By-laws, and that she was fully within her rights to insist on her name being entered as such in the Register kept by the City for that purpose. The relevant part of s 8 of Chapter 2 of the By-Laws read as follows: -

'Private rights

8. (1) The holder of private rights includes –

- (a) a person who purchased a grave or who received a grave as a gift from the purchaser and whose name appears in the register of the Council;
- (b) a person who paid the prescribed burial fees in respect of the first burial in the grave;
- (c) a person to whom private rights to a grave have been transferred;
- (d) a person who inherited the private rights.' (My emphasis)

[13]. The wording of this section is clear. The applicant, who paid the prescribed burial fees in respect of the first burial in the grave of her deceased husband, is a 'holder of rights' and the City and its officer-in-charge should have registered her as such.

[14]. There is a further reason why the applicant should have been granted permission to erect the memorial and that is the fact that the existing memorial on the grave is, as indicated, no more than a very basic grave marker, which can be removed without causing any damage to the grave or to the cemetery. No one would suffer any prejudice if the said plaque is removed, least of all the third respondent.

[15]. For all of these reasons, the applicant should be granted the relief claimed in this application.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. On first principles, the City should therefore pay the applicant's costs of this application.

[17]. On the flipside though the application was launched in the urgent court, but not proceeded with as an urgent application ostensibly because the applicant accepted that her matter is not urgent. The applicant is therefore liable for the costs relating to the urgent application.

[18]. Moreover, the issues raised in this application by the City can, in my view, be said to have been raised reasonably. It is so that the City, as a public body, is required to act lawfully and in accordance with the provisions of their own By-laws. I do not think that they can be faulted for having opposed this application on the basis of the doctrine of legality.

[19]. I am therefore of the view that it would be fair to grant no order as to costs. Such an order will be granted.

Order

[20]. Accordingly, I make the following order: -

- (1) The applicant be and is hereby declared to be the 'Holder of Private Rights', as defined in section 8(1)(b) of Chapter 2 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, in and in respect of the grave of her deceased husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.
- (2) The first respondent, the second respondent and the Officer-in-Charge of the Westpark Cemetery are hereby ordered and directed to, within ten days from date of this order, enter the name of the applicant in the Register contemplated in section 8(1)(a) of Chapter 2 of the City of

Johannesburg Cemeteries and Crematoria By-Laws, 2004, as being the 'Holder of Private Rights' in and in respect of the grave of her deceased husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.

- (3) The applicant is hereby granted permission to dismantle and remove from the grave of her late husband any and all existing memorial works on the said grave of her later husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.
- (4) The applicant is hereby granted permission to erect a new 'memorial work' in the form of a tombstone or a headstone ('the tombstone') on the grave of her deceased husband, Simon Mkhunjulwa Zwane, being grave number ECM 9710, Westpark Cemetery in Johannesburg.
- (5) The first respondent, the second respondent and the Officer-in-Charge of the Westpark Cemetery are hereby ordered and directed to, within ten days from date of this order, provide the applicant with a written consent, in terms of section 27(1) of Chapter 6 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, to dismantle and remove the existing grave marker from the grave of her late husband.
- (6) The first respondent, the second respondent and the Officer-in-Charge of the Westpark Cemetery are hereby ordered and directed to, within ten days from date of this order, provide the applicant with a written consent, in terms of section 24(4)(a) of Chapter 6 of the City of Johannesburg Cemeteries and Crematoria By-Laws, 2004, to erect the said tombstone.
- (7) Each party shall bear her / his / its own costs of this opposed application.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	15 th August 2022
JUDGMENT DATE:	18 th August 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Zweli Zakwe
INSTRUCTED BY:	Machaka Chewe Incorporated, Protea North, Soweto
FOR THE FIRST AND SECOND RESPONDENTS:	Advocate Christopher Gibson
INSTRUCTED BY:	Moodie & Robertson, Braamfontein, Johannesburg
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance