

# Burial Rights

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**T**he recent media attention on the exhumation and reburial of some of the descendants of Nelson Mandela against the backdrop of his own grave illness raises the sensitive issue of burial rights. The phrase – ‘burial rights’ – relates to the whole range of death and burial practices.

It is not unknown for a dispute to arise between family members regarding the form of the burial ceremony and the place where the deceased should be buried. This raises the vexing question of with whom the burial right rests. An exposition of the legal position pertaining to death and a deceased body in SA jurisdiction is illuminating.

The National Health Act (61 of 2003) introduced and adopted the criterion of brain death as the legal standard of death. A natural person’s legal personality is terminated by death; a dead person thus has neither rights nor obligations but the law protects the deceased’s body and regulates its disposal.

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These laws do not arise out of the rights of the deceased but out of the rights of the living. Such rights cover both public interest, such as health and environmental considerations, and private interest, namely, protecting the feelings and dignity of the family and the larger community of the deceased.

So, by way of illustration, a deceased's tissues and organs may only be used in the circumstances and subject to the provisions and for purposes set out in s62 of the National Health Act. Regulations promulgated in terms of the Act set out in detail issues relating to the transportation of human remains and the standards pertaining to mortuaries and funeral undertakers' premises, among others. Criminal sanctions exist too: for example, violating a grave is a common law crime, while sexual intercourse with a corpse is a statutory crime in terms of s14 of the Sexual Offences and Related Matters Amendment Act (32 of 2007).

In terms of Part B of Schedule 5 of the Constitution, cemeteries, crematoria and funeral parlours are local government matters.

The Births and Deaths Registration Act (51 of 1992), as amended, regulates the registration of deaths and burials. It is the duty of any person present at the death of another person who died of natural causes, or any person who becomes aware of such a death, or who organises the funeral, to notify the Director-General or his representative of the Department of Home Affairs as soon as possible of the death of the person concerned. The Notice is given in the form of a prescribed certificate by a medical practitioner, if one had attended to the person prior to his death, or had examined the body of the person after death. If no medical practitioner was present or available at the time of death, any person who was present must make an appropriate statement.

If the cause of the death is unknown, an autopsy may be held and, if it is suspected to have been due to unnatural causes, an inquest will be held to determine the cause in terms of the provisions of the Inquest Act (58 of 1959). In addition to determining the cause of death in medical terms, the magistrate will make a finding as to whether the death was caused by any act or omission, which *prima facie* involved or amounted to an offence by anyone.

Once the death has been reported and registered, the Department will issue a death certificate, which is *prima facie* proof of death. Thereafter, in

terms of private law, a partner of the deceased may remarry and the estate of the deceased may be distributed subject to the terms of the Administration of Estates Act (66 of 1965).

Conversely, if no physical evidence of the death is available or if uncertainty exists as to whether a person is alive or not, as may happen in a plane accident or the unexplained disappearance of a person, an application must be brought in terms of the common law, or in certain limited circumstances in terms of statute, for the presumption of the death of the person concerned. SA law, unlike some other jurisdictions, does not have a set period of absence, after which such an order may be granted; each case is dealt with on the merits of the particular facts. The effect of this order is the same as that of a death certificate.

No body may be buried or cremated before a burial order has been issued in terms of s20 (1) of the Births and Deaths Registration Act. The burial order must be delivered by the person in charge of the burial to the person who has control of the burial place. If the burial is to take place outside the magisterial district within which the death occurred, the corpse may only be removed to a place outside the magisterial district by virtue of a burial order.

A body may be disposed of by different methods. Conventional methods include in-ground burial, above-ground burial, burial at sea, cremation, freeze reduction and biodegradation. Apart from personal preference, cultural and religious beliefs play a dominant role in the accepted manner of burial. For instance, the Islamic faith determines that the body must be buried before sunset on the same day; moreover, the body is not placed in a casket, and the grave mound must be up to 25 centimeters above the ground.

Generally, the Jewish faith is opposed to cremation, as the body is regarded as a gift from God and the interment takes place as soon as possible, with the body facing towards Jerusalem.

The Christian faith accepts both cremation and in-ground burial; if interred, the body is placed in a casket, and the feet face east.

Generally, in African culture, death is regarded as a passage from the world of the living to the world of the dead. In order to restore the equilibrium between the living and the dead by incorporating the deceased into the group of ancestors, specific cleansing rites and manners of exit

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and transportation are thus performed, with group variations.

According to the common law, the person appointed or nominated by the deceased ultimately has these rights, whether the authority is given in a Will or other document, or verbally. In the absence of an appointment, the heir or heirs have the right. If the deceased did leave instructions as to the disposal of his remains in his will, then the duty to carry out these instructions rests on the Executor, provided that it is not impossible, too expensive for the estate to bear or unlawful. However, in practice, there is



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often a substantial delay between death and the Letters of Executorship being issued, which results in the relatives proceeding with or without the co-operation of the Executor.

In terms of customary law, the entitlement to bury a deceased stems from the agnatic group rights (a patrilineal principle) of authority over group members. In certain customary law intestate succession dispensations, the principle of primogeniture is applicable.

The body of case law largely confirms these rules.

In *Said v Schatz* 1972 (1) SA 491 (T), a dispute arose between a surviving spouse, who was a Christian, and the deceased's brother, who claimed that the deceased had been a Muslim and that she should thus be buried in accordance with Islamic rites. The court held that the wishes of the husband, in the absence of instruction and a will as intestate heir, had to prevail.

In *Human v Human* 1975 (2) (SA) 251(ECD), the children of the deceased contended that their father had expressly wished his mortal remains to be buried alongside those of his first wife, their late mother, in Vereeniging, where a place had been reserved by him for this purpose. The surviving spouse, however, proposed to bury him in Queenstown where he had died. The court confirmed that the right to attend to a deceased person's funeral devolves upon his heirs and since the surviving spouse had been appointed as his only heir, her decision prevailed.

In *Tseola and Another v Maquta* 1976 (2) 418 (THC), the court decided, on the basis of public policy, that the wishes of the wife should prevail, where she and the mother of the deceased were both intestate beneficiaries.

In *Mbanjwa v Mona* 1977 (4) SA 403 (TSC), the paternal grandfather's wishes as the guardian to the intestate beneficiaries who were minors were accepted and an order made accordingly. The court took into account that the wishes of the minors as expressed through their Guardian were to bury the deceased in close proximity to where they were going to live.

In *Gonsalves and Another v Gonsalves and Another* 1985 3 (SA) 507 (T), in a matter involving a dispute among heirs of equal status, namely

the deceased's brother on one hand and his sister on the other, as to whether he should be buried in Frankfort or Benoni, according to the rites of the Roman Catholic Church, the court held that the view of the majority of the heirs should prevail.

In *Sekeleni v Sekeleni and Another*, 1986 (2) SA 176 (Tk SC), the deceased, on being admitted to hospital prior to his death, handed to one Nokwonda with whom he had co-habitated after his divorce, a document nominating her to attend to his funeral. The deceased's children from his previous marriage interdicted the burial arrangements made by the appointee. The court held that, if the deceased had during his lifetime appointed or named somebody to attend to his burial, effect should be given to his wishes, irrespective of whether the appointment was contained in a will, other document or even verbally.

In *Mankahla v Matiwane* 1989 (2) SA 920 (CGD), a dispute occurred between the father and the father-in-law of the deceased. The court found that, as the deceased had died intestate, her children had the right to decide what should happen to her remains, and that neither the father nor the father-in-law had *locus standi*. The court proceeded to make an order as upper guardian on behalf of the minor children.

In *Mnyama v Gxalaba and Another* 1990 (1) SA 650 (C), reveals a dispute between an intestate heir claiming the right to bury the deceased as customary law heir and the partner of the deceased who relied on the oral wish expressed to her by the deceased. It was held by the court that oral evidence as to where the deceased wished to be buried was admissible in terms of the exception to hearsay evidence, if assessed to be in the interest of justice but found it lacking in cogency to be accepted in the particular case.

In *Mabulu v Thys and Another* 1993 (4) SA 701 (SECD), deals with a conflict between the deceased's eldest son, as customary heir, and daughter who maintained that the deceased expressed his wishes to her. The court found that the verbal wishes of the deceased could not be established to counter the right of the deceased son as intestate beneficiary.

In *Gabavana and another v Mbete* (2000) 3 All SA 561 (Tk), the court having to consider conflicting versions of oral wishes, concluded that as it could not establish, on the strength of the evidence, what the disputed oral wishes of the deceased were, the right to bury rested with the executor and the heir nominated in the will.

In *Trollip vs Du Plessis en 'n Andere* 2002 (2) SA 242 (W) a surviving spouse took steps to halt the involvement of the deceased's daughter (her step child) with his burial arrangements. In this case the court applied the principle of fairness stating the claim could not be evaluated on some mathematical proportion of heirship and that fairness in each particular situation must be decisive.

The problem of who holds the authority of burial when there are multiple heirs was addressed in the judgement *Mahala v Nkombombini and Another* 2006 3 All SA 366 (SE), when the conflicting wishes of the deceased's wife and her children with the deceased, against the deceased's mother and his issue from extra-marital relationships had to be adjudicated.

The court held that each case should be decided on the merit of its own particular circumstances, with common sense dictating the decision of the court. In other words, the court should consider the family relationships of the deceased, as well as weighing up practical considerations. In this case, the court found that the wishes of the widow of the deceased

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carried great weight. The court further held that weight must also be attached to the wishes of the children of the deceased and that only thereafter some regard must be given to the wishes of the broader family.

In *Goniwe v Mawindi* 2007 JDR 0474 (SE), the court examined the exact nature of the relationship between the deceased and the persons who alleged that he had given them burial authority, to decide on the credibility of their respective claims.

Conflicting claims regarding the right to bury a deceased have all too often given rise to litigation. In *Mahala* the court made reference to the frequency of such applications, stating that they are often brought on an urgent basis, necessitating the court to make decisions on affidavit where disputes have arisen, thus requiring a robust decision.

To avoid the necessity of turning to a court, it is recommended that individuals reflect on their own burial directions and that they make these known, preferably to the persons close to them who are likely to be confronted with the practical arrangements. Ideally, these directions should be recorded in their will or alternatively in written form, preferably signed and dated by them for proof of authenticity and sequence.

Last, they should let those who will be confronted by their death know of the existence of these instructions and the whereabouts of any written confirmation. ♦

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