

NOTES / AANTEKENINGE

THE LAW AND AN ANCESTRAL REQUEST FOR EXHUMATION

“No man can outwit the ancestors” ~ African Proverb

1 Introduction

Exhumation is the removal of the remains of a dead body from its initial resting place – in other words, when a corpse is removed from a coffin, either to be re-buried at another place, or to dispose of the remains in a different manner as in cremation. A corpse could be the remains of a deceased person or a stillborn child or a fetus. An exhumation may also be undertaken to ascertain the cause of death or to ascertain the identity of the deceased. A court or the immediate family of the deceased may request an exhumation for any of the mentioned reasons. If the family is asked by the ancestors to exhume a grave, certain legal questions may come to the fore. It is the purpose of this note to discuss the legal requirements for exhumations and briefly to address the traditional African cultural belief in which ancestors play a part in life on earth. It is not a complete analysis or an opinion on African culture or beliefs. Ancestral beliefs simply form the background to the real legal questions surrounding exhumations in South Africa.

These notes focus on a recent request put to a funeral undertaker. The immediate family of a deceased woman contacted the funeral undertaker with a request for the exhumation of the grave of their relative buried quite a few years ago. The basis of their request was that the ancestors had indicated to the mother of the deceased that the dead woman was not comfortable. The deceased had been pregnant when she died. She had been buried with the fetus still in her uterus. It had now been “communicated” that she would like the fetus to be removed and cremated. To fulfil the request, the grave of the deceased would need to be opened, the remains of the fetus removed and cremated, and the corpse re-buried. But is this legal?

The common-law crimes of violating a dead body and violating a grave are dealt with in some articles (see Christison and Hoctor “Criminalisation of the Violation of a Grave and the Violation of a Dead Body” 2007 28(1) *Obiter* 23–43; Snyman *Criminal Law* 6ed (2015) 435–436), but there seems to be no academic literature on legally permitted exhumations in South Africa. There are a few cases concerning exhumations, but nothing directly relevant to this discussion (see for example, *Rex v Lekota* 1947 (3) SA 713 (O); *R v*

Sephuma 1948 (3) SA 982 (T); *Gillespie v Toplis* 1951 (1) SA 290 (C); *Dibley v Furter* 1951 (4) SA 73 (C); *Mphiki v Mphiki* (54/2018) [2019] ZANHC 43 (24 May 2019); *Bukula v Nkosi* (41333/11) [2014] ZAGPJHC (20 October 2014); see also Christison and Hoctor 2007 *Obiter* 23 for the long history of the crimes comprising violation of a grave and violation of a dead body).

2 Historical background concerning burials

According to Roman law, if a corpse was buried on the land of a person who gave permission for the burial, the grave became *res religiosa* or *locus religiosus* (Inst. 2.1.9; C. 3.44.2. and D. 11.7.2.5; C. 3.44.4.1). It was a crime known as *sepulchri violatio* to violate a *locus religiosus* (D. 47.12.11). The exhumation of corpses or the disturbance of the bones was also listed under this crime. A further requirement was that the act of exhumation or the disturbance of the bones should have been done *dolo malo* (with malicious intent) (D. 47.12.3.pr. and 1). It thus seems as if it was not *sepulchri violatio* to re-bury a corpse or exhume a body if there was a just cause (*iusta causa*) for the act (D. 47.12.3.4 and C. 3.44.1).

De Vos quotes some Roman-Dutch law writers who argued that graves were not holy and that they could be owned and sold (De Vos “Grafskending” 1952 69(3) SALJ 297; Van Leeuwen R.H.R., 2.1.9). He also refers to the case of *Cape Town and District Waterworks Co. Ltd. v Executors of Elders* ((1890) 8 S.C. 9), in which Lord de Villiers concluded that the term *res religiosa* was not part of Roman-Dutch law. Even though the grave is not holy anymore, violation of a grave and violation of a corpse have been accepted as crimes in Roman-Dutch law and are therefore part of the common law in South Africa (see De Vos 1952 SALJ 297–306; Christison and Hoctor 2007 *Obiter* 23–43). If a body is exhumed with no malicious intentions and according to legislative requirements, as is discussed below, no crime is committed.

3 Ancestral beliefs

Followers of traditional African religions believe that ancestors maintain a spiritual connection with their relatives still living. Ancestors are held to be the deceased members of a family. Most ancestral spirits are generally good and kind. It is believed that if they are unhappy, they may cause minor illnesses to warn people they are on the wrong path. To please these unhappy ancestors, offerings of beer and meat are usually made. Ancestral worship is “founded on the belief that the dead live on and are capable of influencing the lives of those who are still living” (Bogopa “Health and Ancestors: The Case of South Africa and Beyond” 2010 *Indo-Pacific Journal of Phenomenology* 1). It is thus believed that ancestors have mystical powers and authority over the living. Traditional healers often facilitate communication between the living and the dead. Bogopa mentions an example that appeared in a newspaper. A 28-year-old man had been told to pay his father’s bride-wealth (*ilobola*) or else he must live with the consequences. The man was advised by a traditional healer (*sangoma*) that

his poor health was a direct result of his father's failure to pay *ilobola* for his mother. The ancestors were now holding him (the young man) responsible for the outstanding *ilobola* ("Outstanding Lobola" 1999 *City Press* 25 and "Son to Pay" 1999 *The Sunday Times*).

Lee refers to a man who could not attend his brother's funeral. He later heard that the corpse had fallen out of the coffin while on the way to the burial. Speaking through the man's dreams, the deceased brother stated that he was not comfortable. The man then consulted the elders of the family, as well as the ancestors, about his dreams. The dreams were interpreted to mean that the deceased wanted to be reburied with dignity at the family home (Lee "Death 'on the Move': Funerals, Entrepreneurs and the Rural-Urban Nexus in South Africa" 2011 *Africa* 239).

Lee also refers to funeral directors in Cape Town, who had noted a growing proportion of their business being taken up by exhumations, especially for re-burial at homes in rural areas. She states that the exhumation process is often initiated by a visitation by the dead person to a family member in a dream or a series of dreams. She gives an example of a father who "visited" his child while the child was sleeping. The father said: "I'm not sleeping well in this place. I'm getting cold". The child then went to dig him out, wrapped the bones in a blanket, bought a coffin and re-buried him at home. Lee concludes by saying that exhumation presents an opportunity for a prolonged conversation with the material remains of the body (Lee 2011 *Africa* 240–241).

The examples above are analogous to the case of the deceased pregnant woman who reportedly communicated to her mother, via the ancestors and the traditional healer, saying she is not comfortable in the grave with the fetus still inside her body. The request by the mother for an exhumation also seems to be constitutionally acceptable.

The Constitution of the Republic of South Africa, 1996 clearly states in Chapter 2 (the Bill of Rights) that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion" (s 15(2)). Section 30 states that "[e]veryone has the right to use the language and to participate in the cultural life of their choice". Section 9, the equality clause, also states that no one may discriminate directly or indirectly against anyone based on religion, conscience, belief or culture, among other criteria.

If the mother thus believes the ancestors communicated the discomfort of her daughter in the grave to her and that she must do something to assist the deceased, it should be accepted as a constitutionally valid reason to exhume the body of her daughter. Based on the mother's culture and her belief in the role of the ancestors, the remains of the fetus should be removed from her daughter's corpse and be cremated as requested by the deceased. Apart from the constitutionally valid reason for the request for the exhumation, there is other legislation with which the family should comply in order to effect the exhumation and cremation legally.

4 Legislation

4.1 *National Health Act 61 of 2003 (NHA)*

The NHA does not address the issues of exhumation or reburials directly but section 68(1) authorises the Minister of Health to make regulations regarding, among others, the disposal of human bodies. This has been done in the Regulations Relating to the Management of Human Remains, 2013 (GG No. 36473 of 2013-05-22). The Regulations address the exhumation and reburial of human remains directly. Regulation 26 of the Regulations determines that permission should be granted by the local government having jurisdiction in the location where the exhumation and reburial will take place. If, as in the example above, the remains of the fetus need to be cremated, a cremation permit should be sought from local government by a registered undertaker, who must be based in the same jurisdiction as the local government issuing the exhumation permit (reg 26(2) and (4)). To exhume human remains for cremation is legal (reg 23(3)) as is the reburial of the mother's remains in the same grave.

Whenever an exhumation is to take place, the officer-in-charge of the local government must inform the Provincial Commissioner of the South African Police Service (SAPS) (reg 27(1)(a)). A member of SAPS must be present while the exhumation takes place, as must the local government representative (reg 27(1)(b) and (c)). If human remains are to be removed from the grave, an environmental health practitioner (EHP) of the relevant health authority, or if not available, an EHP from another health authority, or in private practice, but registered with the Health Professions Council of South Africa (HPCSA), should also be present (reg 27(1)(d)). Only people with a direct involvement in the exhumation may be present and it must be done when the cemetery is closed to the public (reg 27(1)(c) and (e)). The EHP must see to it that all health requirements are met during the exhumation process (reg 27(f)). After the remains have been removed, the grave should be covered and sealed again.

4.2 *By-Laws*

As the Regulations (above) require the involvement of the local government in whose jurisdiction the exhumation takes place, notice should also be taken of the by-laws of the specific municipal area where the exhumation is to take place. As examples, the City of Tshwane Metropolitan Municipality Cemetery and Crematorium By-Law (published in the *Provincial Gazette Extraordinary*, 9 February 2005, Volume No. 42, Local Authority Notice 266), the City of Johannesburg Metropolitan Municipality Cemeteries and Crematoria By-Law (published under Notice 824 in *Gauteng Provincial Gazette Extraordinary* No 179 dated 21 May 2004) and the City of Cape Town: Cemeteries, Crematoria and Funeral Undertakers By-Law, 2011 (published in Province of Western Cape: Provincial Gazette no. 6898 on 2011-08-12) are analysed.

4 2 1 The Tshwane By-Law

Section 53 of the Cemetery and Crematorium By-Law of the Metropolitan Municipality of Tshwane states that human remains may be exhumed only if:

- “(1) the Premier of Gauteng, the Attorney-General or a magistrate and the reservation certificate holder authorise the exhumation in writing;
- (2) the authorisation contemplated in subsection (1) is handed to the [Strategic Executive Officer (SEO)] or his nominated representative in advance;
- (3) the family of the deceased person or the funeral director notifies the SEO or his nominated representative or the General Manager not less than three working days in advance of the date and time proposed for the exhumation;
- (4) the Senior Administrative Officer is present at the exhumation; and
- (5) at least one member of the South African Police Service, who must be notified by the family of the deceased person or the funeral director, is present at the exhumation.”

A “reservation certificate holder” is defined in section 1 as a person to whom the right to bury a corpse in a certain grave has been granted. A “Senior Administrative Officer” (SAO) is defined as the person appointed by the municipality to be the officer-in-charge of a cemetery or his or her duly authorised representative. The by-law further determines that the area where the exhumation will take place should be screened off so that the public cannot view the exhumation (s 54). Section 59 states that if an exhumation takes place to remove a corpse from a grave, the reservation certificate holder retains his or her rights in respect of the grave if the corpse is to be returned to that grave. The Tshwane Municipality also has a Fine Schedule for By-law Policing (September 2006 <http://www.tshwane.gov.za>). According to Code 91929, section 53(1), the approved fine for the execution of an exhumation without official permission by the Premier or the Attorney-General or a magistrate shall be determined by a court of law. In other words, there is no specified amount indicated as a fine, and fines may vary. The same stipulation applies to being present at an exhumation without written permission (Code 91930, s 56). If any of the instructions of the SAO or SAPS are disobeyed at an exhumation, the prescribed fine is R200.00 (Code 91931, s 58).

4 2 2 The Johannesburg By-Law

The Cemeteries and Crematoria By-Law of the City of Johannesburg Metropolitan Municipality states in section 20(1) that no person may exhume or cause to be exhumed a body without the written consent of the—

- “(a) Premier of the Gauteng Provincial Government;
- (b) the Council;
- (c) the provincial Department of Health;
- (d) the Administrator of cemeteries; and
- (e) the Council's Medical Officer of Health.”

Section 20 further determines that the officer-in-charge of the exhumation must inform the Provincial Commissioner of SAPS, as a member of SAPS must always be present when an exhumation takes place (s 20(2) and (3)). An exhumation must not take place when the cemetery is open to the public and only the undertaker, under the supervision of the officer-in-charge, may cause the grave to be excavated for an exhumation (s 20(4) and (5)). If a grave is to be excavated for exhumation, 48 hours' written notice must be given to the officer-in-charge and the administrator of cemeteries before the time of the exhumation, and a prescribed fee must accompany such notice (s 20(6)(a) and (b)). An "officer-in-charge" means the registrar of a crematorium appointed in terms of regulation 21 of the Regulations Relating to Crematoria and Cremations, made in terms of Ordinance No. 18 of 1965, and includes a person authorised by the Council to be in control of any cemetery (s 1).

In a document published online by the City of Johannesburg Parks division, it is stated that a seven-working-day period is required for administrative purposes before an exhumation may be carried out ("Exhumations" <http://www.jhbcityparks.com> (accessed 2019-09-19)). Permission for an exhumation must be obtained from the office of the Minister of Development and Planning, Gauteng. Permission must also be obtained from the Gauteng Provincial Department of Health, as well as the Medical Officer of Health of the metropolitan council. A fee for the exhumation and/or re-burial is payable at the office of the relevant cemetery. The Johannesburg Metropolitan Council also requires a certified copy of the deceased's death certificate when an application for the exhumation is made. Reference is also made to the Removal of Graves and Dead Bodies Ordinance 7 of 1925. According to this Ordinance, the following must be adhered to at all times: the Commissioner of the Municipal Police Service must be informed by the person executing the exhumation; graves older than 60 years or unknown will need approval from the South African Heritage Resource Agency (SAHRA); exhumation of these graves must be done under the supervision of an accredited archeologist; to get permits from the Provincial Government and SAHRA for unknown graves, there should be a full public participation/ social consultation process recorded. This includes newspaper advertisements in three local and provincial newspapers for a period of 30 days for response and on-site notices for a period of 60 days as well as door-to-door family interviews.

4 2 3 The Cape Town By-Law

The exhumation of bodies is addressed in Chapter 9 of the City of Cape Town: Cemeteries, Crematoria and Funeral Undertakers By-Law, 2011. According to section 45(1), an application for exhumation must be submitted to the City and should include an application form, a copy of the death certificate, a letter or affidavit from the next of kin of the deceased consenting to the exhumation and the prescribed fees should be paid. No exhumation may take place without the written consent of the City and the Provincial Department of Health (s 46(1)). These written documents must be submitted to the environmental health practitioner five working days prior to

the approved exhumation date (s 45(2)). An experienced environmental health practitioner and a registered funeral undertaker must be present at the exhumation (s 46(4)). If a re-burial or cremation is to take place, it should happen within 48 hours of the exhumation.

4 2 4 Summary

Different local authorities have different specific requirements –for example, the fees payable and who should or may be present during the exhumation. The Regulations in terms of the Act should be complied with, as it is national legislation. The Regulations state that permission for an exhumation is necessary from local government. In Tshwane, permission should be sought from the Premier, the Attorney-General or a magistrate and the reservation certificate holder. In Johannesburg, there is a list of five people who should give permission, but the Johannesburg by-law differs from the document on their website. The Cape Town by-law only states that the “City” must give permission. Thus, permission is essential although there is a difference in who should give permission. The Regulations also state that the Provincial Commissioner of SAPS should be notified, and that a member of SAPS should be present. This is therefore not negotiable at the local level and should be complied with. Finally, the Regulations require an EHP to be present at an exhumation and this should also be implemented at local level. The requirement of the presence of an EHP is not the case in the different by-laws.

5 The fetus

As the request to the funeral undertaker (in the subject case of this note) was to remove a fetus from the exhumed deceased body, it is also necessary to explain the position of a fetus in South African law. According to the Births and Deaths Registration Act 51 of 1992, a corpse “means any dead human body, including the body of any still-born child” (s 1). “Still-born” in relation to a child “means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth” (s 1). The relevance of these definitions is that if the fetus was in the deceased body for less than 26 weeks before the woman died, the fetal tissue should be seen and treated as medical waste. If the fetus was in her body for more than 26 weeks when she died, the fetus would be a stillborn baby (see Slabbert “Pregnancy Loss: A Burial or Medical Waste 2017 *THRHR* 102–112). It is the author’s argument that this should be irrelevant in the current scenario. The deceased only wanted the fetal remains to be removed so that she would be comfortable. This should be done irrespective of the gestational age of the fetus, which would by now have decomposed. If the grave is exhumed, the fetal material would most probably be found between the legs of the deceased. The gases that form part of decomposition would excrete the fetal material out of the dead body. What could be found might only be the little bones left of the fetus. If a cremation order is then granted, these remains should be cremated in the manner asked for by the deceased mother via the ancestors.

6 Conclusion

If a funeral undertaker gets a request such as the one described in this note, it should not be discarded as illegal or impossible to do. It is clear from our legislation that an exhumation for a valid reason is possible. The request to the funeral undertaker was thus valid. The wish of the dead mother communicated to her living relative is valid on constitutional grounds, as it is a cultural belief that the dead can communicate with the living; discrimination against such beliefs is prohibited. It thus seems clear that if the family follows the Regulations in terms of the NHA, as well as the by-laws in the jurisdiction where the exhumation would take place, that it could legally be done.

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