



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

Case No: 2025-238197

In the matter between:

DR TOLGAH BASSIER

Applicant

And

THE MOSLEM CEMETERY BOARD

Respondent

Coram: DA SILVA SALIE, J

Heard on: 24 March 2026

Delivered on: 24 March 2026

Summary:

Muslim community cemetery – restrictive title deed limiting use to burial – interpretation of burial (dafn) within context of waqf (religious endowment) – role of mutawalli (custodian) – whether construction of mortuary facility constitutes ancillary use – limits of

ancillary use and impermissible expansion beyond burial – governance of cemetery board – failure to convene AGMs for prolonged period – validity of 2020 constitution not decisive – breakdown of participatory governance – membership not confined exclusively to lineal descendants – proper construction of 1948 constitution – reconstruction and regularisation of membership through registration process – election of representative governing body – interdict against further development – structural relief and supervisory jurisdiction.

ORDER

1. The respondent is interdicted from completing or further developing the partially constructed structure pending compliance with paragraphs 4 to 6 of this order and pending any further order this Court may make upon consideration of the report contemplated in paragraph 7 below.
2. A final interdict is granted restraining the respondent from constructing, completing, operating or maintaining any mortuary facility on the cemetery property, such use being inconsistent with the purpose of the property as a burial place.
3. Any interpretation or practice by the respondent that treats membership as confined exclusively to lineal descendants, to the exclusion of other persons qualifying as set out herein, is declared invalid and of no force and effect.
4. The respondent shall, within 30 days of this order, initiate a process to notify the Muslim community of Cape Town and surrounding areas of the reopening and regularisation of membership registration. Such process shall include reasonable steps to ensure adequate public notice and shall permit persons who claim

qualification in terms of the 1948 Constitution, including by lineage or demonstrated interest in the cemetery, to apply for inscription in the membership register.

5. A Special General Meeting shall be convened within 60 days for the election of a governing body. Participation in such meeting shall be confined to persons duly registered as members pursuant to the process contemplated in paragraph 4 above.
6. The newly elected governing body shall determine the future of the structure, provided that any use is consistent with the purpose of the cemetery as a burial place and as defined in this judgment.
7. A report shall be filed with the Registrar of this Court c/o gmartin@judiciary.org.za within 90 days by the newly elected governing body, which report shall set out:
 - (a) The steps taken to comply with this order; and
 - (b) The outcome of the Special General Meeting; and
 - (c) Its determination regarding the partially constructed structure; and
 - (d) The matter shall be set down by the Registrar, before the presiding Judge, for further direction by this Court within 14 days from the date of receipt of the report. The parties may seek further relief on the same papers duly amplified as contemplated in paragraph 34.
8. The costs of mediation shall be borne equally by the parties and paid within 7 (seven) days of this order.

9. Each party shall bear its own costs.

JUDGMENT

DA SILVA SALIE J:

Introduction

“From the earth We created you, and into it We shall return you, and from it We will bring you forth once more.” (Quran - Surah Ṭā Hā 20:55)

مِنْهَا خَلَقْنَاكُمْ وَفِيهَا نُعِيدُكُمْ وَمِنْهَا نُخْرِجُكُمْ تَارَةً أُخْرَى

[1] This application concerns the use and administration of the Mowbray Moslem Cemetery, a site of longstanding religious, historical and communal significance. At its core lies the question whether the construction of a mortuary facility on the property is permissible within the confines of its governing instruments, most notably the title deed which restricts its use as a burial place.

[2] The founding instrument regulating the cemetery records a restriction in the following terms:

“The said Cemetery has been purchased and shall be used solely as a burial place for Moslems.”

[3] This restriction defines the purpose of the property and lies at the heart of the present dispute. It is common cause that the cemetery was acquired in 1886 specifically to provide a dedicated burial ground for members of the Muslim faith.

Background and governing framework

[4] The cemetery has historically been administered as a communal religious institution, associated with the burial of members of the Muslim community in accordance with Islamic rites, including the ritual washing of the deceased (*ghusl*) and burial in a burial shroud known as "*kafan*". The property bears the characteristics of an endowment (*waqf*), being dedicated to a defined religious purpose.

[5] The characterisation of the property as a *waqf* carries with it important legal consequences. Those who administer the cemetery do so not as owners, but as custodians or *mutawallis* (trustees), entrusted with preserving the property and ensuring that it is applied strictly in accordance with the purpose for which it was dedicated. Their powers are therefore not at large but are circumscribed by that purpose. Any deviation from, or expansion beyond, the defined purpose of burial is inconsistent with that custodial role. In this matter, *waqf* is vested in the respondent ("the Board").

The issues

[6] The essential issues for determination are:

- (a) whether the construction and operation of a mortuary facility fall within the permitted use of the property as a burial place, and

(b) whether the governance structures relied upon by the respondent justify or authorise such development.

[7] I firstly turn to the two Constitutions which form part of the subject of this dispute.

The 1948 Constitution of the Board:

[8] The 1948 Constitution regulates aspects of governance, including membership and administration. It recognises, inter alia, that membership may arise through lineage as follows:

“3. Whereas the “Registration Book” referred to in paragraph III of the said Annexure cannot now be traced, and is presumed lost or destroyed, it is declared and provided that a new Registration Book which has been compiled by the “Moslem Cemetery Board” at present functioning and administering the property, shall form the basis of the roll of “Members” now or hereafter interested or concerned in the said Cemetery, and entitled to a voice and vote in its administration.

4. Any Moslem of or above the age of 14 years, being:-

- (a) a survivor of those who originally subscribed or contributed towards the cost of acquiring the property...., or***
- (b) a lineal descendant of any such subscriber or contributor,***

shall (if his name be not already inscribed in the said Book), on payment of a nominal fee of Two Shillings and on satisfying the Board (hereinafter

referred to) of his qualification under (a) or (b) above, be entitled to have his name inscribed in the said Book, and, thereafter enjoy full rights and privileges as a Member, and no persons other than those whose name shall have been recorded in the said Registration Book shall have any such rights and privileges."

The 2020 Constitution of the Board (as amended):

[9] The respondent in turn relies on an amended Constitution adopted in 2020 as the source of its authority. The deponent of the answering affidavit for and on behalf of the Board, Mr. Faizal Sayed ("Mr. Sayed"), submits that on 23 April 2020 the Board adopted a new constitution which provides in express terms for the powers conferred upon the Board which services its management committee. Mr. Sayed is the chairperson of the management committee of the Board. The management committee has been bestowed power and authority in terms of the amended Constitution to achieve the objectives including to raise funds, or to invite and receive contributions. Additionally, it also has the power to buy, hire or exchange for any property that it needs to achieve its objectives as well as the power to raise and borrow money for the purpose of the organization and to invest and lend money of the organization on such terms as may be decided by the Board from time to time. It is on this basis that Mr. Sayed contends that the management committee has the authority to take all steps necessary for the construction of a mortuary. He further states that the mortuary is a logistical support measure for burial and not a change of purpose. The mortuary, he adds, is an infrastructure improvement for which approval is vested in the Board.

[10] The 2020 amendment is challenged by the applicant on the basis that it was not validly adopted in accordance with the governing provisions of the 1948 Constitution, including the requirement of adoption at a Special General Meeting (a "SGM"). Clause 17 of the 1948 Constitution requires the Board to convene an Annual General Meeting (an

“AGM”) in October of each and every calendar year. Clause 18 requires that notice of the AGM be published in at least two (2) newspapers at least seven (7) days before holding such a meeting. This ensures that members receive proper notice and can participate in governance decisions. Clause 22 provides that any twenty (20) members may requisition a SGM to consider matters of concern. The Board has failed to hold an AGM for over fifteen (15) years. This systematic failure is not without consequence.

Consequence of the Board's 15 years absence of AGM's:

[11] Whilst it is argued by the applicant that the 15-year absence of AGM's has created a governance vacuum in which the current management committee operates without a valid mandate from the membership, the question logically follows. How after such a long period of inaction, would such membership be considered?

[12] The applicant's argument about the invalidity of 2020 SGM appear to bear merit because the 1948 Constitution contemplated a participatory structure: annual general meetings, notice and a requisitioned SGM. A body purporting to amend the constitution or assume governance outside those mechanisms faces an immediately legitimacy difficulty. If I am with the applicant, the Court cannot simply revert to a readily ascertainable membership body under the 1948 Constitution. The prolonged non-observance of the Constitutional processes and AGM's gives rise to further difficulties. In these circumstances, the Court must avoid two extremes: it cannot ignore the procedural defects in the 2020 process, but neither can it assume that a fully functional and readily identifiable membership body in terms of the Constitution presently exists.

[13] In these circumstances, it is neither necessary nor appropriate to finally determine the precise historical composition of the membership body under the 1948 Constitution. The more appropriate course is to direct a process through which lawful and

representative governance may be restored in a manner consistent with that Constitution and the purpose of the cemetery, avoiding both a vacuum in co-ordinated membership and the uncertainty that would arise if the matter were left to the community to resolve without guidance. The appropriate remedy is therefore to direct a practical process through which the membership may be regularised and a representative governing body elected.

Ancillary use of the cemetery and its limits – The burial (dafn) and the mortuary:

[14] The respondent contends that the mortuary constitutes a facility ancillary or complementary to burial and that it serves the needs of the Muslim community in facilitating dignified burial practices. It further relies on the 2020 Constitution as authorising the development, and asserts that the facility is limited in scope, being described as a cold storage installation rather than a forensic or medical facility.

[15] Those contentions must be assessed against the restrictive condition in the title deed and the purpose for which the property was established.

[16] The Board submitted that the establishment of a mortuary facility is ancillary to the purpose of burial and therefore falls within the permissible scope of the organisation's objectives. This is the very basis upon which the respondent seeks to justify the development, contending that the mortuary constitutes an activity ancillary or complementary to the burial of deceased persons.

The expansion of activities under the guise of burial (dafn):

[17] I find this contention problematic. Whilst certain preparatory acts may be closely connected to burial, the concept of what is “ancillary” cannot be extended without limit. If accepted in the broad terms advanced, it would permit a progressive expansion of activities under the guise of burial, potentially encompassing functions far removed from the act of interment itself. The difficulty lies in identifying a principled boundary. On the Board’s approach, there would be little to prevent the inclusion of services such as pathology-related processes, hospital-linked functions, or the production and supply of burial-related materials, all on the basis that they are connected, in some attenuated way, to burial.

[18] This concern is not merely abstract. The annexures to the founding papers describe the proposed development as a refrigeration and body-storage facility, with associated technical installations designed to preserve and prepare bodies prior to burial. Clearly the construction and development extend beyond the act of burial itself and into preparatory and custodial processes which requires scrutiny before being characterised as merely ancillary.

[19] This is reinforced by a transcript of a radio interview annexed to the papers, in which a representative of the respondent describes the development as proceeding in phases, including what is referred to as “phase 1” and “phase 2” of the project. The reference to phased construction, and the articulation of the facility as part of a broader developmental plan, is indicative of a structured expansion of infrastructure rather than a limited or incidental adjunct to burial. It demonstrates that the project is conceived not as a minor or subordinate feature, but as a facility with its own operational scope and progression.

The Maqbarah (the cemetery) as a place of peace, tranquillity and dignity

[20] The language of the title deed, requiring that the property be used solely as a burial place, conveys more than a mere functional limitation. It reflects a conception of the cemetery as a dedicated and tranquil space in which the deceased are laid to rest and returned to the soil with dignity and minimal disturbance. A cemetery is, by its nature, a space that must remain safe, orderly and undisturbed, both to accommodate the processes of burial and to preserve the dignity of those who visit the graves of their departed. That character is difficult to reconcile with the development of phased infrastructure involving continuous activity, which introduces a different use to that which was originally contemplated.

[21] The concept of ancillary use must therefore be approached with caution in this context. Where property is subject to a restrictive condition requiring that it be used solely as a burial place, any ancillary use must be truly incidental and directly connected to the act of burial, and incapable of independent operation. This would include actions which bear a direct nexus to the act of burial such as an area or structure where the deceased body is prepared for burial by way of the ritual bath and placement of the *kafan* (*shrouds*).

[22] To accept the respondent's construction would permit a gradual expansion of the defined purpose of the property under the guise of ancillary use. Once storage is accepted as incidental to burial, there would be no principled basis upon which to exclude further facilities said to facilitate burial in an increasingly broad or modern sense. That would undermine the effect of the word "*solely*" in the restriction and erode the fixed purpose of the endowment. In these circumstances, the proposed facility cannot properly be characterised as incidental to burial but constitutes a distinct use which falls outside the purpose for which the property was set aside.

Governance and legitimacy of the Board:

[23] The authority of the existing Board must be assessed against its governing framework.

[24] It is common cause that no Annual General Meetings have been convened for a prolonged period, estimated at approximately fifteen years. The absence of these processes has resulted in the effective exclusion of members from participation in governance and undermines the framework through which authority is ordinarily renewed.

[25] The Constitution further provides that members and office bearers do not acquire any right, title or interest in the property, which is held in a custodial capacity for its defined purpose.

[26] The governance principles reflected in the respondent's Constitution accord with broader principles recognised in South African law governing bodies that hold and administer property for the benefit of others, including accountability, transparency and adherence to purpose.

[27] The respondent relies on a governing structure said to have been constituted pursuant to amendments adopted in 2020. The evidence does not establish that the broader Muslim community was called upon to participate in that process nor does the signatories to this amended Constitution indicate how the members had come to be such of the Board.

[28] A body of persons cannot assume control of a communal institution of this nature without recourse to mechanisms that ensure accountability to the community it serves.

The absence of a properly convened and inclusive process goes to the heart of legitimacy. There is no basis on the papers to conclude that the current board derives its authority from a representative process. In those circumstances, it cannot be regarded as a lawful or representative governing body.

Lineal descent

[29] Dr Bassier further argued that membership of the Board is confined to lineal descendants of certain founding families, including the Achmat, Davids, Hendricks, Khan and Maclick families, as reflected in the original subscriber records. That submission does not accurately reflect the structure of the 1948 Constitution. Whilst the 1948 Constitution recognises lineage as a basis upon which membership may be acquired, it does not create a closed or exclusively hereditary class. Membership is instead regulated through inscription in a registration book and is extended to persons "interested or concerned" in the cemetery, subject to qualification. Lineage thus operates as a qualifying criterion within a broader membership framework, and not as a mechanism for confining governance to a fixed group of descendants.

[30] The purpose of this restriction must be considered within the context of my views above regarding the reconstruction of membership and that the cemetery is *waqf* property for the Muslim community. The cemetery serves the Muslim community at large, which has evolved significantly since its establishment. With the growth of Islam amongst both local communities and foreign residents, the constituency to which the cemetery relates is not confined to the descendants of a limited number of founding families. The 1948 Constitution contemplates a living and evolving membership body, rather than a static or historically frozen class. This accords with the character of the cemetery as *waqf* property dedicated to the Muslim community. To interpret membership as confined exclusively to lineal descendants would not only be inconsistent with the text but would undermine the

participatory governance structure envisaged by the Constitution and disconnect the administration from the community it serves.

[31] The Constitution of the Republic of South Africa, 1996, guarantees equality and freedom of association. While voluntary associations may regulate membership, such regulation must be rationally connected to purpose. An interpretation that would exclude the broader Muslim community from meaningful participation in the governance of the cemetery would lack justification and cannot be sustained.

[32] In light of the above, the construction, completion or operation of a mortuary facility on the cemetery property constitutes a use inconsistent with the restrictive condition in the Title Deed. In the circumstances, the application has established a clear right, an injury actually committed or reasonably apprehended, and the absence of any alternative satisfactory remedy. It follows that such use cannot be permitted and the interdict must be made final.

Conclusion

[33] The deficiencies in the governance of the Board, the need for an updated Constitution as well as the impermissible expansion of the use of the property warrant intervention by this Court to restore lawful administration and preserve the purpose of the cemetery.

[34] The parties are granted leave to supplement their papers, on the same papers duly amplified, for the purpose of seeking any further or ancillary relief necessary to implement this order, including relief directed at the assumption of control over the respondent's

affairs, bank accounts, financial books of account, financial records, and to ensure compliance with any other statutory, regulatory and/or tax obligations.

Costs

[35] The matter concerns a communal religious institution and raises issues extending beyond the immediate interests of the parties. The parties cannot be said to have acted in bad faith. When the matter was heard on 26 February 2026, both parties agreed to engage in mediation in an endeavour to resolve the issues in dispute. In the premise I appointed attorney, Mr. Igshaan Higgins, as mediator in line with a directive setting out the terms of such mediation. As per the mediation certificate filed with this Court on 12 March 2026, the parties engaged with the mediation process as directed.

[36] However, a mediated resolution of the issues between the parties was not achievable. The mediation process spanned over a lengthy period, with the interim order extended in light of the parties' joint request to engage in mediation attempts. Mr Higgins addressed the Court during this hearing that the matter could not be resolved notwithstanding the attempts of both parties to come to a resolution. Consequently, the parties advised that they require the adjudication of this Court in accordance with paragraph 6 of the directive.

[37] I am satisfied that the mediation attempts by both parties were in good faith although it did not yield a resolution. The circumstances reflect a genuine dispute of a broader communal nature in which both parties sought to vindicate what they considered to be the proper administration of the cemetery. In the result it is appropriate that the parties equally share in the costs of mediation. However, given the nature of the issues, the absence of mala fides and the fact that the litigation was directed at clarifying the lawful use and governance of the cemetery, each party shall bear its own costs of suit.

[38] In these circumstances, each party shall bear its own costs.

Order

[39] For the reasons set out herein, the following order is made:

[39.1] The respondent is interdicted from completing or further developing the partially constructed structure pending compliance with paragraphs 39.4 to 39.6 of this order and pending any further order this Court may make upon consideration of the report contemplated in paragraph 39.7 below.

[39.2] A final interdict is granted restraining the respondent from constructing, completing, operating or maintaining any mortuary facility on the cemetery property, such use being inconsistent with the purpose of the property as a burial place.

[39.3] Any interpretation or practice by the respondent that treats membership as confined exclusively to lineal descendants, to the exclusion of other persons qualifying as set out herein, is declared invalid and of no force and effect.

[39.4] The respondent shall, within 30 days of this order, initiate a process to notify the Muslim community of Cape Town and surrounding areas of the reopening and regularisation of membership registration. Such process shall include reasonable steps to ensure adequate public notice and shall permit persons who claim qualification in terms of the 1948 Constitution, including by lineage or

demonstrated interest in the cemetery, to apply for inscription in the membership register.

[39.5] A Special General Meeting shall be convened within 60 days for the election of a governing body. Participation in such meeting shall be confined to persons duly registered as members pursuant to the process contemplated in paragraph 39.4.

[39.6] The newly elected governing body shall determine the future of the structure, provided that any use is consistent with the purpose of the cemetery as a burial place and as defined in this judgment.

[39.7] A report shall be filed with the Registrar of this Court c/o gmartin@judiciary.org.za within 90 days by the newly elected governing body, which report shall set out:

- (a) The steps taken to comply with this order; and
- (b) The outcome of the Special General Meeting; and
- (c) Its determination regarding the partially constructed structure; and
- (d) The matter shall be set down by the Registrar, before the presiding Judge, for further direction by this Court within 14 days from the date of receipt of the report. The parties may seek further relief on the same papers duly amplified as contemplated in paragraph 34 above.

[39.8] The costs of mediation shall be borne equally by the parties and paid within 7 (seven) days of this order.

[39.9] Each party shall bear its own costs.

A large, stylized handwritten signature in black ink, appearing to read 'Gayaat da Silva Salie', is written over a horizontal line.

GAYAAT DA SILVA SALIE

JUDGE OF THE HIGH COURT

WESTERN CAPE DIVISION

Appearances

For Applicant: Adv. Marius Botha
Instructed by: Louw & Coetzee Attorneys

For Respondent: Adv. D J Jacobs SC
Instructed by: Albertus Law Attorneys