THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 30/05
Reportable

In the matter between :

M DLAMINI AND ANOTHER — APPELLANTS

and

P J JOOSTEN AND OTHERS — RESPONDENTS

CORAM : HARMS, STREICHER, JAFTA, MLAMBO JJA *et* CACHALIA AJA

HEARD : 10 NOVEMBER 2005

DELIVERED : 30 NOVEMBER 2005

Summary: In the Extension of Security of Tenure Act, 62 of 1997, meaning of 'land' determined by reference to its cadastral description ─
'Established practice' ─
- Once an 'established practice' for burials exists, a landowner or person in charge may not unilaterally terminate the practice.

JUDGMENT

CACHALIA AJA/

CACHALIA AJA:

[1] The first and second appellants are the husband (now widower) and son of the deceased, Gertrude Ntombi Zondi. They sought an urgent order in the Land Claims Court (LCC) that they be permitted to bury the deceased at the Dlamini family burial site on the farm Bockenhoud Fontein (Bockenhoud), alternatively that they be permitted to bury her at a burial site on the farm Sandspruit. They based their cause of action on section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (the Act)[1]. Introduced by amendment[2] in 2001, the section permits an 'occupier' who resides on land, which belongs to another person:

'to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists;'

An 'established practice' is defined in section 1(1) of the Act to mean:

'A practice in terms of which the owner or person in charge or his or her predecessor in title routinely gave permission to people residing on the land to bury deceased

[1] The appellants, in addition relied on section 6(5) of the Act, but eschewed any reliance thereon in this appeal. In the founding papers the first appellant also made out a case that he was a labour tenant in terms of the Land Reform (Labour Tenants) Act 3 of 1996. However as there were material disputes of fact the appellants did not pursue this cause of action in the LCC. In the circumstances the appellants did not persist with that case in the LCC.

[2] Inserted by s 7(a) of Act 51 of 2001.

members of their family on that land in accordance with their religion or cultural belief.'[3]

[2] The LCC (Bam JP) refused to permit the burial, but granted leave to appeal against its decision to this court. In the interim, the deceased was buried elsewhere. The appellants however reserved their right to apply to the provincial authority for the exhumation of the deceased's remains for reburial should the appeal succeed.[4] Accordingly, in these proceedings, the appellants seek a declaratory order that they are entitled to bury the deceased on either of the farms. The appeal has crystallized around three issues:

(i) whether the word 'land' as used in s 6(2)(dA) is confined to its cadastral description or has a different meaning because, unless it has a wider meaning, the deceased cannot be buried on Bockenhoud;

(ii) if the deceased cannot be buried on Bockenhoud whether the appellants had proved that it was 'in accordance with their religion or

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[3] Section 1 of the Act Provides
Definition
'…
'occupier' means a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—
…
'owner' means the owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder in by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land.'

[4] The application may be made in terms of s 20(3) of the KwaZulu-Natal Cemetries Act, 12 of 1996.

cultural beliefs' for the deceased to be buried on the farm Sandspruit; and if so

(iii) whether the respondents were entitled to terminate the appellants' right to bury the deceased on Sandspruit unilaterally, once burials had become an established practice.

[3] Before dealing with these issues it is necessary to embark upon a brief excursus of the relevant facts. Members of the Joosten family own three farms adjacent to each other in the New Hanover area of KwaZulu-Natal, and have so for generations. The farms are Bockenhoud, Sandspruit and Mount Elias. Each farm is registered as a separate piece of land. Bockenhoud is owned by Hogard Joosten, the father of three sons, Philip, Andre and Manfred. He inherited the farm from his parents in 1981, but had farmed it for his own account from 1965 until 1995.

[4] Sandspruit and Mount Elias are owned by Andre and Philip respectively, having been purchased from their father in 1995. The brothers farm their respective farms each for his own account.

[5] The closely-knit family reside in three family homes within a kilometre of each other on two of the three farms. The Joostens are not only well aware of what takes place on each of their farms, but conduct

farming operations in consultation with each other. They also share the same labour force.

[6] The first appellant's late parents lived on Bockenhoud and worked for Hogard. They are buried at a burial site on that farm. The first appellant and the deceased were employed by Hogard and resided on Bockenhoud since 1974. At the time Bockenhoud and Sandspruit were farmed as a single unit. In about 1986, the first appellant and the deceased, at Hogard's instance, moved willingly from their homestead on Bockenhoud to a new homestead on Sandspruit. The first appellant's parents remained on Bockenhoud.

[7] Over the years Hogard allowed the Dlamini family to bury their dead at a burial site on Bockenhoud, some 50 meters from their homestead, where the first appellant's parents are buried. There are other burial spots on the farm where two other families have also buried their deceased.

[8] The Joostens have also routinely given permission for various families living on Sandspruit to bury their dead on that farm. One Dlamini, a child, is buried there and the last burial that took place here was of an infant from the Mzizi family. In July 2002 Andre informed them

that the practice of allowing burials on Sandspruit would henceforth be stopped. There have been no further burials on this farm since then.

[9] When the deceased died at the Dlamini homestead on 5 June 2004, Philip, who was temporarily in charge of the farm while Andre was abroad, refused permission for the burial on the farm precipitating the present dispute.

[10] I turn to a consideration of the first of the issues referred to above, whether the word 'land' is confined to its cadastral description, as the court *a quo* found, or whether, depending on the circumstances of a particular case, it may have a different meaning, as contended by the appellants. The respondents' case is that because the Dlamini burial site is on Bockenhoud, the appellants are not entitled to bury the deceased there because the deceased did not reside on the farm; at the time of her death she and her family resided on Sandspruit, which is adjacent to Bockenhoud. The two farms have distinct cadastral boundaries on the Surveyor General's map and are registered as separate farms.

[11] Having left their homestead in Bockenhoud in 1986, long before the amending Act was passed in 2001, it is apparent that the Dlamini family can claim no right to bury deceased members of their family on

Bockenhoud if the respondents' contention that Bockenhoud and Sandspruit are distinct pieces of land is correct. This is because s 6(2)(dA) of the Act explicitly confers on people residing on land burial rights in respect of a deceased family member who was an occupier of the land, only on the land where the occupier and the deceased family resided at the time of the deceased's death. The fact that the first appellant and the deceased resided on Bockenhoud before the amending Act was passed does not avail them because the Act did not create rights retrospectively.

[12] To overcome this hurdle, the appellants were driven to contend that the word 'land', as it is used in the Act, need not be confined to its cadastral description, but may be described differently, depending on the facts of a particular case.

[13] In the instant matter the appellants contend that considerations other than the boundaries of the land registered in the deeds office must be taken into account in deciding whether an occupier can claim any rights on it. They submit that the three farms must be regarded as the same land because they have effectively been farmed by the father and sons as a single unit; that it had not been apparent to the first appellant

which of the Joostens was responsible for farming particular portions of the farm; that the boundaries between the farms were neither material nor apparent; and that the first appellant worked on the farms Bockenhoud and Sandspruit never appreciating that they were different parcels of land.

[14] The contention that the meaning of words in a statute may vary, depending on the facts of a particular case, has no legal foundation. The word 'land' is not defined in the Act. But it is apparent that in the context within which it is used, it can refer only to land that is registered in the name of an owner. This is because the Act regulates the relationship between occupiers of land and owners of the same land.[5]

[15] A right of burial may be claimed by an occupier of land only where a practice has been established by the routine granting of permission for such a practice by the owner or person in charge of the land (s 6(2)(dA)). A person is quite clearly not lawfully entitled to grant permission for burial on land which he does not own or is not 'in charge of'. The fact that the owners of adjacent land are related to each other, as in this case, is irrelevant, as is the fact that the appellants subjectively believed

[5] Chapter III (sections 5 – 7) sets out the 'Rights and Duties of Occupiers and Owners.'

that the farms were on the same land, understandable though this belief may have been.

[16] The burial right in s 6(2)(dA) of the Act is an incidence of the right of residence contained in s 6(1), which creates a real right in land. Such a right is in principle registrable in a Deeds Registry because it constitutes a 'burden on the land' by reducing the owner's right of ownership of the land and binds successors in title.[6] The burial right is in the nature of a personal servitude which the occupier has over the property on which he possesses a real right of residence at death of a family member who at the time of death was residing on the land. These rights are claimable against the owners of registered land only. And the only objective determination of the extent of the land which has been registered by an owner is by reference to its cadastral description.

[17] It follows that the court *a quo* was correct in its view that Bockenhoud and Sandspruit are separate pieces of 'land' for the purposes of the Act. Accordingly the appellants have not established a right to bury the deceased on Bockenhoud.

[6] Section 24(1) of the Act provides that 'The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned'. See further G Budlender, J Latsky and T Roux '*Juta's New Land Law*' 1 ed 1998 p 7A-19, n2.

[18] In regard to the second issue, whether it was proved that it was in accordance with the appellants' religious and cultural belief for the deceased to be buried on Sandspruit, the court *a quo* held that no such case was made out in the papers as the Dlamini's were buried at the gravesite on Bockenhoud, not Sandspruit. And, so that court reasoned, even though the practice was established for other families on Sandspruit, the appellants could not rely on that established practice in respect of the deceased.

[19] In so deciding the court *a quo* erroneously interpreted s 6(2)(dA) to require the established practice to relate to a particular family whereas the section clearly links the 'established practice' to 'people residing on the land'. It is not confined to particular families. The respondents were therefore correct in conceding that the court *a quo's* interpretation of the section is wrong.

[20] Nevertheless, they persisted with the submission that the case made out in the appellants' papers is that the deceased must be buried at the site on Bockenhoud where the Dlamini ancestors are buried, and not Sandspruit. I am unable to agree with this contention.

[21] The appellants' case is that it is a religious or cultural belief that

deceased members of their family must be buried close to their homestead so that the spirits of their ancestors might be close to them.[7] This belief is set out expressly in the first appellant's founding affidavit where he states:

'It was and is extremely important to my late wife and I that we were entitled to bury our deceased family members near our home on the farm, as it is a cultural imperative for us that our ancestors and our family members are buried close to our home.'

This the respondents admitted. Since the Sandspruit burial site is closer to the appellants' homestead than the Bockenhoud site, the requirement has clearly been met.

[22] I turn to the third and final issue, whether an owner is entitled to terminate an established practice unilaterally as Andre purported to do in July 2002. The respondents contended that because an established practice can come into existence only after the owner or person in charge has routinely given permission for burials to take place on the property, it follows that such permission may be withdrawn by the owner. Put another way, the contention was that the granting of permission, being a unilateral act on the part of the owner, may likewise be

[7] Cf. *Nhlabathi and others v Fick* [2003] 2 All SA 323 LCC at 336h-i.

unilaterally terminated.

[23] Prior to the introduction of s 6(2)(dA), landowners were not obliged to permit occupiers to have further graves on their land upon request. The law as stated by this court in *Nkosi and another v Bührmann* 2002 (1) SA 372, (SCA) at 389A-B was that:

'(D)espite the recognition in s (6)(4) of the sanctity of existing family graves and despite the reduction of the rights of ownership to the extent demanded by the exercise of the rights conferred in s 6, the Legislature stopped short of obliging owners to accept against their will the creation of further graves. Had it been the Legislature's intention to impose that burden by granting occupiers the corresponding right it would not have occasioned any real drafting problem to say so expressly. It is improbable that the creation of that right was left to a matter of obscure inference.'

[24] The Legislature introduced s 6(2)(dA) to deal with this lacuna by 'obliging owners to accept against their will the creation of further graves'. The obligation however only arises if the owner has routinely granted permission for burials, resulting in an established practice. But once a practice has been established, a right is conferred on an occupier to bury a deceased family member who, at the time of that person's death, as is the case in the instant matter, was residing on the land on

which the occupier was residing. The respondents cannot be correct that such a right may be withdrawn unilaterally, because, if this were so, the entire purpose of the amendment would be rendered nugatory.

[25] As mentioned earlier, the Act grants to an occupier a real right in land that belongs to another person. And the right of an occupier to bury a deceased family member on such land is an incidence of this right. The withdrawal of consent by an owner for an occupier to bury a deceased family member is therefore an unlawful deprivation of this right.

[26] It follows that once it is accepted that an established practice to bury deceased persons on Sandspruit came into existence, and I do not understand the respondents to contend otherwise, the appellants were entitled to bury the deceased there.

[27] The court *a quo* made no costs order and neither party sought any costs in this court. In the result the appeal is upheld and the order of the court *a quo* amended accordingly. The following order is made:

(i) The appeal succeeds.

(ii) The order of the court below is set aside and substituted with the following:

It is declared that the applicants are entitled, in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 to bury the body of Gertrude Ntombi Zondi in the burial site on the remainder of the farm Sandspruit No. 1920.

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A CACHALIA
ACTING JUDGE OF APPEAL

Concur: Harms JA
Streicher JA
Jafta JA
Mlambo Ja