THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 440/2011
Reportable

In the matter between:

MICHAEL HATTINGH	**First Appellant**
EDWINA JUNITA HATTINGH	**Second Appellant**
PIETER HATTINGH	**Third Appellant**
and	
LAURENCE EDWARD JUTA	**Respondent**

Neutral citation: *Hattingh v Juta* (440/2011) [2012] ZASCA 84 (30 May 2012)

Coram: Navsa, Nugent and Leach JJA

Heard: 18 May 2012

Delivered: 30 May 2012

Summary: Family's cultural rights under s 6(2)(*d*) of ESTA – what constitutes – section envisages rights of an associative nature.

O R D E R

On appeal from: Land Claims Court, held at Cape Town (Meer J and Gildenhuys J):

1. The appeal is dismissed.
2. The dates 12 May 2011 and 13 May 2011 in paras 1 and 2 of the order of the court a quo are amended to read 31 August 2012 and 1 September 2012, respectively.
3. There will be no order as to the costs of this appeal.

J U D G M E N T

LEACH JA (NAVSA AND NUGENT JJA CONCURRING):

[1] The issue in this appeal is whether the appellants were correctly evicted from a worker's house on a smallholding known as Fijnbosch farm in the district of Stellenbosch ('the farm') that is owned by the respondent.[1] The appellants have since December 2002 resided in the house together with the mother of the first and third appellants. On 10 May 2010 the Stellenbosch Magistrate's Court dismissed an application brought by the respondent to evict the appellants from the house. The respondent thereafter successfully appealed to the Land Claims Court which, on 30 March 2011, set aside the magistrate's order and substituted an order directing the appellants to vacate by 20 May 2011. With leave of the Land Claims Court, the appellants now appeal to this court against that order.

[2] The first and third appellants are brothers, the sons of Mrs Magrieta Hattingh, a woman in her mid-sixties. The second appellant is the first appellant's wife. At the time of the institution of the eviction proceedings in the magistrate's court, the first and second appellant's were both 29 years of age, while the third appellant was 37

1 More fully described as 'Portion 9 (a portion of portion 2) of the farm Mendoza No 512, in the Municipality and Division Stellenbosch, Province Western Cape in extent: 1,4286 hectares'.

years old. The first and second appellants have either two or three minor children (the papers are contradictory) who also live with them.

[3] The respondent purchased the farm in 2002. At that time Mrs Hattingh was working for him as a domestic servant in his home in Stellenbosch, having been employed in this capacity since approximately 1994. After taking occupation of the farm, the respondent built himself a residence there, which was only completed in December 2003. However there was a worker's house on the farm which the respondent agreed to allow Mrs Hattingh and her husband to use, and they moved in during December 2002. Although Mrs Hattingh only resumed full time employment with the respondent once his house had been completed, she continued to receive her full salary. The respondent also employed her husband as a gardener for a period.

[4] Mrs Hattingh continued in the respondent's employ until the end of 2005. The respondent avers that he ended her employment at that time as her health had deteriorated and she was unable to work. The appellants deny this, and allege that the termination of her employment occurred without any valid reason. It is unnecessary to determine this dispute for purposes of the present enquiry as it is common cause that, after her employment came to an end, the respondent allowed her to continue living in the worker's house with her husband who was in poor health until he died from lung cancer in 2006. She continues to reside in the worker's house to this day, not as an entitlement flowing from her employment with the respondent but solely due to his generosity and consent.

[5] I turn to consider the position of the appellants. At the time the respondent purchased the farm, the appellants were living on another farm in the district owned by a Mr Nico Mostert. How long this had been the case and under what circumstances they came to be living there, is not disclosed in the affidavits. It is not clear whether Mrs Hattingh and her husband were living with them, although that may well have been the case. It is also not clear whether the appellants moved onto the respondent's farm at the same time as Mrs Hattingh or shortly thereafter, although that is neither here nor there for present purposes. What is clear is that in December 2002, the same month in which Mrs Hattingh moved to the farm, they did

so too and have remained residing there ever since.

[6] According to the respondent, he allowed the appellants to move onto the farm on condition that they remained there for no longer than three months. This the appellants deny. While it is common cause that the second appellant worked for the respondent for a period, there is a dispute as to whether he had also employed the first and third appellants at any time. They allege that he did, but he denies this. Again it is unnecessary to resolve this dispute. What is common cause is that when the eviction application was launched all three appellants were working for different employers in Stellenbosch.

[7] It is also common cause that when Mrs Hattingh moved onto the farm her third son, Ricardo, was at school at Graaff–Reinet. During his school holidays he returned home from time to time and lived on the farm with his parents. After leaving school Ricardo returned to Stellenbosch where he was able to find both work and accommodation in the town. However, when he changed jobs and took up work with an employer who did not provide accommodation, he too went to live with Mrs Hattingh and the appellants in the worker's house on the respondent's farm. It must immediately be recorded that the respondent does not seek to have Ricardo evicted and, as counsel for the respondent confirmed from the bar, is happy to allow him to reside with his mother.

[8] The worker's house on the farm where the appellants live consists of two interlinked units which were altered when they moved onto the farm to become effectively a single house. Since September 2006 the respondent has employed a Mr Gert Willemse as a general labourer and is of a mind to restore the house to its original condition of two living units with the intention to accommodate Mr Willemse in the one and Mrs Hattingh and Ricardo in the other. It was for this reason that he sought to evict the appellants.

[9] In seeking to avoid eviction the appellants do not purport to rely upon any rights that they themselves hold under the Extension of Security of Tenure Act 62 of 1997 ('ESTA'). Instead they contend that they are entitled to remain on the property

by virtue of Mrs Hattingh who is an 'occupier' under ESTA, being entitled to exercise her rights as such under s 6(2)(*d*) thereof which provides:

'Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right ─

. . .

(d) to family life in accordance with the culture of that family . . .'[2]

[10] It is the meaning of the phrase 'family life in accordance with the culture of that family' that lies at the heart of the dispute between the parties. In considering the issue, the court a quo took into account s 8(5) of ESTA which extends a right of residence to only a spouse or dependant of an occupier who dies, and commented that restricting family members only to those persons is an equitable formulation '[f]or were it otherwise, landowners would have the onus and intolerable burden of housing adult members or occupiers' extended families indefinitely'. It therefore concluded that while in a specific situation a wider interpretation, which would permit other family members to reside with an occupier, could be accorded under the right to family life protected by s 6(2)(*d*), in such a case evidence in support of a wider interpretation would be necessary. It then proceeded to then rule against the appellants on the basis that they had failed to prove that family life as envisaged by their culture entitled them to reside with Mrs Hattingh, and that they were therefore not protected from eviction.

[11] The appellants did not seek to impugn the approach that it was incumbent upon them to prove the cultural basis under s 6(2)(*d*), upon which they rely to avoid eviction from the respondent's farm, and it is thus unnecessary to decide whether the court a quo's reasoning in this regard was correct. However I certainly think that it would hardly require evidence to prove that a wife and minor dependants were family of an occupier, and a nuclear family of that nature would surely be regarded as a 'family' as envisaged by s 6(2)(*d*). But that is not the issue in the present case; it is whether the extended Hattingh family reside together in accordance with its culture.

[12] In arguing this to be the case, counsel for the appellants submitted that the

2 There is a proviso to the subsection which is of no relevance to the present debate.

concept of 'culture' as envisaged in s 6(2)(*d*) should be broadly interpreted and was in no way limited to considerations of race, ethnicity, religion, language and community. Rather he submitted that each family had to be considered individually to determine its culture, being the way in which it lived, and that although this might well be influenced by race, ethnicity, language, religion and the values and practices of the local community, such factors would not be determinative.

[13] Essentially the appellant's argument was that 'culture' as envisaged by s 6 was not a matter of association — rather it is a reflection of the ethos of the family itself and the way in which it lived — and is, as counsel for the appellant put it, 'family sensitive'. Thus, so it was argued, the history of the appellants showed that they were members of a caring family who looked after and supported each other; who had lived together sharing the same accommodation for years; and who had been prepared to share their home with members of their extended family when the need arose, as it had when Ricardo changed employment and needed somewhere to live. These were their shared values which evidenced their culture. And as they lived together as part of that family culture, their continued residence on the farm was protected by s 6.

[14] In construing s 6, the importance of family and family life must be borne in mind. South Africa has ratified the International Covenant on Civil and Political Rights, art 23(1) of which recognises that the family 'is the natural and fundamental unit of society' entitled to protection by society and the state. Article 18 of the African Charter on Human and People's Rights contains a similar provision, and in art 8 of the European Convention on Human Rights and Fundamental Freedoms provision is made for the recognition and protection of a person's 'right to respect for his private and family life, his home and his correspondence'. In *Huang v Secretary of State for the Home Department*[3] Lord Bingham, dealing with the core value of this latter article in an immigration context, commented:[4]

'Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially.'

3 *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (HL); [2007] UKHL 11.
4 At para 18.

[15] In the *Certification of the Constitution of the Republic of South Africa* case[5] the Constitutional Court, after recording that a survey of various national constitutions throughout the world shows that there to be no universal acceptance of a right to family life as fundamental in the sense that it required express constitutional protection, went on to observe:[6]

'The absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right . . . to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, . . . These are seen as questions that relate to the history, culture and special circumstances of each society, permitting no universal solutions.'

[16] Although the Constitutional Court found it unnecessary to constitutionally entrench the right to family life, which it felt was adequately protected by other provisions, it has subsequently recognised it as being a concomitant of the right to human dignity entrenched in s 10 of the Constitution: see eg the judgment in *Dawood & another v Minister of Home Affairs & others.*[7]

[17] Although the word 'family' is incapable of having a precise legal connotation or definition, it is apparent from what I have said that a right to family life is inherent in the fundamental right to human dignity enshrined in the Constitution. And, as enjoined by decisions such as *Bato Star Fishing,*[8] it is the Constitution which provides the backdrop when seeking to interpret sections such as s 6(2)(*d*).

[18] In considering the concepts of family life and culture through the prism of the

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5 *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).
6 At para 99.
7 *Dawood & another v Minister of Home Affairs & others*; *Shalabi & another v Minister of Home Affairs & others*; *Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) at paras 28-37.
8 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 90. See further *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

Constitution, the decision in *Pillay,*[9] a case to which we were most surprisingly not referred to by the parties, is instructive. In that matter the Constitutional Court was called on to deal with the issue of discrimination under s 6 of the so-called Equality Act[10] in order to consider whether a learner of Hindu descent had been discriminated against by not being permitted to wear a nose-stud to school. That section reiterates the prohibition in ss 9(3) and 9(4) of the Constitution against unfair discrimination on a number of grounds, including culture. In this context the court were unanimous that the concept of 'culture' resisted any precise definition but in both the majority judgment of Langa CJ (with whom the other members of the court, save for O'Regan J concurred) as well as O'Regan J's partial dissent, it was concluded that culture was an inherently associative practice and that, while differing from religion, cultural practices are often influenced by religious practices. But, as Langa CJ observed, 'culture generally relates to traditions and beliefs developed by a community'.[11] The learned Chief Justice went on further to hold:

' . . . cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people. The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises "communality and the interdependence of the members of a community" and that every individual is an extension of others. According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons". This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.' (Footnotes omitted).

[19] In her judgment O'Regan J stated that a cultural practice is 'about a practice pursued by individuals as part of a community'.[12] Indeed, as appears from her

9 *MEC for Education, KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC).
10 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
11 Para 47.
12 Para 147.

judgment, she was concerned that the approach of the majority judgment did not sufficiently acknowledge the associative nature of cultural practices and that the right to cultural life is a right to be practiced, not primarily as a sincere but personal belief, but as a member of the community. She then went on to state: [13]

'Nevertheless, the need to investigate whether a particular property asserted practice is shared within the broader community, or portion of it and therefore understood as a cultural practice rather than a personal habit or preference, is central to determining whether a cultural claim has been established,'

and that:[14]

'My understanding of how our Constitution requires us to approach the rights to culture, therefore, emphasises four things: *cultural rights are associative practices*, which are protected because of the meaning that shared practices give to individuals and *to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality*; an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society . . .'(Emphasis added).

[20] As is apparent from both judgments in *Pillay*, a person's culture as envisaged by the Constitution is clearly not a matter of such person's individual practice but a matter of association and practices pursued by a number of persons as part of a community. As O'Regan J concluded, the 'anthropological conception of culture which refers to the way of life of a particular community' is the concept of culture referred to in ss 30 and 31 of the Constitution, and that the rights in those sections are 'associative rights exercised by individual human beings' which 'bolster the existence of cultural, religious and linguistic groups so long as individuals remain committed to living their lives in that form of association'.[15] And while the majority judgment may have placed less emphasis on the associative nature of cultural practices, in a comment particularly damaging to the appellants' contention Langa CJ, warned that 'if too wide a meaning is given to culture "the category becomes so broad as to be rather useless for understanding differences among identity

13 Para 154.
14 Para 157.
15 Para 150.

groups"'.[16]

[21] The right to a family life in accordance with the family's 'culture' in s 6 of ESTA is clearly a reflection of the fundamental rights set out in ss 30 and 31 of the Constitution, namely, that every person has the right 'to participate in the cultural life of their choice' and to 'enjoy their culture' with other members of a cultural, religious or linguistic community.[17] Bearing that in mind, the finding in *Pillay* that cultural rights protected by the Constitution are clearly associative in nature is fatal to the appellant's argument that culture as envisaged in s 6(2)(*d*) of ESTA was non-associative and fell to be determined solely by the manner in which Mrs Hattingh and her extended family lived their lives. As the court a quo correctly found, the appellants did not seek to establish a cultural practice of association as envisaged by the Constitution to show that they that they and Mrs Hattingh were enjoying family life in accordance with the culture of their family. Indeed counsel for the appellants conceded that in the event of this court finding that culture was a matter of association shared by at least a portion of the community, the appeal must fail.

[22] In the order of the court a quo, the appellants were given until 12 May 2011 to vacate the premises and, in the event that they failed to do so, the sheriff, with effect from the following day, was authorised to take the necessary steps to evict them. That order has been overtaken by events and, even though the appeal must fail, it is necessary to amend its terms to afford the appellants the adequate opportunity to arrange other accommodation. The parties were agreed that it would be fair to allow the appellants a period of some three months to do so. As this judgment will be delivered before the end of May 2012, this can be achieved by amending the dates

16 The quotation used by the learned Chief Justice is from Gutmann *Identity in Democracy* (Princeton University Press 2003) at 38.

17 The sections read as follows:

'30. Language and culture. ─ Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities. ─

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community ─

(*a*) to enjoy their culture, practise their religion and use their language; and

(*b*) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

in the order to 31 August 2012 and 1 September 2012, respectively.

[23] Finally, dealing with the question of costs, the respondent who has at all times behaved with the utmost consideration towards Mrs Hattingh and her extended family, did not seek a costs order against the appellants. For this he is to be commended.

[24] In the result the following order is made:

1. The appeal is dismissed.
2. The dates 12 May 2011 and 13 May 2011 in paras 1 and 2 of the order of the court a quo are amended to read 31 August 2012 and 1 September 2012, respectively.
3. There will be no order as to the costs of this appeal.

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L E Leach
Judge of Appeal

APPEARANCES:

For Appellant 1st and 3rd:	A C Dodson SC Instructed by: University of Stellenbosch Law Clinic Stellenbosch Honey Attorneys, Bloemfontein

For Respondent:	L F Wilken Instructed by: Bouwer Potgieter Inc, Strand Symington & De Kok Attorneys, Bloemfontein