

**LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG**

**CASE NO: LCC: 43/2013**

(1)	REPORTABLE: <b>YES</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>YES</b>
(3)	REVISED: <b>YES</b>
<b>3 April 2014</b>	.....
DATE	SIGNATURE

In the matter between:

**SELOMO, ELIAS**

Applicant

and

**DOMAN, DESMOND ETTIENE**

Respondent

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**JUDGMENT**

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**SPILG, J:**

## THE APPLICATION

1. On 22 March 2013 the court heard an urgent application brought by Mr Selomo who wished to bury his daughter on the following morning at the family gravesite. The gravesite is situated on the respondent's farm which for present purpose may be described as the farm known as Pennsylvania.

The application was brought under section 6(2) (dA) of the Extension of Security of Tenure Act, 62 of 1997 ('ESTA') which provides:

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

(a) .....

(dA) *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."*

Section 5 embeds into ESTA respect for the constitutional rights exercisable by those who are affected by its provisions. It reads:

**"5 Fundamental rights.**-*Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to-*

(a) *human dignity;*

(b) *freedom and security of the person;*

(c) *privacy;*

(d) *freedom of religion, belief and opinion and of expression;*

(e) *freedom of association; and*

(f) *freedom of movement,*

*with due regard to the objects of the Constitution and this Act."*

Aside from section 6(2) indicating that its provisions are without prejudice to the generality of section 5, it also expressly provides that it is without prejudice to the generality of section 6(1). Section 6(1) reads;

*"6. Rights and duties of occupier.- (1) Subject to the provisions of this Act, an occupier shall have the right to reside and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly"*

2. The respondent, Mr Doman, resisted the application on a number of grounds which will be set out in the body of the judgment. Due to the urgency of the matter I made an order and indicated that I would furnish reasons at a later stage.

## BACKGROUND

3. The applicant's daughter, Caroline Celia, passed away on 23 February 2013 at the age of twenty two . The evidence presented in the founding affidavit was that it is customary among the Bapedi to arrange for a prompt burial. Although not universal, most faith and spiritual based cultures require the expeditious burial of those who have passed on.
4. The burial was to take place on 2 March 2013 at the Selomo family ancestral gravesite located on the farm Pennsylvania. The gravesite was recognised and respected by all previous landowners. It is a fenced off area where the graves of seven or eight family members are located. The graves include those of the applicant's parents and three of his children, the last of whom named Daniel was laid to rest on 15 August 2010. It is not disputed that the applicant was born on the farm in 1948 and that his family's homestead was already established then, that they enjoyed cropping and grazing rights and that a gravesite was set aside and respected.
5. The applicant however averred that certain of his grazing rights were whittled away by a previous owner and that in February 2012 the present owner refused access to allow the gravesite to be maintained.
6. The funeral could not proceed because the respondent refused to allow access onto the farm. The body of the daughter has remained in the morgue awaiting burial.
7. The applicant insisted that she be laid to rest amongst the ancestors. The respondent was equally insistent that the daughter was not an occupant on the farm, and that the applicant had left the farm as far back as 2005 or 2007, is not an

occupier under ESTA and is unable to rely on its provisions in order to bury his daughter on the farm.

8. It is also suggested that the applicant is attempting to use the opportunity to bolster a claim of occupancy rights under ESTA. It is common cause that other family members of the applicant, including a number of his own children, continue to reside on the farm and are currently asserting occupancy rights under ESTA in defending an eviction application brought against them by the respondent.
9. There were a number of preliminary issues regarding the timely delivery of affidavits on the part of both parties. I took the view that the late filing of papers would be condoned. The respondent adopted the position that the matter should be brought to finality and did not oppose the urgency.

## THE ISSUES

10. The factual issue is whether the applicant can claim occupancy rights under ESTA and whether his daughter resided on the farm at the time of her death. As stated earlier the respondent contends that the applicant left the farm permanently in 2005.
11. The respondent relies on a letter signed by the applicant in January 2005 where he agreed to vacate the farm on payment of R8 000 by way of compensation. It is averred that the applicant together with the children then in his care, which included Caroline Celia, left the farm permanently and settled in Steilloop. The respondent contends that the document amounts to a waiver of rights. It is however admitted that some of the applicant's elder children have continued to reside on the farm. These are among the family members whose evictions are being sought in a substantive application before the court.
12. The respondent also places in issue whether the applicant's income exceeds the threshold requirement for obtaining protection under ESTA. The applicant did not disclose his income although he had an opportunity to do so after the point was taken in the answering affidavit filed by the respondent.
13. The applicant does not dispute signing the letter but argues that the document did not deprive him of occupation rights under ESTA and that in any event the alleged waiver is unenforceable by reason of section 25 because it is not permitted under the Act and furthermore that it was not incorporated in a court order as otherwise sanctioned under the section. It was also contended that the alleged termination of his right of residence was not on lawful grounds as it would not have been just and equitable if regard is had to the relevant factors identified in section 8 of that Act.
14. The legal issue is whether the applicant's rights to bury his daughter on the farm are strictly limited to those provided for under section 6(dA) of ESTA.

**THE RIGHTS CLAIMED**

- 15. I am prepared to accept that Caroline Celia lived in Steilloop at the time of her death. However the term 'reside' as used in ESTA does not appear to have been decided upon insofar as a child or even a dependent who is a major is concerned. The applicant contends that she lived in Steilloop temporarily in order to further her education and later to receive medical treatment but not on the basis of any permanency.
- 16. Insofar as the applicant may have physically resided at Steilloop, and leaving aside the waiver of rights issue for the moment, he explained that he needed to provide a place near to the schools for his younger children's education and that he does not own the residence. Accepting that the test remains that an applicant must make out a case for a clear protectable right is concerned, the enquiry is not concluded by only having regard to where residence might be for a period of time.

There are two further considerations. The first is the meaning to be ascribed to the term 'residing' in the context of the section 1 definition of 'occupier' and in section 6(2)(dA). The other is to identify any other rights that afford the applicant the rights he seeks or which may bolster the assertion of a clear right.

- 17. *Kieprsol Poultry farm (Pty) Ltd v Phasiya* 2010 (3) SA 152 (SCA) is directly in point. The court determined the meaning to be ascribed in ESTA to the term 'residing'. Mpati P on behalf of the court adopted the meaning given in *Barrie NO v Ferrois* 1987 (2) SA 709 (C) at 714F to the word 'reside', namely:

*"It is his place of abode, the place where he sleeps after the work of the day is done ... It does not include one's weekend cottage unless one is residing there ... The essence of the word is the notion of 'permanent home'"*

- 18. It appears however that the question is always a factual one and may be a matter of degree. Cases involving a change of domicile may also be instructive. A forced relocation or a temporary departure due to a lengthy secondment does not on its own affect a change in permanent residence.
- 19. There is also a tangential consideration. An occupier for ESTA purposes is a person who resides on the land and who has done so on or after 4 February 1997 with consent, or enjoys 'another right in law to do so' (see the section 1 definition of an 'occupier').
- 20. The respondent does not dispute that the applicant's right of occupation was derived as a labour tenant, as were those of his parents. It is alleged by the applicant that his own children who were on the farm had also at some stage provide labour.
- 21. In terms of section 1 of the Land Reform (Labour Tenants) Act 3 of 1996 ('Labour Tenants Act') a 'labour tenant' is defined to include a person who resides "or has a right to reside on a farm", enjoys or previously enjoyed cropping or grazing rights and

whose parents or grandparents resided on it and had the use of cropping or grazing rights in consideration for which labour was provided and includes *"a person who has been appointed a successor to a labour tenant ... but excluding a farmworker"*. Also under the section 1 definitions an 'associate' is defined to include a family member of a labour tenant.

In order to enjoy rights as a labour tenant or associate under the Labour Tenants Act the person must have been a labour tenant on 2 June 1995. The rights afforded include a right, with his or her family members (which includes the labour tenant's parents or a dependent under the definition of that term), to occupy and use that part of the farm *"which he or she or his or her associate was using and occupying on that date"* (ie; on 2 June 1995). This would include an ancestral gravesite for burial. The assertion of these rights does not require continued or even current residence on the land.

22. I accept that no case was made out for rights either as a labour tenant or associate and that in the eviction proceedings his children only asserted rights under ESTA without amplifying that the right claimed might include those of a labour tenant. However it is evident from the alleged facts, most of which appear to be common cause, that the applicant and his parents were labour tenants for well over half a century and that he and certain of his children were either labour tenants or associates as defined under the Labour Tenants Act as at 2 June 1995. His late daughter would therefore also have fallen under the definition of an associate either by reference to the applicant or one of his other children still on the farm who was a labour tenant at that date.
23. The applicant has relied on ESTA to support his entitlement to bury his daughter. However because the allegations of continued residence are challenged to a material degree and there is the issue of a waiver of rights, in consideration for being paid compensation, it appears to me competent, in the present circumstance, to have regard to these additional undisputed facts concerning the applicant's historic rights as a labour tenant and the protection the Labour Tenants Act may afford, based on these same facts. I am also cognisant of the fact that both parties have been obliged at short notice to present such facts as they are able within a very limited time frame.
24. While a party is expected to identify the legislation upon which he or she relies, in the present case there are two features that militate against applying it even where it was not pertinently addressed by either party at the time of argument;
  - a. the first is that this was an urgent application regarding perhaps one of the most sensitive cultural aspects, the burial of a family member, which required an immediate decision as the burial was to take place on the following day;
  - b. the second concerns two uncontested facts which require proper characterisation. The most significant is that despite the respondent claiming that the applicant's occupancy and residence terminated in 2005 by

agreement, the previous landowner nonetheless accepted some five years later in 2010 that the applicant could bury a child on the farm. It is also not disputed that other children of the applicant continued to reside on the land after 2005 and still do.

25. Accordingly I am satisfied that such rights as the applicant enjoyed whether directly or through his children, at least in June 1995, can be taken into consideration. There can be no prejudice to the respondent since the factual basis for the applicant enjoying such rights at that date is effectively admitted in the answering affidavit and is not a matter for conjecture.
26. The effect is two-fold. Although the applicant has not convinced the court, by reason of the case made out by the respondent (on the basis of the *Plascon-Evans*<sup>1</sup> principles applying in a case of this nature), that he regarded the farm as his permanent place of residence, his claim of a right to bury his daughter on the farm is bolstered by reason of his historic occupation of a portion of the farm at least up to 2005, and the continued occupation of a number of his children. The evidence also showed that his right to bury a family member was respected by the previous owner even after 2005 and a mere three years ago. The applicant does not contend that permission was sought nor does the respondent claim that the right so exercised was personal as opposed to part of the enforceable rights available against successive landowners.
27. The effect is that the applicant has a right exercisable by the applicant to bury his daughter on the ancestral gravesite on the farm Pennsylvania. It is nonetheless appropriate to refer to two of the cases relied upon by the parties.
28. The first is *Nkosi v Buhrmann* 2002(1) SA 372 (SCA). In that case, although the appellant's late husband first resided on the farm in 1996 they moved to an adjacent farm in 1981. Her husband passed away and was buried on the adjacent farm. She returned to the respondent's farm in 1987 where she continued to live. The appellant had placed reliance on an alleged oral agreement between her late husband and a previous owner in about 1967 in terms of which the latter had allowed their grandchild to be buried. On appeal such reliance was expressly disavowed and it was accepted that the landowner's predecessor in title had not given either express or tacit consent to any subsequent burials of the appellant's relatives on the farm (at para 29).
29. The court considered the then provisions of ESTA as a whole and legislation regulating burials from a public health and statistical recordal perspective. The common law regarding the desecration of graves was also considered. A significant part of the decision was based on recognising that section 6(4) of ESTA altered the common law position in that those to whom it applies "*may now, as of right, visit and maintain family graves on land belonging to someone else ...this subsection, apart*

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<sup>1</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A).

*from imposing what is in effect a right of way over the land, entitles family of the buried deceased to maintain graves indefinitely, including tombstones and railings, if any” (at para 37.*

30. Section 6(4) was therefore held (at para 38) to create a permanent diminution of the right of ownership of the land and: *“If a grave site could be taken by an occupier as of right this would amount to an appropriation”.*
31. The court then considered the right to religious freedom contained both in section 15(1) of the Constitution and transposed into section 5(d) of ESTA (at paras 39 to 43). The case proceeded on the basis of weighing the competing interests of property rights and the right of religious freedom in order to properly interpret the reach of section 5(d) either in isolation or having regard to the Act as a whole as read with the Constitution (at paras 39 to 48 and especially para 45). In the course of the judgment the SCA found that Constitutional Court decisions on the right to religious freedom did not address its horizontal application between fellow citizens and did not decide *“ that one may actively diminish another’s patrimony by way of appropriation”* (at para 44).
32. The SCA concluded that the right to freedom of religion and religious practice have internal limitations which do not confer unfettered liberty to choose a grave site nor the right to take a gravesite without the landowner’s consent (at para 49). The court also considered the effect on the constitutional right to dignity, family life and culture, all of which find expression in section 5 of ESTA (at para 55).
33. It is evident that in interpreting ESTA as a whole the SCA was also concerned with the case where there was already an established ancestral gravesite (see p 389A to B).
34. Subsequent amendments to the legislation brought about in response to the decision were effected under Act 51 of 2001 which inserted two new provisions. The one is the sub-section presently under consideration and set out earlier, namely section 6(2) (dA). The other is limited to the rights of family members to bury an occupier contemplated in section 8(4). In terms of section 6(5);

*“(5) The family members of an occupier contemplated in section 8 (4) of this Act shall on his or her death have a right to bury that occupier on the land on which he or she was residing at the time of his or her death, in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge.*

It therefore appears that the amendments were intended to be of specific and limited application.



35. In *Dlamini and another v Joosten and others* 2006(3) SA 342 (SCA) Cachalia AJA (at the time) considered the effect of introducing section 6(2)(dA) on the court's earlier decision in *Nkosi*. In *Nkosi* the court in the course of rejecting the appellant's submissions held that if owners were obliged to accept against their will the creation of further graves then the legislation would have spelt it out. In para 24 of *Dlamini* the learned justice of appeal confirmed that section 6(2)(dA) was inserted to address this *lacuna* and added that;

*"The obligation 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."*

Despite the amendments ESTA therefore has limitations which do not simply permit subsequent burials on established ancestral gravesites of family members and that '*residence*' remains a key requirement. In short, fervent religious or cultural beliefs that the spirits of the ancestors should be close to those who are recently departed or close to the homestead of those living are not alone a sufficient basis to grant a continued right of burial on even well- established ancestral gravesite.

36. At the time of argument I do not believe that the case of *Hattingh and others v Juta* 2013 (3) SA 275 (CC) appeared in the main law reports. I do not recall it being cited. The Constitutional Court (at para 31) affirmed that the instances of application identified within the subsections of section 6(2) was to be considered by reference to the provisions of sections 5 and 6(1). At paras 32 and 33 the court determined that the phrase '*balanced with the rights of the owner or person in charge*' adopted by the legislature in the preamble to section 6(2) was to be interpreted in a manner that struck a just and equitable balance between the rights of an occupier and that of a landowner. The court did not refer to the general limitations of the subsections as expressed in *Nkosi* and *Dlamini*. Accordingly it does not appear that the court was necessarily suggesting that the subsections of 6(2) were illustrative of the broader principles set out in sections 5 and 6(1). The Constitutional Court did however have regard to the *just and equitable* principles that were to be taken into account by reference to all relevant factors when considering the terms of any agreed termination of occupation rights under section 8(1) for the purposes of construing section 6(2)(d) and determined that fairness plays a very important role (at para 32).
37. In my respectful view the decision recognises that where the person seeking redress was an occupier then even if the right to residence terminated nonetheless certain of the rights recognised as amongst the bundle of rights enjoyed during occupation may survive if it is just and equitable having regard to all relevant circumstances including that of fairness. It appears therefore that the reasoning in respect of section 6(2)(d) would have similar application to section 6(2)(dA).

38. In weighing these consideration in the present case I bear in mind that the applicant retained the residual right to bury a child (as exercised by him in 2010), he and family members continue to have the right, which is not disputed in the answering affidavit, to visit and maintain the existing graves in an area that is fenced off and respected (at paras 13.1 to 13.3), and that certain of his other children, who it is not disputed presently reside on the farm, currently exercise these same rights.
39. Moreover ESTA appears to be silent on the continued right to visit the gravesite once occupation is terminated, although it respects the right to allow burials on established gravesites before that date and while a family member is still in occupation. ESTA is also silent on allowing the gravesite to be maintained after the right of residence has terminated.

ESTA's silence on the subject does not mean that such right is excluded. It appears that ESTA has left it for the courts to determine on a case by case basis under section 8. It appears that the legislature contemplated that continued rights of reasonable access to an area which, under common law, cannot be levelled or desecrated without a court order would be resolved through the mechanism of applying the '*just and equitable*' principles required by sections 8 and 12 in those case where an occupier's right of residence is terminated.

When an eviction order made by a Magistrates' Court is brought on automatic review for confirmation under section 19(3) of ESTA it is my practice to enquire if there are any family gravesites and if so whether the parties have considered what is to happen in cases where the agreement is silent. I should add that generally the Magistrates' Court order is in the form of a consent order incorporating a settlement agreement with payment of a sum of money or a contribution to provide alternative housing.

40. In so far as the respondent's position is concerned, he has already suffered a diminution of his real right in land because he is unable to utilise the area on which the family gravesite is located for the reasons explained in *Nkosi*. The daughter is to be buried within this area and there is no suggestion that it would create a health hazard or that the authorities were not notified of her death. As stated earlier, the respondent also accepts that the applicant may visit and maintain the gravesite and has therefore has already consented to a limited right of access over his land for this purpose.

The respondent therefore is only expected to endure the trespass on a path through his land by mourners attending the funeral service. It is also not suggested that the existing gravesite will be visited by more people than before. Accordingly the respondent already has his rights of ownership diluted by the existence of the demarcated gravesite and his existing consent to respect family member's right to visit the gravesite provided it is exercised reasonably.

41. The daughter's burial therefore affects the exercise of his present rights of ownership only to the limited extent of allowing mourners to access his farm to reach

the gravesite and such temporary inconvenience that may be occasioned by the service itself. For the rest there will be no alteration of the pre-existing situation.

42. Against this limited and temporary trespass and inconvenience must be weighed the freedom of exercising ones beliefs, religion and the freedom of association. There is also the need to consider respect for the applicant to be able to bury his daughter in close proximity to her departed grandparents, siblings and other family members so that they may communicate and provide her with comfort. To refuse to respect these deeply held convictions of a father, particularly when they relate to a child who passed away much too soon and before his eyes, is to strip him of dignity.
43. While recognising that competing interests are at stake and that the right to dignity and strongly held religious and cultural beliefs may not overshadow real rights to property, in the present case I am satisfied that the diminution of the ownership rights are negligible if not, in reality, impose a minor inconvenience of limited duration.
44. Whether the court;
- a. applies an extended interpretation to the word '*residing*' under section 6(2)(dA) in relation to the daughter; and
  - b. interprets '*occupier*' and '*residing*' by reference to the applicant's rights that ought to be respected generally under section 6(2) having regard to section 5 and on an application of the protective provisions of section 8 to any termination of the right of residence considered with respect to the *de facto* recognition in 2010 that the applicant could bury his child on the farm ; or
  - c. applies section 6(2) with due regard to the rights identified in section 5 and the Labour Tenants Act which is legislation introduced to remedy the injustices of the past regarding land tenure occasioned by the breach of human rights and a denial of access to land (see the preamble to that Act and compare section 7 and 25(6) of the Constitution respectively);or
  - d. independently of ESTA, relies on the uncontradicted evidence that without permission being sought the applicant could continue using the burial site, at least for his children;

I am of the view that the applicant is entitled in law to bury his daughter on the farm Pennsylvania.

#### **FORM OF RELIEF CLAIMED (EXCURSUS)**

45. I have found that the applicant has a protectable right effective against the respondent to bury his daughter on the ancestral gravesite on the farm.

46. In line with *Nkosi* an application of this nature is final in effect (see at Para 4). In my respectful view this creates difficulties since the creation of a dispute of fact which meets the *Plascon-Evans* yardstick will inevitably result in the dismissal of an application as, realistically, there would be insufficient time in an urgent case of this nature to afford a meaningful hearing of *vive voce* evidence. Whether there is scope for an interim order if subsequent exhumation is not against the beliefs was not explored. Certainly in such a case the balance of the requirements for mandatory or interdictory interim relief would be present.
47. In the main these would be addressed by considering the religious and cultural beliefs of the applicant or other families residing on the farm. The applicant explained that their beliefs require that a departed family member be buried close to his or her ancestors in the same gravesite so that they may communicate and provide comfort. It is also a strongly held belief that those who are alive should also communicate with the spirits of those who have passed away by having the graves close to the family homestead.
48. These beliefs are an essential expression of constitutionally protected rights of religious and cultural freedom under sections 15(1), 30 and 31 as well as the right to dignity under section 10. See also section 5(a) and (d) of ESTA.
49. Accordingly the apprehension of harm and there being no alternative remedy is inextricably linked to the legitimate beliefs of the applicant and the consequences that will befall if not adhered to. In the present case the depth of the applicant's convictions were eloquently demonstrated by the fact that he had still not buried his daughter despite the lengthy period her body has remained at the mortuary and the cost to him of not moving her from there. On the other hand the respondent has already had to contend with an existing gravesite which family members are entitled to maintain and visit. As indicated earlier the inconvenience of allowing one more funeral would by contrast be nominal.

## ORDER

50. The order that I granted as a matter of urgency read;

1. The applicant is entitled to bury his daughter Caroline Celia in the burial site on the farm Pennsylvania 336, registration division LR in Limpopo Province on Saturday 23<sup>rd</sup> March 2013.
  2. No order as to costs.
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