IN THE LAND COURT OF SOUTH AFRICA
RANDBURG

CASE NO: **LCC40/2024**

Before: Honourable Ncube J
Heard on: 01 November 2024
Delivered on: 06 November 2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

06/11/2024
DATE

SIGNATURE

In the matter between:

MAFUBE COAL MINING PROPRIETARY LIMITED **Applicant**

and

SOPHIE DLAMANGA BUTI AND 9 OTHERS **Respondent**

ORDER

In the result I make the following order:

1. Leave to appeal is refused.
2. There is no order as to costs.

Delivered: This judgement was handed down electronically by circulation to the Parties' Legal Representative via email. The date and time for hand-down is **06 November 2024** at **15h30pm**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NCUBE J

Introduction

[1] This is opposed application for leave to appeal to the Supreme Court of Appeal, against the whole judgment and order of this Court handed down on 18 July 2024. The respondents, in their notice of application for leave to appeal enumerated three (3) grounds of appeal which I repeat below.

Grounds of Appeal

"1. The Honourable Judge erred and misdirected himself in finding that there is no dispute that The applicant is the owner of the Farm on which Buta's Homestate(sic) is established.

2. The Honourable Judge erred and misdirected himself in finding that the burial was without the consent of the applicant being the owner of the form(sic) on which the Buta homestead is established.

3. The Honourable Judge erred and misdirected himself in finding that the burial of the late Simon Buta at a Buta homestead located on the Farm Noortgedacht 417 Id (sic) unlawful".

Argument on hearing of application for leave to Appeal.

[2] During the argument Mr Marweshe, counsel for Respondents, (Applicants in application for leave to appeal) submitted that the respondents were abandoning the first two grounds of appeal as they are now relying on only one (1) ground which is the last ground of appeal. Basically, Mr Marweshe contends that the burial of the Late Mr Simon Buta on the Buta yard, on the Buta Homestead is not unlawful since there was an established practice to bury the deceased occupiers on the designated grave yard on the farm. He contends that once there is an established practice, even the consent of the land owner is not required. For this contention, Mr Marweshe relies on the Supreme Court of

Appeal decision in Sandvliet Boerdery (Pty) Ltd v Mampies and Another[1] where Maya P, (as she then was) held:

> *"Needless to say, once granted the permission to bury could not be unilaterally withdrawn either by the original grantor of the permission or his successor in title including the appellant, which was aware of the existence of the graveyard when it purchased Middel - plaas in June 2015. That result does not conflict with Constitution in the context of this case having regard to all the relevant factors"*

[3] Mr Marweshe's reliance on the above – mentioned case, is misplaced for two reasons. Firstly, the facts of the above-mentioned case are distinguishable from the facts of the present case. In Sandivliet case occupiers had been granted consent to bury the deceased family members on the designated graveyard on the farm. There was no established practice in that regard. In the present case, the established practice was to bury on graveyard 1. There was no established practice bury on homestead which the respondents did. If the respondents wanted to assert their right in accordance with the established practice, they should have buried the deceased on graveyard 1 which they did not do. There was no consent to bury on the homestead and there was equally no established practice to do so.

[4] The applicant had identified the new site where the deceased family members were to be buried. Homesteads near the mine blasting area were being relocated to the new sites. Graves in graveyard 1 were also being exhumed and relocated to the new graveyard. This was with the consent of the occupiers themselves including the respondents who later renegated on that agreement and made unreasonable demands, including payment of sixteen million rands to purchase a farm of their own choice where they wanted to bury the deceased.

[5] The second reason why Mr Marweshe's reliance on established practice, is misplaced is that this issue is raised for the first time. There was no reference to section 6 (2) (dA) of ESTA in the respondents answering affidavit. There was also no reference to that section in their original Heads of Argument. The respondents are clearly on fishing expedition.

Test for Leave to Appeal

[6] Leave to appeal will be granted only in those instances where there is a reasonable prospect of success on appeal or where there is some other compelling reason why the appeal should be heard. To that end, section 17(1) of the Superior Court Act, Act 10 of 2013 provides:-

> " 17(1) Leave to appeal may only be given where the Judge or Judges concerned

[1] 2019 (6) SA 409 (SCA) Para 31

are of the opinion that

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration....."

[7] In *MEC Health Eastern Cape v Mkhitha* (1221/15) {2016} ZASCA 176 (25 November 2016) para 17 Schippers AJA, as he then was, expressed himself in the following terms:-

> " An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[8] In *Smith v S* 2012 (1) SACR 567 (SCA) para 7 Plasket AJA said:-

> " What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding."

[9] I conclude that there is no reasonable prospect of success on appeal in the present case and there is no compelling reason why the appeal should be heard.

Order

[10] In the result I make the following order:

1. Leave to appeal is refused.
2. There is no order as to costs.

NCUBE J
JUDGE OF THE LAND COURT
RANDBURG

Legal Representation:

For the Applicant: Mr. M Marweshe

Instructed by: Marweshe Attorneys

SANDTON

For the Respondent: Adv M Majozi

Instructed by : Werkmans Attorneys

96 Rivonia Road

SANDTON

Heard: 01 November 2024

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