

SOUTH AFRICA / JUDGMENT

Bashe v Meyer and Another (2098/2008) [2008] ZAECHC 187 (6 November 2008)

[2008] ZAECHC 187**COURT**

High Courts - Eastern Cape

BEFORE

Plasket

CASE / FILE NUMBER

2098/2008

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Source record**6****FORM A****FILING SHEET FOR TRANSKEI****DIVISION JUDGMENT****PARTIES:**KHANYELWA
BASHE APPLICANT
and
JOHAN
MEYER 1ST RESPONDENT
SHWEME
& SHWEME 2ND RESPONDENT
Case**Number:**2098/2008
High**Court:**EASTERN
CAPE DIVISIOIN
DATE**HEARD:**5/11/2008
DATE
DELIVERED: 6/11/2008**JUDGE(S):**PLASKET
J
LEGAL
REPRESENTATIVES –

Appearances: For
the Applicant(s): Mr
E. Menti
for

the Respondent(s): Mr
M. Wolmarans
Instructing

attorneys:

Applicant(s): Lulama
Prince and Associates

Respondent(s): N.N.
Dullabh and Co
CASE
INFORMATION -
Nature

of proceedings : Urgent
Application

Topic: Burial
right
Key
Words: In
an urgent application by the mother of a deceased against the person
in charge of the farm on which she lived to interdict
him from
interfering with the burial of the deceased on the farm, it was held
that the applicant had not made out a cause of
action in her
founding papers. She had not established that a practice existed on
that farm that occupiers who died there could
be buried there or
that the burial of the deceased, on the farm, was in accordance with
her religion or cultural beliefs. These
were requirements of s
6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997. As
she had failed to make out a case in her founding papers the
application was dismissed.
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISIOIN)
CASE
NO: 2098/2008
DATE HEARD: 5/11/2008
DATE DELIVERED: 6/11/2008
NOT
REPORTABLE

In the matter between: KHANYELWA BASHE APPLICANT
JOHAN MEYER
1ST
RESPONDENT
SHWEME &
SHWEME 2ND
RESPONDENT

In an urgent application by the mother of a deceased against the person in charge of the farm on which she lived to interdict him from interfering with the burial of the deceased on the farm, it was held that the applicant had not made out a cause of action in her founding papers. She had not established that a practice existed on that farm that occupiers who died there could be buried there or that the burial of the deceased, on the farm, was in accordance with her religion or cultural beliefs. These were requirements of s 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997. As she had failed to make out a case in her founding papers the application was dismissed.

JUDGMENT

PLASKET J

[1] This urgent applicant to interdict the first respondent from interfering with or preventing the burial of the late Thandolwethu Bashe concerns the question whether the applicant, the deceased's mother, has the right to bury him on the farm of which the first respondent is the person in charge. (The second respondent, an undertaker, plays no part in these proceedings.) In order to establish the right that the applicant claims, she must bring herself within the terms of s 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (which I shall refer to as ESTA).

[2] Section 6(2)(dA) of ESTA provides:

‘2. 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 –

...

(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.’

- [3] From this section it is evident that, in order to make out a cause of action, the applicant's founding papers must show that:
- (a) at the time of his death, her son was residing on the farm; (b) she is an occupier of the farm; (c) the burial on the farm is in accordance with her religion or cultural beliefs; and (d) an established practice exists in respect of burials on that land.
- [4] The first two requirements are not in dispute and they are pertinently raised in the founding affidavit. It is to the remaining two requirements that I now turn.
- [5] I shall commence with whether the founding papers contain allegations that make out a case that an established practice exists of

permitting burials on the first respondent's farm.

- [6] The term 'established practice' is defined in s 1(1) of ESTA as 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 members of their family on that land in accordance with their religion and cultural belief'.¹ This definition is in harmony with the dictionary definition of the word 'practice' used in the present context, namely the 'habitual doing or carrying on of something; customary or constant action'; a 'habit, custom'; a 'habitual

action'.²

- [7] This means that it is not good enough for the applicant to allege merely that a particular act was performed in some instances:³ in order to establish a practice, facts have to be alleged to show a habitual way of acting on the part of the owner of the farm over the years. In other words, the applicant must show that occupiers of the farm have been 'consistently allowed in a sufficient number of cases' to bury members of their families on the farm 'to lead to the inference that such a practice was authorised and generally prevailed'.⁴
- [8] No mention is made of ESTA in the applicant's founding papers and no claim is made that she is entitled to bury her son on the farm of the first respondent on the basis of the right created for occupiers by s 6(2)(dA) of ESTA. This is strange, to say the least, as the section is the very source of the right that the applicant claims. While, however, it may not be necessary for a litigant who relies on a statutory provision to refer to it expressly, 'it must be clear from the facts alleged by the litigant that the section is relevant and operative'.⁵
- [9] In respect of the requirement of an existing practice, all that is said by the applicant in her founding affidavit is that 'I have been advised that both my parents have been staying on the farm for more than 30 years and my grandparents have been buried on this farm'. This falls woefully short of making the averments necessary to allege an established practice, and thus making out one of the key components of her cause of action.

[10] The second aspect, with which I shall now deal, is whether the applicant has established that the burial of her son on the farm is in accordance with her religion or cultural belief.⁶ All she has said in this regard was that: her mother approached the first respondent for permission to bury the applicant's son on the farm, which was refused; the first respondent's attitude caused 'great inconvenience and severe emotional stress'; and that 'there is no other convenient place at which I can bury my son'. This, like the allegations concerning the established practice, falls woefully short of what ought to have been alleged in order to establish this component of the applicant's cause of action.

[11] It is trite law that an applicant must make out a case in his or her founding papers and may not make out a case in reply.⁷ In this instance, the applicant has failed to make out a case in her founding papers and the application must be dismissed on that

account. Even if she had made out a case, she would not have succeeded on the papers in the light of the dispute of fact generated

by the first respondent's detailed denials in his answering papers.⁸ I would not have been disposed to have exercised my discretion in favour of referring the matter to oral evidence: given the urgency of the matter and the nature of the dispute, it would have been impractical to have done so. I, like Zietsman JP in the analogous

case of *Mabulu v Thys* and another,⁹ would have had to have tried 'to do the best I can on the affidavits placed before me'.

[12] Finally, the first respondent has indicated that in the event of him succeeding, he does not seek a cost order against the applicant.

[13] The application is accordingly dismissed.

C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant: Mr E. Menti, instructed by Lulama Prince and Associates, Port Elizabeth and Neville Borman and Botha, Grahamstown.

For the first respondent: Mr M. Wolmarans of N.N. Dullabh and Co, Grahamstown.

1 See *Dlamini and another v Joosten and others* 2006 (3) SA 342 (SCA), para 15.

2 The Shorter Oxford English Dictionary (Vol 2).

3 See *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd*

[1990] ZASCA 76; 1990 (4) SA 529 (A), 536G-H. This case concerned the phrase 'practice generally prevailing' as it applied in the assessment of tax.

4 Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd (note 3), 539A-B.

5 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others

[2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), para 27.

6 Dlamini and another v Joosten and others (note 1), para 18.

7 Van Winsen, Cilliers and Loots Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa (4 ed) Cape Town, Juta and Co: 1997, 364-365.

8 See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A), 634H-I.

9 1993 (4) SA 701 (SE), 704C.

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