

SOUTH AFRICA / JUDGMENT

Greyling and Another v Nkosi and Others (LCC 71/2022 B) [2022] ZALCC 17 (9 June 2022) [2022] ZALCC 17

COURT

Land Claims Court

BEFORE

Y S Meer

CASE / FILE NUMBER

LCC 71/2022 B

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT RANDBURG

Case

Number: LCC 71/2022 B

Reportable:

No

Of

Interest to other Judges: No

Revised:

Yes

Before:

The Honourable Acting Judge President Meer

Heard

on: 9 June 2022

Delivered

on: 9 June 2022

In

the matter between:

BAREND
PETRUS GREYLING
First Applicant
BAREND
PETRUS GREYLING N.O
Second Applicant
and
BUSISIWE
GLORIA NKOSI
First Respondent
NKOSINGIPHILE
GRACE NKOSI
Second Respondent
DR.
PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY
Third Respondent
GERT
SIBANDE DISTRICT MUNICIPALITY
Fourth Respondent
THE
PROVINCIAL COMMISSIONER
SOUTH
AFRICAN POLICE SERVICES
Fifth Respondent
MEC,
MPUMALANGA DEPARTMENT OF HEALTH
Sixth Respondent

JUDGMENT

MEER AJP

Introduction

- [1] This is an urgent application for the exhumation of the body of Richard Bonginkosi Mabaso (“the deceased”) from the Remaining Extent of the farm Buitenzorg 114 HT, Registration Division HT, province of Mpumalanga (“the farm”), for reburial at the Esizameleni Graveyard, Wakkerstroom. The deceased was buried on the farm on 15 May 2022.
- [2] The First and Second Respondents, the family members of the deceased, oppose the application. The Third to Sixth Respondents have not participated in these proceedings.

Background

Facts and Evidence

[3] On 11 May 2022 the Respondents, as applicants in that matter, applied on an urgent basis for an order permitting the burial of the deceased, their family member, at the burial site on the farm. The Respondents were funded by Legal Aid in that application as they are in this one. Permission for the burial had been refused by the Applicant. After hearing argument on 14 May 2022. I dismissed the application on the grounds that the deceased had not resided on the farm at the time of his death, such residence being a threshold requirement specified in section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) for the right to bury a deceased family member on the farm. A reasoned judgment was delivered shortly thereafter.

[4] Notwithstanding my order of 14 May 2022 being communicated to the Respondents by their attorney and it being explained to them that the burial could not proceed, a fact which they do not deny, they buried the deceased at the burial site on the farm on 15 May

2022. Their flagrant disregard for the court order is extremely disquieting.

[5] Equally disquieting is the failure on the part of the South African Police Service (“SAPS”) to ensure compliance with the court order, as appears from the following undisputed account in the affidavit of the Applicant’s attorney concerning attempts to obtain the assistance of SAPS –

5.1 On 14 May 2022, the Applicant, apprehensive that the burial would still go ahead, contacted Captain Nxumalo of Public Order Policing, Sibande District for assistance as the local Wakkerstroom police would not have manpower to restrain the 100 people anticipated to attend the funeral. Pursuant to this, a copy of the application and the court order were sent to Captain Nxumalo, who advised that Station Commander Captain Dlamini had been informed of the situation.

5.2 When it became apparent that the burial would take place and the Applicant, after numerous failed attempts, finally reached Captain Dlamini, the latter said the burial should be allowed to proceed and that an exhumation order could thereafter be obtained. He referred the Applicant to Brigadier Makatane, SAPS’ legal counsel.

5.3 A copy of the court order was sent to Brigadier Makatane, who stated that the Respondents would be in contempt of court if they proceeded with the burial, and their only option was to appeal the decision of the Court. It is undisputed that thereafter, Captain Dlamini, also equipped with the application and court order, handed the court order to the Respondents and explained that if they proceeded with the burial, they would be in contempt of court, and may face criminal charges and an exhumation application. This notwithstanding, the burial proceeded. The replying affidavit states that SAPS was present on the scene, that the Respondents were informed that they were not allowed to proceed with the burial, and this sparked aggressive behaviour towards SAPS, as can be confirmed by video material taken on the scene.

[6] On 27 May 2022 pursuant to these unfortunate events, the Applicant instituted this urgent application for the exhumation of the deceased.

Urgency

[7] The Respondents raise lack of urgency as a point in limine, stating that the Applicants have not explained why they will not get substantive relief at a hearing in due course. The Applicant

counters, correctly in my view, that the body is decomposing daily and if one waited for a hearing in due course, the extent of

decomposition may well impact on the exhumation process. Furthermore, says the Applicant, the application is brought on an urgent basis so as to prevent a sense of permanency being established in the deceased being buried in the farm.

[8] I am inclined to agree. If an exhumation were to be ordered, it is in the interests of all concerned that this occur as soon as possible before a sense of permanency is created. The application is, to my mind, clearly one of urgency. I note that it is not disputed that it was instituted as soon as possible after the burial. The period of 12 days in launching this application was not

in my view unreasonable.

Jurisdiction of this Court to grant an exhumation order

[9] Section 22(2)(c) of the Restitution of Land Rights Act 22 of 1994 (“Restitution Act”) clothes this Court with jurisdiction to decide any issue which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it in the interests of justice to do so. The Respondents submitted that this application did not fall into the category of matters over which this Court has incidental jurisdiction. I disagree. This application is clearly incidental to a burial in terms of section 6 of ESTA, a matter over which this Court clearly has jurisdiction. It is also in my view clearly in the interests of justice that it be adjudicated.

[10] I mero motu raised the question of this Court’s jurisdiction to grant an exhumation application in the light of Regulation 26(1) of the

Regulations Relating to the Management of Human Remains,[1] promulgated in terms of the National Health Act 61 of 2003. Regulation 26 (1) states:

“26. Authorisation for exhumation of human remains.

- (1) No exhumations and reburials of human remains shall be done unless –
 - (a) authorized by the relevant sphere of government and permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place; or
 - (b) a court order issued by a magistrate and shall be permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place.”

This appears to restrict such applications to the Magistrate's Court.

[11] The Applicants contended that this Court could grant an order permitting the exhumation, which order would be the basis for a magistrate to issue an exhumation order. The Respondents contended that the jurisdiction of this Court was ousted.

[12] Section 22(2)(a) of the Restitution Act provides that this Court shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings.

[13] The High Court's concurrent jurisdiction with the Magistrates Court is well recognized. In *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021

(6) SA 403 (SCA) at para 26, the Court held:

"the concurrency of jurisdiction in circumstances in which a claim justiciable in a Magistrates' Court has been brought in a High Court has been recognised in case law for over a century."

[14] In *Nedbank Ltd v Mateman and Another; Nedbank Ltd v Stringer and Another* [2007] ZAGPHC 295; 2008

(4) SA 276 (T) at 280, the court held:

"It is settled law that the High Court has concurrent jurisdiction with any magistrate's court in its area of jurisdiction . . ."

It is common cause between counsel before us (and correctly so), that there is a strong presumption against the ouster or curtailment of the High Court's jurisdiction".

[15] The court went on to find that the provision in section 127(8)(a) of the National Credit Act 34 of 2005 for the credit provider to commence proceedings in terms of the Magistrates' Courts Act 32 of 1944 for judgment enforcing the credit agreement, did not deal and was not intended to deal, with the jurisdiction of the High Court or the ousting thereof.

[16] There is no provision in the National Health Act which ousts the jurisdiction of this Court or the High Court. The purported ouster is contained in a regulation or subordinate legislation which, as has been correctly acknowledged, cannot oust a court's jurisdiction. See *Golube v Oosthuizen and Another* 1955 (3) SA 1 (T), where at paragraph it was said:

"Quite apart from this consideration it seems to me that, in the absence of express enabling authority, this subordinate legislative authority would have no power to limit the Court's jurisdiction in this way. A subordinate legislative authority has no power to oust the jurisdiction of the Court. . ."

[17] In similar vein, Regulation 26 of the Regulations Relating to the Management of Human Remains, issued under the National Health Act, does not oust the jurisdiction of the High court, as evidenced by the following high court cases in which exhumation orders were granted:

Mphiki v Mphiki and Another [2019] ZANCHC 43; Bukula and Another v Nkosi [2014] ZAGPJHC 298; and Shai v Botlholo and Others [2020] ZAGPJHC 156. Nor does the Regulation oust the incidental jurisdiction of this Court. The intention of the Regulation was in any event intended to provide for matters pertaining to the exhumation of human remains and the proper functioning of the National Health Act. Its intention was not to oust the concurrent jurisdiction of the High Court or the incidental jurisdiction of this Court.[2] This Court accordingly has the requisite jurisdiction to entertain the application.

[18] It is common cause that with full knowledge of the court order and that in defiance thereof, notwithstanding being warned of the consequences by members of SAPS and their attorney, the Respondents buried the deceased on the Applicant's farm. This being so, there is no bar to the application being granted.

Costs

[19] The Respondents' defiant burial of the deceased in the light of the court order which did not allow it and with full knowledge of the consequences of their conduct, are in my view exceptional circumstances which warrant their being mulcted with costs.

Order

I order as follows:

1. The exhumation of the deceased, Richard Bonginkosi Mabasa, who was buried on the Remaining Extent of Farm Buitenzorg, 114 Registration Division HT, Province of Mpumalanga on 15 May 2022 for reburial at Esizameleni Graveyard in Wakkerstroom is ordered. Such exhumation shall occur in compliance with Regulation 26 of the Regulations relating to the Management of Human Remains promulgated in terms of the National Health Act 61 of 2003.
2. The Third and/or the Fourth and/or Sixth Respondents are ordered to issue a reburial permit for the reburial of the deceased at the Esizameleni in Wakkerstroom.
3. The Third and/or the Fourth and/or Sixth Respondents are ordered to oversee and/or conduct the exhumation, in terms of paragraph 1 above.
4. The First and Second Respondents, and anyone associated with them, are interdicted from interfering with or obstructing the exhumation of the deceased and from preventing or hindering the reburial of the deceased, as aforesaid.
5. The Fifth Respondent, the Provincial Commissioner of the South African Police Services, is directed to oversee the exhumation and reburial process and ensure enforcement of prayer 4 above.
6. The First and Second Respondents shall bear the costs of the application.

Y S MEER

Acting Judge President

Land Claims Court

APPEARANCES

For the First and Second Applicants: Adv. I. Oschman

Instructed by:

C Pretorius Attorneys

For the First and Second Respondents: Adv. N. Gama

Shabangu Lulamile Attorneys

[1] GNR.363 in GG 36473 (22 May 2013).

[2] See the discussion of the purpose of the National Credit Act in para 79 of Standard Bank of South Africa Ltd and Others v Mpongo and Others 2021

(6) SA 403 (SCA), quoting Nedbank Ltd v Mateman and Another; Nedbank Ltd v Stringer and Another [2007] ZAGPHC 295; 2008

(4) SA 276 (T) with approval.

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Prepared on 12 October 2026 · Esheria