

SOUTH AFRICA / JUDGMENT

Mahlangu v Du Plessis; Du Plessis v Mahlangu and Another (LCC97/2021) [2022] ZALCC 9 (30 March 2022)

[2022] ZALCC 9

COURT
Land Claims CourtBEFORE
FlatelaCASE / FILE NUMBER
LCC97/2021

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT RANDBURG
CASE NO: LCC 97/2021
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED
In

the matter between: MAHLANGU
ANNAH NTOMBIZODWA
Applicant
and
DU
PLESSIS SERVAANS MARIE VAN BREDA
Respondent
and
in
DU
PLESSIS SERVAANS MARIE VAN BREDA
Applicant
MAHLANGU
ANNAH NTOMBIZODWA
First Respondent
AGRICULTURE,
LAND REFORM AND RURAL

DEVELOPMENT Second
Respondent

JUDGMENT

ON LEAVE TO APPEAL

FLATELA; A.J:

- [1] This is an application for leave to appeal against the whole judgement that I delivered on 3 February 2022 wherein I granted judgement in favour of the applicant and dismissed the respondent's counter application with costs.
- [2] At issue in the main application was the right of an occupier in terms of ESTA to practise her religion which required her to beat the drums during the day or night and to perform cultural ceremonies. The respondent an owner of the property and a staunch Christian objected to the applicant's drum beating and cultural practises citing noise nuisance and religious reasons, failing which the respondent warned that he will evict her and her family from his property. The Applicant and respondent are living on the same property; their dwellings are 250 m apart. The applicant stopped beating the drums for a while but indicated that this was causing problems in her calling. The Negotiations /Mediation between the parties did not yield any positive results. The respondent's attitude was that the applicant either negate her spiritual identity and convictions or be homeless.
- [3] The applicant approached the court to seek a declaratory order in terms of section 5(d) of the Extension of Security of Tenure Act declaring that she has the right to freedom of religion, belief, opinion, and of expression at Portion 38 Sterkfontein 194 IR Bronkhorstspuit (the farm); and further interdicting the respondent from interfering with the said rights.
- [4] The application was opposed by the respondent and he filed a counter application. The respondent's case was that the noise emanating from the drumbeats is a nuisance causing extreme inconvenience to him; disturbance of his sleep, and peace; amounting to constant harassment. He avers that the drumbeats diminish his right to the enjoyment of his property; a violation of which he grounds to be contravention of his property rights in terms of section 25 of the Constitution.[1]
- [5] The respondent contended that that the noise disturbance caused by the applicant is unlawful and constitutes a criminal offence as it contravenes the National Noise Control Regulations (hereinafter "the Regulations") enacted in terms of section 25[2] of the Environment Conservation Act 73 of 1989 (hereinafter, "the ECA").
- [6] In wrote a comprehensive judgement on this matter. I granted the judgement in favour of the applicant and ordered the parties to engage meaningfully within 30 days of judgement regarding the time schedule for drum beating. The respondent immediately filed the notice

of appeal. The grounds of appeal deal with all the disputes that were raised in pleadings. The respondent argued during the application for leave to appeal that the order granted that the parties should engage about the beating of the drum is incompetent because beating of the drums by the applicant is an unlawful and criminal activity and any possible agreement reached in relation with this will be tantamount to planning criminal activity which will be tainted with illegality and the court cannot sanction or rubber stamp such agreement.

- [7] The respondent argued that because the nuisance the respondent is complaining about originates on the same land; his case differs from previous decided cases where neighbours litigated against each other regarding therefore that is a novel point of law and the SCA need to determine the issue. Although I hold the view that it does not matter

if you are a neighbour in the same property or in different property the principles governing nuisance are the same. However, I do think that the SCA must determine the issue in the light of *Ellaurie v Madrasah Institute*.^[3] In that matter the applicant was a Hindu neighbour who lived close to a Madrasah Islamic institute successfully interdicted the institute to stop the nuisance caused by call of prayer, Mngadi J ordered those calls to prayer made by the first respondent should not be heard from the property of the neighbour.

- [8] In the main application I granted the judgement in favour of the applicant to beat the drum as required by her ancestors but must negotiate the time schedule with her neighbour in balancing the rights to religion and the neighbours right to his property.

- [9] The respondent is also appealing against the cost order.

- [10] An application for leave to appeal is regulated by s 17(1) of the Superior Courts Act 10 of 2013 which provides:

‘(1) Leave to appeal may only be given where the judge or judges concerned 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;

- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

- [11] I am of the opinion that there are some other reasons why the appeal should be heard, including conflicting judgements on the matter under consideration.

ORDER

[12] In the result, the following order is made:

1. Leave to Appeal is granted to the Supreme Court of appeal.
3. The costs of the application for leave to appeal will be the costs in the appeal.

L Flatela

Acting Judge of the Land Claims Court

APPEARANCES

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Date Heard: 14 March 2022

Date Delivered: 30 March 2022

[1] Act 108 of 1996

[2] 25. Regulations regarding noise, vibration and shock - The Minister may make regulations with regard to the control of noise, vibration and shock, concerning-(a) the definition of noise, vibration and shock

[3] 2021 2 SA 163

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Prepared on 12 October 2026 · Esheria