

SOUTH AFRICA / JUDGMENT

Mathebula and Another v Harry (LCC72/2015) [2015] ZALCC 6; 2016 (5) SA 534 (LCC) (2 June 2015) [2015] ZALCC 6

COURT

Land Claims Court

BEFORE

Ngcukaitobi

CASE / FILE NUMBER

LCC72/2015

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IN THE LAND CLAIMS
COURT OF SOUTH AFRICA
(HELD
AT RANDBURG)
Case
No:LCC72/2015

Heard:	29 May 2015 Inspection
in loco:	30 May 2015 Order
without reasons:	30 May 2015
Judgment:	2 June 2015

In the matter between: LIZZY
MATHEBULA
First
Applicant
LOMANESI
MATHEBULA
Second
Applicant
and
MR
HARRY
Respondent
(the
owner of Sweet Home 3 Farm, Barberton,
Mpumalanga)

JUDGMENT

NGCUKAITOB I AJ:

INTRODUCTION

- [1] On 11 May 2015, Mr Mfanyana Mathebula, the brother of the first applicant died. The first applicant, who (together with other family members including the second applicant, her daughter) resides at the farm known as Sweet Home 3 Farm, in Barberton Mpumalanga, and the family began preparations for the funeral which was to take place on 24 May 2015. The respondent, Mr Gerhardus Jacobus Roets, who has been cited as “Mr Harry”, came to know of these funeral arrangements and refused the burial to take place at the farm.
- [2] The applicants state that they did not expect the respondent to refuse the burial because the deceased was once employed at the farm and was resident there, when he died. They add that the Mathebula family graves, 22 of them, are on the farm. The applicants sought assistance from the Department and Land Reform and an attorney was appointed to act on their behalf. These proceedings were launched on 22 May 2015 on urgent grounds, but the matter was not heard on that day in order to allow the respondent time to answer the application. The respondent also undertook to pay for the mortuary costs until 31 May 2015. The funeral was also postponed to 31 May 2015.
- [3] The relief sought is an interdict allowing the burial to take place. The applicants submit that they are entitled to the relief by virtue of the provisions of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”). The respondent opposes the application. He argues that the applicants are not “occupiers” as defined in ESTA; that the deceased was not resident at the farm at the time of his death; and that there is no past practice of allowing burials at the farm. Therefore, he contends, the statutory requirements are not met.

[4] After considering the affidavits filed of record, and hearing oral argument, I was not satisfied that a proper and accurate picture of the facts had been presented. On application of the rule in *Plascon-Evans Paints (Tvl) Ltd v Van Riebeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) – which was urged upon me by the respondent – the result would have been a referral of the matter to oral evidence on discreet issues. This would have been inconvenient in view of the urgency of the matter, given that the body of the deceased has been at the mortuary for two weeks; the respondent's offer of financial assistance is limited; and the family postponed

the funeral by a week. I considered that the most appropriate approach is to order an inspection in loco on specific issues. This was duly undertaken on 30 May 2015, with the assistance of the respondent and his legal representatives. The power of this Court to adopt this procedure is provided for in Rule 33(8) of the Rules of this Court which provides that where a matter cannot properly be decided, the Court may dismiss the application or make any other order with a view to ensuring a just and expeditious decision, which is the case herein. The facts recorded herein are therefore not limited to the pleadings, but include those facts gathered during the inspection in loco.

[5] It is convenient to set out the law before I venture into the facts.

THE LAW

[6] The issue is whether or not the applicants have a right in terms of section 6(2)(dA) of ESTA to bury the deceased at the farm. That section provides that an occupier shall have the right “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.”

[7] Section 1(1) of ESTA defines an “established practice” to mean “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 or cultural belief.”

[8] Therefore, the applicant must prove:-

8.1. that she is an occupier as defined by the ESTA;

8.2 that the deceased member of her family was at the time of his death residing on the farm; and

8.3 that there is an established practice in respect of which the owner or person in charge or his or her predecessors routinely gave permission to people residing on the land to bury deceased members of their family on that land in accordance with their religion or cultural belief.

[9] ESTA should be understood in its constitutional setting. Section 25(5) of the Constitution imposes an obligation on the state to foster conditions which enable access to land for everyone on an equitable basis. Section 25(6) of the Constitution provides that a person or

community whose tenure in land was legally insecure because of racial discriminatory practices of the past is entitled, as may be provided by an Act of Parliament, to tenure which is legally secure or comparable redress. ESTA gives partial effect to these constitutional rights. It protects occupiers from arbitrary evictions. And, as this case shows, it also grants enforceable rights to persons living on farms, despite the fact that they do not own the land they live in. These include the right to security of tenure, the right to have visitors, the right to a family life, and the right to receive communication. Another important right is the right to utilize land belonging to another to bury an occupier's relatives, if certain requirements are met. While these rights fall short of the constitutional promise in sections 25(5) and 25(6), they are nevertheless important statutory interventions towards the realisation of the Constitution.

- [10] As noted by the Supreme Court of Appeal in the matter of *Randfontein Municipality v Grobler and Others* [2010] 2 All SA 40 (SCA), ESTA also gives effect to the rights in section 26 of the Constitution (the right of access to adequate housing) insofar as it entrenches security of tenure and regulates the substantive and procedural grounds for evictions.
- [11] The respondent has disputed all of the requirements in section 6(2)(dA). It is accordingly necessary to explain the meaning of these terms before considering whether or not the applicant has made out a case.
- (i) An occupier
- [12] The definition of the term occupier is the gateway to the protections in ESTA. Subject to exclusions, occupier means a person "residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so". The exclusions relate to persons who intend to use the land for reasons other than residence or employment by the owner of such land or a person whose earnings exceed a prescribed amount, which stands at R5 000,00 per month.
- [13] It was submitted, on behalf of the respondent, that the first applicant did not allege that she earns less than the R5000,00 per month and therefore she is not an occupier. This argument must be rejected. The applicants reside on the farm with the consent of the owner of the farm and/or his predecessors. Although the first applicant did not allege that she earns less than R5000,00 per month, it can be inferred from the circumstances of this case that she earns less than this amount. First, she is an unemployed pensioner. Second she lives at the staff accommodation, at the farm. Third, she was previously employed at the farm, and according to a former farm development manager, she used to do seasonal work at the farm, when "additional hands were required for harvesting and weeding." Fourth, I must also consider the fact that the first applicant appears to be illiterate as the founding affidavit is deposed to by means of a thumb print. Fifth, there is no evidence that she earns more than R5000,00. As I explain below, during an inspection in loco, the first applicant was present. She is not conversant in English, at all, which in this country, at least, is an indicator of one's level of education. Finally, I also take judicial notice that persons on old age pension, in

terms of the Social Assistance Act 13 of 2004 do not earn more than R5000,00 per month.

[14] Therefore, I do not accept the submissions that the first applicant is not an occupier as defined in the Act. She cannot be blamed for the poor quality of pleadings filed on her behalf. I find that the first applicant is an occupier as defined in ESTA.

(ii) Residence at the time death

[15] The second requirement is that of residence. ESTA does not define the term “reside”. But the concept of residence runs through the various provisions of the Act. The term “occupier” itself is linked with the requirement of residence. Section 3 for instance deals with consent to reside in land. Section 8 speaks of the termination of the right of residence. Section 14 refers to the restoration of right of residence.

[16] When these sections are considered together, it is apparent that the term “reside” is not limited to the mere physical presence at a particular place at a given point in time. Furthermore, once the right of residence is considered to exist in terms of the legislation, certain other associative rights also come into being.

[17] The case of Kieprsol Poultry Farm (Pty) Ltd. v Phasiya 2010

(3) SA 152 (SCA) dealt with the meaning of the term “reside” in the context of the definition of occupier. The issue before the Supreme Court of Appeal was whether an occupier had given up his rights or residence because of having left the affected property. In order to answer this question, the SCA had to consider the meaning of the term “reside”. It held:

“[8] In Ex parte: Minister of Native Affairs, this court was concerned with the interpretation of the word ‘resides’ in s10(3) of Act 38 of 1927. The court said-

‘In construing the word ‘resides’ one must bear in mind what was said by Solomon J in Buck v Parker (1908 TS at p1104) where the learned Judge said:

‘The word ‘residence’ is one which is capable of bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act. As was said by Earle CJ, in Naef v Mutter (CPP 359), ‘Residence’ has a variety of meanings according to the statute in which it is used.’”

This court has held, recently, that the main purpose of the Act ‘is to regulate the eviction process of vulnerable occupiers of land’ and that the Act ‘generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land ... with the express or tacit consent of the owner against unfair eviction from such land.’ The term ‘residing’ in the definition of an ‘occupier’ in the Act must thus be construed with this purpose in mind.

[9] In *Mkwanazi v Bivane Bosbou (Pty) Ltd.*, one of the issues the court was called upon to determine was the meaning of the term ‘reside’ in the definition of ‘labour tenant’ in the Land Reform (Labour Tenants) Act 3 of 1996. Gildenhuys J (Moloto J concurring) adopted the meaning ascribed to the word ‘reside’ by Baker J in *Barrie N.O. v Ferris*, viz: “‘Reside’ means

that a person has his home at the place mentioned. 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'."

Just as the Act regulates the eviction of vulnerable occupiers of land, the Land Reform (Labour Tenants) Act regulates the eviction of labour tenants. I can find no reason why I should not adopt in this case, as Gildenhuys J did in *Mkwanazi*, the meaning ascribed to the word 'reside' by Baker J in *Barrie N.O. v Ferris* (supra). There could be no dispute that at least before February 2004 Sam's permanent home was the premises on Zandspruit. He resided there."

[18] It is so that the SCA was explaining the meaning of the term in the context of the definition "occupier" in ESTA. But certain elements of that definition can be imported to the present context. In *Selomo v Doman* (43/2013) [2014] ZALCC 1 (3 April

2014) this Court adopted the above passage from the SCA, when it was dealing with section 6(2) (dA) of ESTA. The Court was correct in *Selomo* and I shall follow that approach, subject to some qualifications.

[19] The approach in *Selomo*, must be followed. But the social context of the application of the section should be considered. It would not be appropriate, in my view, to fasten upon imprecise statements such as "a place where one sleeps after the day is done" or phrases such as "weekend cottages are excluded". The social context of the application of the term residence is vital. In South Africa, that social context was articulated by Didcott J, writing for a unanimous Court in *Mohlomi v Minister of Defence*.^[1] He described the "prevailing state of affairs in South Africa" as being:-

"[14]...[A] land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons."

[20] Although this was said in 1996, it cannot be disputed that the social and economic concerns that underpinned the commentary by Didcott J still prevail in South Africa.

[21] The meaning of the "reside" as used in section 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week does a person spend in a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of actual physical presence. But this need not necessarily be continuous. Importantly, the Court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to return on a permanent basis to one's residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact

should ipso facto exclude their residence on a particular farm.

[22] The enquiry therefore must be directed at establishing one's permanent home: this should take into account the history, the overall objects of ESTA, and the actual physical location of the occupier at the time of his death. In relation to the objects of ESTA, an important consideration is that an occupier has a real right to be buried on a property which belongs to another person arising from their status as a former employee and resident on the farm. This must always be taken into account when deciding whether the residency requirement is met.

[23] In *Dlamini & Another v Joosten & Others* [2006] 3 All SA 1 (SCA) the Supreme Court of Appeal commented that where one leaves their place of residence for a substantial period of time and

makes no meaningful attempt at returning thereto, (in that case having left in 1986) they could not be regarded as residing on that land. Clearly, a person who has deserted their residence, such as in the example postulated by the SCA, cannot be said to be residing at the deserted place. But, as I explain below, unlike in *Dlamini*, a temporary absence from one's place of residence due to employment should not deprive one of his or her rights of residence

under the Act.

(i) Established practice of permissions for burials

[24] The third requirement is that there must be an established practice of routine permission being given by a landowner that persons

residing in the land can be buried on the land. Two important elements must be established. First, the evidence must establish a routine practice in terms of which the owner of the land or his predecessors gave permission. Second, the routine permission must be granted to persons residing on the land to bury members of their family on the land of the owner in terms of their cultural

practices.

[25] The Act does not say whether the words "gave permission" mean that the permission must be express. But it is necessary to refer to another related term also used in the Act, namely, "consent". Consent is defined to mean express or tacit consent. Therefore, the term "gave permission" is broad enough to include the tacit giving of permission. In *Landbounavorsingsraad v Klaasen* 2005

(3) SA 410 (LCC) this Court held that "tacit consent" creates legally binding and enforceable obligations on the part of the owner and occupier. This is applicable in this case. Once it is established that permission had been routinely granted by the owner of his predecessors, then there is a statutory right to bury a member of a family at the farm, regardless of whether an owner tries to break the practice.

- [26] Explaining the importance of the requirement of an established practice, in *ESTA*, in *Dlamini & Another v Joosten & Others* the SCA held:

“[24] The legislature introduced s6(2)(dA) to deal with this lacuna by ‘obliging owners to accept against their will the creation of further graves’. The obligation however 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, because, if this was so, the entire purpose of the amendment would be rendered nugatory.

- [25] As mentioned earlier, the Act grants to an occupier a real right in land that belongs to another person. And the right of an occupier to bury a deceased family member on such land is an incidence of this right. The withdrawal of consent by an owner for an occupier to bury a deceased family member is therefore an unlawful deprivation of this right.”

- [27] In an unreported case of *Bashe v Meyer & Another* (Case No. 2098/2008), ECD (unreported) delivered on 6 November 2008, Plaskett J also considered the definition of “established practice”. He held the following:-

“The [statutory definition of the term] ‘established practice’ ... 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’.

This means that it is not good enough for the applicant to allege merely that a particular act was performed in some instances. 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 the 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’.”

- [28] A further point must be made. The notion of a “routine” of an established practice does not mean that each and every person buried on the farm must have been buried with the consent of the farmer or his or her predecessors. It means that there must be sufficient instances of giving permission so as to lead an occupier

to the reasonable expectation that permission for burial would not be refused. This is a question of fact to be considered on a case by case basis.

APPLICATION TO THE FACTS

- (i) Residence of deceased at the time of his death

- [29] The convenient starting point is the founding affidavit. The first applicant alleged as follows:-

29.1. She was born at the farm in 1950 and lived and worked there with the consent of the previous owners.

29.2. Her parents, also the parents of the deceased, and further ancestors also lived on the farm during the course of their lives and were buried there.

29.3. Her mother worked for the previous farm owners, with the last owner being Mr John Venter who sold the farm to the respondent.

29.4. She still resides on the farm.

[30] The first applicant alleged that the deceased was born on the farm in 1956 “and lived on the farm until he passed away on 11 May 2015”. Also, she stated that “the deceased was permanently resident on the farm but he used to stay near his workplace during the weekdays.” In addition, the first applicant claimed that the deceased and various members of their family have lived and worked on the farm all their lives.

[31] In the supplementary affidavit, the first applicant added the following allegations:

31.1. The deceased was born on the farm in 1956 and lived on the farm until he died on 11 May 2015. He had lived and worked on the farm for previous owners most of his life.

31.2. In recent times, the deceased had worked as a handyman for a pastor, where he resided during the week for that purpose.

31.3. The deceased returned home, to the farm, every weekend. The farm had been his home his entire life.

31.4. At no stage did he abandon his home, on the farm. The fact that he stayed with the pastor during weekdays was for convenience. Prior to his death, the deceased had been residing on the farm.

31.5. To the supplementary affidavit, certain confirmatory affidavits were attached, being those of the second applicant, Staff Mpila, the daughter of the first applicant, Alex Xilenke, the first applicant's son in law, and Busisiwe Mathebula, being the local councillor. They all confirmed the allegations made by the first applicant.

[32] Against these allegations, the answering affidavit must be considered. The respondent denied any knowledge of the first applicant and whether she had ever worked at the farm. However, Mr Venter, a previous owner of the farm confirmed in his affidavit knowing the first applicant and the fact that she worked for him during the time when he was owner of the farm, between 1974 and 1988. This allegation is also confirmed by further witnesses who gave affidavits in support of the respondent, Mr Maarten Nieuwenhuize and Mr Ivan Lilford who were the development manager and farm manager on the farm, respectively, until about 2010, when the respondent bought the farm.

- [33] The respondent denied any knowledge of the deceased and also denied that he ever worked at the farm since 2010, when he purchased the farm. He also referred to certain “returns” drawn up by him and his wife, who also deposed to a confirmatory affidavit. These returns purport to constitute a record of the people residing on the farm. He produced copies of the returns compiled between May 2012 and September 2014. He also said that the returns were compiled after physical inspections at the staff accommodation. Further, where changes occurred in relation to people living on the farm, the necessary changes would be effected on the returns. He alleged that since the name of the deceased did not appear in the returns, that shows that the deceased did not reside on the farm during the period when the returns were completed. The respondent also claimed that he maintained proper control over the farm and if the deceased resided on the farm, that fact would have been within his knowledge.
- [34] These returns are not reliable. First, a witness who deposed to an affidavit in support of the respondent alleges that there were 40 people residing in the “compound”. According to the respondent, the returns are meant to be an accurate record of the persons residing on the farm, not simply at the compound or in the staff accommodation. When I enquired from counsel for guidance as to the number of persons recorded in the most recent return, compiled in September 2012, it appeared that the number recorded is about 18 people. There is no adequate explanation of this discrepancy between the number 40 and the number 18. Second, there are two other employees who deposed to affidavits, in support of the respondent, Mr Judas Khumbuza and Ms Chinindza Madalema Jose. They both claim to reside and work at the farm. Mr Khumbuza says that he resides at Sweet Home farm, Barberton and that “I have 40 people who stay at the compound”. Ms Jose also says that she resides at Sweet Home. Their names are not included in the returns which purport to constitute an accurate record of people residing in the farm. The returns fall to be rejected as evidence of whether the deceased was resident on the farm.
- [35] This brings me to an unusual aspect of this matter. When the answering affidavit was filed, two unsigned documents drawn up in affidavit format in the name of Ms Letha Nteine Shaki, who is alleged to have been the customary law wife of the deceased and Brenda Sarah Mathebula, who is alleged to be the daughter of the deceased. No signed affidavits by them were submitted. At the commencement of the proceedings on 29 May 2015, the respondent’s attorney submitted a supplementary affidavit, in which he sought to explain why the unsigned documents were included in the answering affidavit. At the hearing, I was advised that the respondent would not proceed with the request to place the unsigned statements before court, but that the affidavit of the respondent’s attorney should be understood as explaining why unsigned statements were attached to the answering affidavit in the first place.

[36] I accept this but the significant aspect is that the supplementary affidavit of the respondent's attorney attached a signed affidavit from Ms Nokukholwa Precious Nomfundo Mavuso, an attorney based in Nelspruit. She interviewed Ms Shaki, the alleged customary wife of the deceased. Out of this interview, she produced a "telephone note". The note records the following questions posed by the attorney and the following answers given by Ms Shaki:

"6. What is your source of income?"

She stated that her husband and herself both worked at a farm in Barberton called Mangisa. But she soon realised that they couldn't

continue working at a farm forever and not have a place to stay, she therefore left work and went back to Ratanang Village and started building home and her husband would send her money.

7. What did you do on weekends?

On weekends she stated that she would go to Barberton in order to see her husband if she didn't have money to go to Barberton, Mr Mathebula would come and visit her on weekends."

[37] This is a reliable recordal of what was said by Ms Shaki. It makes three points abundantly clear. The first is that the deceased

(referred to as "my husband" in the note) did not stay at the Ratanang township, but at a farm in Barberton (which is clearly the farm in issue herein on the probabilities and no suggestion was made to the contrary). The second is that the deceased spent his weekends at the farm, where Ms Shaki occasionally visited. The third is that the deceased was once employed at the farm. These points are not included in the draft of the affidavit which was apparently given to Ms Shaki for signature, which she refused to sign.

[38] This evidence cannot be discarded. It is clearly relevant. Its strength also lies in the fact that it emanated from the respondent.

Coupled with this is the poor quality of the founding papers and the replying papers, which left many questions unanswered. The matter could thus not be decided on incomplete facts regarding the issue of residence of the deceased and established practice.

[39] During the evening of 29 May 2015, I directed that there must be an inspection in loco at the farm. I was made to understand that both parties would be able to attend the inspection on Saturday, 30 May 2015. However, the applicants' legal representatives failed to appear at the agreed time at the inspection, for reasons which are not satisfactory. I spoke to the attorney of the applicants on the phone shortly before the inspection could commence. She informed me the reason she could not attend was that she was in "another court engagement in Mamelodi". I could not make out what this was referring to. No reason was given why counsel for the applicants was unable to attend. A local politician instead came and purported to "represent" the applicants. I refused this attempt as there is no legal basis to allow a politician any standing rights in the Land Claims Court. At any rate, the first applicant also attended in person. I must express my gratitude to the respondent's attorney

and counsel for making themselves available at short notice and making the necessary arrangements for the inspection. The issue regarding the non-appearance of the legal representatives of the applicants should be taken up by those responsible for instructing them to conduct this matter.

[40] My intentions in calling for the inspection were to establish two issues, which were disputed on the papers, but are significant to the proper resolution of this matter. The first relates to the numbers of people residing in the staff accommodation or the compound and the second relates to the graves at the site.

[41] At the inspection, the respondent, who was speaking under oath, confirmed that there is no difference between the “compound” and the staff accommodation. He took us to the compound, which comprises thirteen residential structures and five individual rooms.

He stated that during September 2014, there were 22 people who came to live in the compound, who are employed by a contractor, and a further 20 who arrived in March 2015. Added to this is another 4 people, whom he employs and another 5 not employed by him. In total, it was agreed that there are 51 people living in the compound. These numbers do not correlate with the figures given the returns attached to the answering affidavit. Nor are they reconcilable with the evidence of Mr Khumbuza, who signed an affidavit supporting the respondent.

[42] The respondent also relies on the affidavits of Ms Jose and Mr Khumbuza. The main purpose of these affidavits, as I can see it, is to deny the allegation that the deceased resided on the farm. But there is a problem with their probative value. First, the affidavits are inconsistent with the returns on the issue of the numbers of the people living on the farm. Second, it is not clear on what basis these witnesses claim to have personal knowledge of the persons living on the farm. Third, they also do not seem to correlate with the facts established during the inspection in loco. I must reject these affidavits.

[43] The further issue relates to the evidence of the respondent, Messrs Venter, Nieuwenhuize and Lilford. They have all, in support of the respondent deposed to affidavits in which they deny the allegation that the deceased worked or lived on the farm.

[44] The evidence collected during the inspection also shows that almost the entire Mathebula family is buried at the farm. The deceased's great grandfather, his grandfather, his siblings and some of the children of his siblings are buried on the farm. The reason why they are buried there is not hard to find. They lived on the farm. The majority of the graves were dug during the time of Mr Venter and during the time when Messrs Nieuwenhuize and Lilford were in charge of the farm. They deposed affidavits denying having granted permission for the burials and denying knowledge of the deceased. This evidence contained in these affidavits is inconsistent with the objective facts and must be rejected.

[45] On the balance of probabilities, the deceased resided on the farm. Overall the evidence of the first applicant has not been credibly denied. It has also been supported by the affidavit of Ms Mavuso, who appears to be removed from the events. The evidence of the inspection shows that almost the entire Mathebula family is buried on the farm. Finally, the fact that the deceased stayed elsewhere during the week did not deprive the applicants of their rights, in terms of ESTA to bury him on the land of the respondent.

(ii) Established practice

[46] In relation to the issue of an established practice, the first applicant alleged that there is a “Mathebula family graveyard on the farm consisting of several family graves, including those of our late parents, and this was done and maintained over decades with the consent of the previous farm owners.” She also alleged that the graves belong to family members of the deceased and that, following the death of the deceased, he was to be buried “on the farm in accordance with our family’s custom and tradition.”

[47] The supplementary affidavit confirmed the family graveyard of 22 graves on the farm. The allegations regarding the consent of the previous owners were repeated.

[48] In the answering affidavit, the respondent gave a description of the layout of the farm. He stated that there are fourteen dwelling units, grouped together, which serve as staff accommodation. Thirteen of the dwelling units are houses and the fourteenth is a building consisting of five rooms. The structures are made of bricks and mortar with zinc roofs. The first applicant resides in one of the dwellings.

[49] In relation to Mr Venter, the respondent alleged:-

49.1. It is not correct that Mr Venter sold the farm to the respondent. It appears that Mr Venter owned the farm between 1974 and 1988 and it has subsequently been sold to various owners until the respondent bought it in 2010.

49.2. The respondent claimed that he bought the farm from a company known as Kasquip Hire (Pty) Limited in 2010. When that company owned the farm a Mr Nieuwenhuizen and Mr Lilford who were the development manager and farm manager on the farm, provided affidavits to the respondent. According to Mr Nieuwenhuizen, he resided on the farm between January 2004 and October 2008.

49.3. He recalled that in about 2006 certain people requested to visit the graves of their family members which, after initially being refused, was permitted. Those graves were apparently old and situated at the bottom of the farm across the river. During the period when Mr Nieuwenhuizen was the development manager, certain requests for burials were made, but all were refused. Those burials which did take place were apparently done in secret and without his knowledge or consent, as they would not have allowed any burial to take place on the farm. It was apparently the policy of the company not to allow burials on the farm. In relation to the first applicant, Mr Nieuwenhuizen alleged that she and her late husband worked for the company, which owned the farm and resided thereon. He denied that the deceased resided on the farm or was employed by

the company or at the farm.

[50] Mr Lilford, also supported the majority of the allegations made by Mr Nieuwenhuize. He also stated that he received two requests for burial on the farm, both of which were refused. He was the farm manager between 2001 and October 2008. In relation to the deceased, he also stated that he did not reside on the farm and was not employed by the company, which at the time owned the farm. Mr Venter also submitted an affidavit in terms of which he stated that he owned the farm between 1974 until it was sold in about 1988 or 1989. He stated that the deceased neither worked for him nor resided on the farm when he was the owner. When he was owner, he claimed to have never received any requests for burials and as a fact, no burials took place on the farm.

[51] The respondent alleges that behind the staff accommodation, “there are only six unnamed graves grouped together”. He does not give any date to these graves. He also alleges that at another place on the farm, there are two graves, but the people buried there are relatives of people who do not reside on the farm. Similarly, he does not date these graves either. It must follow from this that the respondent at least concedes that the people buried in the six unnamed graves are relatives of people residing on the farm. He also alleges that the applicants have failed to identify the 22 graves of their family members.

[52] It became clear during argument that the evidence of the respondent was ambiguous and confusing. Was respondent admitting to the existence of the graves or was he disputing only the location of the graves? Was the respondent denying the version of the applicants in relation to the number of the graves or was he admitting and only denying being aware of the graves? Again, it was clear that an inspection was necessary.

[53] At the inspection the following was established, in relation to the issue of the graves:

53.1. Immediately behind the compound, on its southern side, there are 6 unmarked graves, which were pointed by the respondent. The first applicant, however counted seven graves in the spot. I can understand the respondent’s inability to confirm the seventh grave because it is not marked by rocks, like the other graves; it is a pile of soil resembling a big anthill. The first applicant stated that 2 of the graves are two years old, and one person was buried in 2014. The remainder were all people who passed on before the respondent bought the farm.

53.2. On the south-eastern side of the compound, the first applicant identified three other graves. These were covered in a thick shrub and it was not possible to confirm if they were graves at all. The respondent pointed another problem with this particular site relating to its location, which is on a sliding slope, unlike the other graves which are on a flat surface. Nothing conclusive could be made of this site.

53.3. In the south-western side of the compound, the first applicant pointed 11 graves. Out of these, the respondent admitted that at least 6 were graves. But he could not confirm the remainder, owing to the fact that the area is overgrown by thick bush and grass. Only rocks could be seen and even the rocks did not resemble the usual rectangular shape of a grave, as some were

in a round shape. It also appears that these graves are old and were there before the time of the respondent. The first applicant confirmed that the burials in these graves took place during the time of Mr Venter and “Mr Maarten”, whom it is safe to presume was referring to Maarten Nieuwenhuizen, who was once a person in charge of the farm before it was purchased by the respondent.

53.4. In the north-eastern side of the compound, 5 graves were identified by the first applicant. The respondent accepted at least 4 of these, as being graves. One of them has a recent tombstone, which was erected in 2014. The first applicant confirmed that she did not ask for permission from the respondent before erecting the tombstone in 2014.

[54] Out of this exercise, at least 17 of the first applicant’s (and therefore, the deceased) family graves are accepted to be common cause. This is clearly more than the 6 which were originally admitted in the answering affidavit. Unlike what is stated in the founding affidavit, the first applicant could point to 26 graves.

[55] The first applicant’s evidence during the inspection pointed to the permission and knowledge of Mr Venter and “Mr Maarten” for the digging of the graves. She did not say that the recent graves (3 in the last 4 years) and 1 tombstone erected in 2014 were

done with the consent of the respondent. Nor did she say whether the respondent was even informed of the graves on the farm.

[56] The respondent did not give express permission in relation to the 3 graves during his time and the tombstone erected in 2014. But it was common cause that he was aware of at least one funeral in 2014, which took place while he was away in Durban with his family. And it is likely that he was aware of the other 2 graves, immediately behind the compound. These are part of the 6 which he admitted in his answering affidavit. It is significant that the respondent did not give any date to the graves in his answering affidavit as that would have undermined a key aspect of his defence, namely, that he was not personally aware of the graves.

[57] The point, however, is not whether the respondent himself gave permission: it is whether there is a practice of routine permission

being granted by either the owner or his predecessors. The evidence establishes overwhelmingly that the predecessors of the respondent

gave permission for burials to take place on the farm. The respondent could not really deny this and it is improbable that more 26 burials took place without the knowledge and consent of the previous owners. The evidence of Mr Venter, Mr Lilford and Mr Nieuwenhuize as inconsistent with the objective facts.

[58] It was also submitted in the answering affidavit that the graves are not named. The failure to specifically name the individuals buried in the graves is not fatal. The Act, after all, does not require the graves necessarily to be those of the affected occupier. What is important, under the Act, is that there must be an established practice whereby permission is routinely given for burials.

[59] Lest the import of my judgment be misunderstood, I am not suggesting that the mere fact that graves have been found on the farm means that there was permission for the burials. But on these facts, the probabilities are that at least tacit permission was granted by the predecessors of the respondent. It appears that during his time, the respondent has tried to stop the practice. But the law prohibits him from doing so. Once a practice is established, a right is created by law, which may not be reversed by the actions of an individual.

ORDER

[60] In the circumstances, I grant the following order.

60.1. It is declared that the applicants are entitled to bury the deceased, Mr Mfanyana Mathebula at Sweet Home 3 Farm, Barbeton, Mpumalanga, in terms of section 6(2)(dA) of the Extension of Security of Tenure Act, 1997.

60.2. The respondent or anyone acting under his direction and authority is ordered to grant the applicants and any person under their direction and control access to the farm for the purposes of arranging for and carrying on the funeral of the deceased.

60.3 There is no order of costs.

Tembeka Ngcukaitobi

Acting Judge

Land Claims Court

APPREARANCES

1st & 2nd Applicant : Adv Egan

Instructed by N Maharaj Attorneys

1st Respondent

: Adv Botha

Instructed by Pieter Moolman attorneys

[1]

[1996] ZACC 20; 1997

(1) SA 124 (CC).

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