

SOUTH AFRICA / JUDGMENT

Mokoena v Church of Holy Ghost (2024/128948) [2025]

ZALCC 5 (7 January 2025)

[2025] ZALCC 5

COURT

Land Claims Court

BEFORE

Ncube

CASE / FILE NUMBER

2024/128948

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IN

THE LAND COURT OF SOUTH AFRICA

RANDBURG

CASE

NO: 2024 - 128948

Before:

Honourable Ncube J
Heard
on: 11 December 2024
Delivered
on: 07 January 2025

REPORTABLE:

YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO
In

the matter between:

TIKOE ANTON
MOKOENA
Applicant
and
THE CHURCH OF THE HOLY
GHOST
Respondent
ORDER
In the result, I make the

following order:

1.
The rules, time limits, forms and procedures provided for in the Land Claims Courts Rules are dispensed with and the application is heard on semi - urgent basis.
2.
It is declared that the Applicant is an occupier in terms of ESTA.
3.
It is declared that upon the Applicant's death, the Applicant's family members shall have the right to bury the Applicant at the burial site where his adoptive parents are buried, the site situated at P385 Cato Ridge Main Road Hammersdale, KwaZulu Natal in accordance with section 6(5) of ESTA.
4.
In the event of the Respondent's non-compliance with paragraph 3 above, the Sheriff and the South African Police are authorized to escort the Applicant's family members and the accompanying funeral procession to the burial site to bury the Applicant.
5.
There is no order as to costs.

JUDGMENT

NCUBE J

Introduction

- [1] This is an application in which the applicant seeks a declaration that he is an occupier in terms of the Extension of Security of Tenure Act^[1] ("ESTA") and that on his death his family will have the right to bury him at the designated burial site on the farm. The application was brought on urgent basis. After reading the papers and other documents filed of record, I was of the opinion that the application was semi – urgent. I accordingly condoned non-compliance with the Rules relating to form, service and time limits. I issued directions relating to filing of further documents. The respondent opposed the application based on both lack of urgency and merits.

Urgency

- [2] The Respondent contends that any possible urgency in this case is self – created. Rule 30 (2) of this court's Rules provides that in urgent applications the applicant must set out in his or her founding affidavit the circumstances which he or she avers render the matter urgent and the reasons why he cannot obtain substantial redress at a hearing in due course. The

Applicant in his Founding Affidavit concedes that the stance of the church was communicated to him in April 2022. However, the Applicant avers that he entertained hope that the church leadership dispute was going to be resolved sooner than later. It was only in April 2024 that the Applicant realised that the church leadership dispute is unresolvable, and he then approached the High Court Pietermaritzburg. The High Court struck the matter off the roll due to lack of urgency. When the matter was about to be heard on the ordinary roll, the Applicant sought advice from counsel and the advice was to approach the Land Court.

- [3] It is true that the Applicant became aware of the Respondent's position in denying him permission to be buried on the church's burial site but it is not like the Applicant just folded his arms and did nothing. As one of the old members of the church, the applicant's desire, was to see the church problems solved amicably. The other factor which is to be considered, is that the Applicant is of advanced age, He is 98 years old and his health is failing him. I therefore find that the Applicant has proved that the matter is urgent.

Factual Background

- [4] The Applicant was born in Lesotho in 1928. In 1952, he relocated to South Africa where he was naturalised in 1991. In 1953 the Applicant joined the Respondent church and became one of its members. Archbishop Nzuza, the founder of the Respondent, connected the Applicant with the Ngwenya family. The Applicant lived with the Ngwenya's 'for twenty-two (22) years. In 1975 the church offered the Applicant a site to build his own house. The Applicant was ordained a reverend of the Respondent as far back as 1968. In 1994 the Applicant was appointed the Presiding Reverend of the Respondent's main branch on P385 Cato Ridge main Road Farm ("the farm")
- [5] Both Mr and Mrs Ngwenya passed away and they were buried on the burial site designated for members of the church. The church has two burial sites one for Reverends and one for the ordinary members of the church. Despite the fact that the applicant is a Reverend, he desires to be buried on the burial site for ordinary members of the church to be near his adoptive parents.
- [6] The founder of the church was succeeded by his son Paulos Mfunwa Nzuza ("Paulos") Paulos is the one who ordained the Applicant as the Reverend of this particular church in 1968. In about 1994, Paulos passed away. After the death of Paulos, a dispute arose concerning the rightful successor. As a result of the said dispute the Reverends of the church split into two groups. The misunderstanding between the two groups led to the expulsion of the Applicant and his membership of the church was terminated. Following upon termination of his membership, the Applicant and other members of his faction were denied entry into the church property and the burial site. However, the Applicant was given consent to continue residing on the farm.

Legal Matrix

[7] In order to succeed in this application, the Applicant must first establish that he is an occupier in terms of ESTA. ESTA defines occupier in the following terms:

“a person residing on land which belongs to another person, and who, on 4 February 1997 or thereafter, had consent or another right in law to do so, but excluding---

(a)

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial, or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount;”

[8] A person who claims to be an occupier has a duty to prove that he complies with all the components of the definition of the

“occupier” in ESTA. The income of the person claiming to be an occupier falls within his peculiar knowledge[2]. In *Pieterse v Venter And Others*[3] Claassen J, writing for a Full Court, said:

“The absence of any evidence as to appellant’s monthly income sounded the final death knell to this defence. In fact, Mr Botha

acknowledged this fact in a concession contained in paragraph 3.27 of his heads of argument:

“The appellant did not disclose his income and has not discharged the onus to show that he is an ESTA occupier. The court a quo therefore correctly found that he is not an ESTA occupier”

[9] In casu, as Mr Timlett, Counsel for the Respondent argued, the Applicant failed to disclose how much income he earns if any, on a monthly

basis and Mr Timlett submitted that this fact alone is dispositive of the case. This argument does not take cognisance of

the fact that ESTA is remedial legislation which is umbilically linked to the Constitution. ESTA is to be interpreted purposively in order to afford persons with insecure tenure on land the fullest protection of their constitutional rights.

[10] Section 25(6) of the Constitution[4] provides:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws and practices is entitled to the extent provided by an act of parliament either to tenure which is legally secure or to comparable redress.”

[11] The long title to ESTA states that the purpose of ESTA is to

“provide for measures with State assistance to facilitate long-term security of land tenure, to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.”

- [12] Therefore, in the determination of the question of whether the Applicant is an occupier, we must look at the spirit, purport and the object of the Bill of Rights[5]. In *Klaase v Van der Merwe NO and Others*[6] the majority of the Constitutional Court held[7].

“In determining the meaning of ‘occupier’ as defined in s 1(1) of ESTA, the starting point is the Constitution. Section 39(2) of the Constitution enjoins courts when interpreting legislation... to promote the spirit, purport and objects of the Bill of Rights. In line with purposive approach to statutory interpretation, a meaning that places the definition within constitutional bounds must be preferred. Because we are concerned with the meaning of ‘occupier’ as defined, the definition must be read not only in light of the purpose of ESTA but also in the context of the legislation as a whole. It is thus necessary to read the meaning of ‘occupier’ in conjunction with the purpose set out in the preamble and other relevant provisions of ESTA, for example, sections 3, 6, 8 and 9.”

- [13] Therefore, taking into account the above cases, an emphasis on the Applicant’s failure to disclose his income in order to qualify as an ‘occupier’, does not take cognisance of the mischief which ESTA seeks to remedy, and it applies a narrow and not wide interpretation of ‘occupier’: Already this Court in *Stargrow Pty Ltd v Hendrik Ockhuis and Others*[8] held that ESTA generally and its definition of ‘occupier’ in particular should be interpreted purposively and generously so as to afford persons with insecure tenure of land the fullest protection of their constitutional rights. I conclude therefore that the Applicant is an ‘occupier’ in terms of ESTA.

Discussion

- [14] Having found that the Applicant qualifies as an occupier, what remains for a determination by this court is whether the Applicant is entitled to be buried at the Respondent’s burial site on the farm. The starting point of exercise will be sections 8(4) of ESTA which provides;

“The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and.

(a.) has reached the age of 60 years; or

(b.) is an employee or former employee of the owner or person in charge and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10(1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.”

[15] It is not in dispute that the Applicant is 98 years old and has resided on the Respondent's farm for more than ten years.

Therefore, the Applicant is an occupier referred to in section 8(4) of ESTA. Such occupiers are referred to as long term protected

occupiers. Section 6(5) of ESTA provides:

"The family members of an occupier contemplated in section 8(4) of this act shall at his or her death have a right to bury that occupier on the land on which he or she was residing at the time of his or her death in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge."

[16] Therefore, in terms of section 6(5) as stipulated in paragraph 15 above, the Applicant's family members, shall have a right on his death, to bury the applicant at the burial site on the Respondent's farm. Mr. Timlett argued that there is no established practice to bury non-members of the Respondent on the farm. Such argument was based on the provisions of section 6(2) (dA) of ESTA which provides:

"2 Without prejudice to the generality of provisions of section 5 and subsection (1), and balanced with the rights of the owner or persons in charge, an occupier shall have the right-

(a)....

(b)....

(c)....

(d).....

(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." [9]

[17] In my view, section 6(2), (dA) and the notion of 'established practice' do not apply in this case. The 'established practice' is only applicable in instances where the occupier's family member residing on land on which the occupier is residing has passed on and is to be buried on that land. The occupier will have the right to bury the deceased family member if there is an established practice to bury the occupier's deceased family member on that land. The present case is not concerned with the burial of the occupier's family members. The present case is concerned with the burial of the occupier himself. Therefore, in casu, section 6(5), which does not require an 'established practice' is applicable. Section 6(2) (dA) is not applicable.

[18] Even if section 6(2) (dA) was applicable, the Respondent has failed to prove that the Applicant is not a member of the church. The Respondent avers that the Applicant was subjected to disciplinary enquiry which found him guilty of misconduct and expelled him from the church. There is no evidence of such expulsion. In motion proceedings affidavits

serve as both pleadings and evidence[10]. In the absence of the disciplinary record containing expulsion as a form of sanction, there is no evidence to prove that the Applicant is no longer a member of the Church of the Holy Ghost.

[19] I therefore conclude that the Applicant has succeeded to prove that he is an occupier in terms of ESTA and that members of his family have a right, on his death, to bury him on the burial site where his adoptive parents are buried.

Costs

[20] Mr. Timlett asked for costs on a punitive scale. The practice in this court is not to make costs awards unless there are exceptional circumstances which warrant a costs award. In this case, there are no exceptional circumstances which warrant an award of costs.

Order

[21] In the result, I make the following order:

1. The rules, time limits, forms and procedures provided for in the Land Claims Courts Rules are dispensed with and the application is heard on semi - urgent basis.

JUDGE OF THE LAND COURT

OF SOUTH AFRICA

Appearances:

For the Applicant: Adv N Mahlangu

Instructed by DMS Incorporated

28 Fricker Road

SANDTON.

For the Respondent: Adv. JW Temlett

Instructed: Nkosi Trevor attorneys

40 Dr Xuma Street

DURBAN

Heard: 11 December 2024

Delivered on: 07 January 2025

[1] Act 62 of 1997

[2] See *Sikhosana and Others v Roos t/a Roos Se Oord and Others* (LCC50/99)

[1999] ZA LCC 22(10 May 1999)

[3] (A5016/2011

[2012] ZAGPJHC7 (10 February 2012)

[4] Act 108 of 1996

[5] Sec 39 (2) of the Constitution

[6] 2016

(6) SA 131 (CC)

[7]

Judgement

of Matojane AJ

[8] 2018

(1) SA 298 (LCC)

[9] My own emphasis.

[10] Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (TPD) at 323 F – G

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