THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No.: 107/2018

In the matter between:

SANDVLIET BOERDERY (PTY) LTD **APPELLANT**

and

MARIA MAMPIES **FIRST RESPONDENT**

HENDRIK MAMPIES **SECOND RESPONDENT**

Neutral citation: *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* (107/2018) [2019] ZASCA 100 (8 July 2019)

Coram: Maya P, Zondi, Dambuza, and Makgoka JJA and Rogers AJA

Heard: 23 November 2018

Delivered: 8 July 2019

Summary: Extension of Security of Tenure Act 62 of 1997 – s 6(2)*(dA)* – meaning of 'reside' – depends on facts of each case and includes use of a graveyard – burial right may be invoked against landowner in respect of ancestral graveyard situated on registered land on which neither an occupier who seeks to bury a deceased family member nor the deceased had a dwelling at deceased's death where they routinely performed sufficient acts in relation to land to regard it as part of land on which they 'reside'.

ORDER

On appeal from: Land Claims Court, Randburg (Poswa-Lerotholi AJ sitting as a court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Maya P (Zondi, Dambuza and Makgoka JJA and Rogers AJA concurring):

[1] The crisp issue in this appeal is whether the respondents had the right to bury a deceased family member on registered land owned by the appellant, in terms of s 6(2)*(dA)* of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The Land Claims Court (the LCC) held that they did and the appellant challenges this decision with leave of this Court.

[2] The material, background facts are not in dispute. The appellant, Sandvliet Boerdery (Pty) Ltd, is the owner[1] of various, adjacent parcels of registered land commonly known as Bo-Plaas and Middel-Plaas. They form part of a historic trilogy collectively referred to as the Montina farms, which includes Onder-Plaas, presently owned by another entity, the relevance of which will shortly become apparent. The farms are situated in Groblershoop in the Northern Cape Province. Their cadastral descriptions are the following: (a) Remaining extent of the Farm Number 292, district

[1] 'Owner' for purposes of ESTA is defined in s 1(1) thereof to mean 'the owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land'.

Hay, Northern Cape Province, Portion 5 of the Farm Oranje Noord Number 360, Portion 6 of the Farm Oranje Noord Number 360 and Portion 7 of the Farm Oranje Noord Number 360 in district Hay, Northern Cape Province, which constitute Bo-Plaas; and (b) Portion 2 of the Farm Oranje Noord Number 360, Portion 3 of the Farm Oranje Noord Number 360 and Portion 4 of the Farm Oranje Noord Number 360 in district Hay, Northern Cape Province, which constitute Middel-Plaas. Onder-Plaas, which is owned by Snybar Developments (Pty) Ltd, is constituted by remaining extent of the Farm Kheis-Dewitt Number 603, Remaining extent of the Farm Landgoed, Number 359, Portion 3 of the Farm Landgoed Number 359, and Portion 4 of the Farm Landgoed Number 359 which are also in district Hay, Northern Cape Province.

[3] The respondents, Mrs Maria Mampies and Mr Hendrik Mampies, are a retired, married couple. They were close relatives of the subject of the burial site dispute, the late Ms Magdalene de Wee (the deceased), who was the daughter of Mrs Mampies' biological brother, Mr Petrus de Wee, and Mrs Katriena de Wee. The respondents are occupiers[2] on the portion of Onder-Plaas with cadastral description Portion 4 of the Farm Landgoed, Number 359. Mrs Mampies was born on this land in 1963 and has resided on it her entire life. She worked at the farms as a seasonal employee of Mr Jan Pieter Engelbrecht, who owned all the farms and operated them as a single unit at the material time, until her retirement. Mr Mampies moved to Onder-Plaas in 1997 to work for Mr Engelbrecht as a permanent employee and has continued residing there even after his retirement in 2011. The deceased started working at Onder-Plaas in

[2] In terms of ESTA which defines 'occupier; in s 1(1)*(x)* as '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, but excluding–
(a) a labour tenant in terms of the Land Reform (Labour Tenants) 1996; (Act No. 3 of 1996) and
(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 family; and
(c) a person who has an income in excess of the prescribed amount'.

2009 and resided there (on Portion 4 of the Farm Landgoed) with her four young children after her retrenchment from work in 2014, until her death on 22 February 2017.

[4] Mrs Mampies' maiden family has resided and worked at Onder-Plaas and, likely the other Montina farms as they were not aware of the farms' boundaries, for generations. They regarded the Montina farms as one unit, as there were no discernible boundaries between them and Mr Engelbrecht operated them as such. They were allowed use of and unrestricted movement across these farms, living as families, rearing and grazing their livestock and burying their dead on them. Mrs Mampies' father also worked for Mr Engelbrecht during his lifetime. His wife, Mrs Mampies' mother, predeceased him and was buried in a graveyard next to their home at Onder-Plaas. He, another daughter and Mrs Mampies' two children, respectively died in 2000, 2008, 2001 and 2006. They, together with other members of their extended family, were buried in another graveyard situated on the portion of Middel-Plaas with cadastral description Portion 2 of the Farm Oranje Noord Number 360. This graveyard was established for use by the occupiers of the Montina farms, the respondents and 37 other families, including those who had no homes in Middel-Plaas, when the Onder-Plaas graveyard reached full capacity. The respondents and their family regard the graveyard as their ancestral burial site.

[5] Ownership of the farms passed from Mr Engelbrecht, in 1991, to several successive owners over the years. Thus, Bo-Plaas and Middel-Plaas are now owned by the appellant and Onder-Plaas is owned by SnyBar Developments (Pty) Ltd as indicated above. Despite these changes, the occupiers' living and employment conditions remained unchanged in the beginning and they continued to have unfettered access to the Middel-Plaas graveyard. However, in 2014 the successive

owners of the farms at the time, Groblershoop Trust, sold them to the Genade, Trisa and Vickie Trusts.

[6] According to the respondents, the latter change in ownership brought new, strict and unreasonable rules for the occupiers. They were not allowed to conceive children whilst living on the farms. Many families were forced to sell their livestock. They were prohibited from receiving visitors at their homes. They were also denied access to the Middel-Plaas graveyard. After numerous failed negotiations, the new successive owners launched eviction proceedings in 2015 against 30 families among the occupiers.[3] The respondents were, however, not included in that group. It is during this conflict that the farms were sold to the current owners.

[7] When the deceased passed away her parents, who did not reside on the Montina farms, and the respondents, who regarded her as their own daughter, wished to bury her at the Middel-Plaas graveyard with the rest of her family. This was in accordance with their religion as members of the Dutch Reformed Church, cultural beliefs and established practice. In terms of these beliefs and practice, they bury kin nearby and in the same graveyard so that the graves may be regularly visited and cleaned without difficulty and to enable the dead 'to provide comfort'. The appellant, however, refused to allow the respondents and their family to bury the deceased in the Middel-Plaas graveyard because they lived on Onder-Plaas and only the graveyard was situated on its land. That decision prompted this litigation.

[8] The respondents launched urgent proceedings in the LCC seeking, mainly, (a) the declaration of their rights under ESTA, including the right to bury the deceased in the Middel-Plaas graveyard in terms of s 6(2)*(dA)* thereof and, or, any law in terms of

[3] In *Trisa Trust & others v Gert Vries & others* LCC Case number 136/15.

which the respondent acquired rights through their historic and continued practices on the farm; and (b) an order interdicting the appellant from interfering with their right to bury on Middel-Plaas.

[9] The respondents subsequently brought an application in terms of Uniform rule 16A in which they challenged the constitutionality of s 6(2)*(dA)*. They contended that they have, 'through their long-term and uninterrupted use of the portion of the [appellant]'s land for religious and/ or cultural purposes, acquired a real right in the form of a private servitude to bury deceased members of their family in accordance with their religion or cultural belief, as an established practice in respect of the land'. They asked the LCC to recognise 'through the development of the common law of acquisition of real rights in terms of s 39(2) of the Constitution or through a creation of a special constitutional remedy through section 38 of the Constitution, that real rights to land may be acquired through long-term use under these circumstances'.

[10] As I have mentioned, the LCC decided the matter in the respondent's favour. The court found that the respondents complied with the provisions of s 6(2)*(dA)* of ESTA as they were family members of the deceased and had established that it was in accordance with their religious and cultural beliefs for the deceased to be buried in the Middel-Plaas graveyard. The court held that a purposive interpretation of the provisions, which are meant to protect the vulnerable occupiers' religious and cultural rights, tipped the scales in the respondents' favour. They had acquired a servitude from their routine practice of burying their deceased family members on that land with the landowner's consent, which could not be revoked unilaterally. And the boundaries between the farms were artificial as the owners treated them as one and allowed the occupiers to do likewise; a position which was not affected by the change in ownership. The court concluded that there would be no further intrusion into the

appellant's ownership rights than was already permissible under s 6(4) of ESTA, which allowed the visitation of the Middel-Plaas graveyard. The court, however, rejected the legal points raised in the alternative, in the Uniform rule 16A application, on the basis that they were made belatedly and had no foundation in the respondents' founding affidavits.

[11] On appeal before us, the appellant contended that the LCC's judgment divested s 6(2)*(dA)* of legal effect because it allowed a burial without compliance with the provision's clear requirements. This was so, it was argued, because the places where the respondents were occupiers, the deceased resided when she died ie Onder-Plaas, and where the respondents wanted to bury her ie Middel-Plaas, are separately registered cadastral units of land of which the appellant owns only one, ie the land with the proposed burial site. Therefore, the respondents could not claim a burial right, which is an incidence of the occupier's right of residence contained in s 6(1) of ESTA, against it. Were that allowed occupiers would obtain a burial right based merely 'on ancestral lineage and burials irrespective of their residency or that of the deceased' and s 6(2)*(dA)* would be rendered inconsequential, so went the argument.

[12] Reliance for this contention was placed on this Court's decision, in *Dlamini & another v Joosten & others* 2006 (3) SA 342 (SCA). In that matter, which the appellant argued is dispositive of this appeal, it was held that as ESTA regulates the relationship between occupiers of land and owners of the same land, the burial right in s 6(2)*(dA)* was claimable by an occupier against the owner of registered land, the extent of which could be objectively determined only by reference to its cadastral description.

[13] The respondents, on the other hand, properly conceded that the LCC was right to dismiss the alternative argument placing reliance on a servitude or development of the common law for failure to comply with Uniform rule 16(1)*(a)*.[4] However, it was contended on their behalf that the main relief was properly granted as they had met the jurisdictional factors set out in s 6(2)*(dA)*. The *Dlamini* decision, which the LCC distinguished on its facts and lamented that it laid emphasis on the meaning of 'land' instead of 'reside', was criticised for 'construing the term "land" narrowly'. We were accordingly urged to rather purposively interpret 'occupy' which, it was argued, denotes a wider concept than the word 'reside' and must be construed to include the right to bury.

[14] In terms of s 25(6) of the Constitution '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. ESTA, which forms part of the legislative instruments intended to facilitate the land reform and redistribution programme, is the statute envisaged in these provisions in the circumstances of this case. It provides long-term security of land tenure to persons who reside on land that does not belong to them and extends their rights while giving due recognition to the rights, duties and legitimate interests of owners as well. Section 5 of ESTA vests occupiers, owners and persons in charge with a compendium of fundamental rights, '[s]ubject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. These rights include 'human dignity and

[4] Which, inter alia, requires '[a]ny person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading'. See, also, *Shaik v Minister of Justice and Constitutional Development & others* 2004 (3) SA 599 (CC) at 610H (para 24) in which the Constitutional Court described the purpose of rule 16(1) to be 'to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests'.

freedom of religion, belief and opinion and of expression'.

[15] Prior to the amendment of ESTA to introduce s 6(2)*(dA)*,[5] the courts interpreted the protection of occupiers' religious and cultural rights under ESTA as excluding the right to bury deceased family members on land owned by others.[6] This Court expressed that view as follows in *Nkosi & another v Bührmann*:[7]

'… [T]he right to freedom of religion and religious practice has internal limits. It does not confer unfettered liberty to choose a grave site nor does it include the right to take a grave site without the consent of the owner of the land concerned.

…[D]espite the recognition of the sanctity of existing family graves and despite the reduction of the rights of ownership to the extent demanded by the exercise of the rights conferred in s 6 [of ESTA], the Legislature stopped short of obliging owners to accept against their will the creation of further graves. Had it been the Legislature's intention to impose that burden by granting occupiers the corresponding right it would not have occasioned any real drafting problem to say so expressly. It is improbable that the creation of that right was left to a matter of obscure inference.'

[16] This interpretation obviously conflicted with the legislative intention and ESTA's objects. Section 6(2)*(dA)* was, therefore, enacted to cure this anomaly and extend the rights of occupiers further by including the right to bury deceased family members on land owned by others. The provisions read:

'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 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.'

An 'established practice' is defined in s 1(1) of ESTA to mean 'a practice in terms of

[5] Inserted by s 7*(a)* of the Land Affairs General Amendment Act 51 of 2001.

[6] See, for example, *Bührmann v Nkosi & another* 2000 (1) SA 1145 (T) paras 49 and 54; *Serole & another v Pienaar* 2000 (1) SA 328 (LCC) at 335B-G.

[7] *Nkosi & another* v *Bührmann* 2002 (1) SA 372 (SCA).

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.'

[17] The approach to be adopted in ascertaining the meaning of ESTA is established. Regard must be had to its purpose and the mischief it seeks to remedy ie securing the tenure of occupiers of land and granting them the dignity of which they were deprived under the apartheid system. Its provisions must be accorded a generous interpretation, in a manner that is consistent with the Constitution, so as to afford this vulnerable class of people the fullest protection intended by the Constitution and ESTA. The Constitutional Court, dealing with a related statute, the Restitution of Land Rights Act 22 of 1994, neatly articulated this exercise as follows in *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd*:[8]

'It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing "as a result of past racially discriminatory laws or practices" in its setting of s 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. *Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to the context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous*.'

[8] *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* (CCT69/06) [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) para 53. See also *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC); *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

(Emphasis added.)

[18] It is against this backdrop that it must be determined whether the respondents met the requisites for the right to bury envisaged by s 6(2)*(dA)*, ie (a) they areoccupiers within the definition of ESTA; (b) the deceased resided on the land at the time of her death; and (c) there was an established practice in terms 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. The existence of the latter requirement was not seriously disputed. This was to be expected in light of the respondents' uncontested allegations that over two decades they and the other occupiers on Montina farms routinely buried their deceased kin in the Middel-Plaas graveyard in accordance with their religious beliefs and practice, with the consent of Mr Engelbrecht and his successors-in title after he sold the farms in 1991, until 2015. The only point of contention was the one indicated at the outset – whether s 6(2)(*dA)* conferred on the respondents a right to bury the deceased in the Middel-Plaas graveyard on a proper interpretation of these provisions.

[19] To my mind, the answer to this question depends simply on whether it can be said that the respondents and the deceased at her death resided on the land in which it was sought to bury her. ESTA does not define the term 'reside'. (This is the term used in s 6(2)*(dA)* and not the term 'occupy' which the respondents fallaciously contended we should construe.) There is, however, a statute assented to by the President on 18 November 2018 – the Extension of Security of Tenure Amendment Act 2 of 2018 – which was published in *Government Gazette* 42046 dated 20 November 2018. The statute's date of commencement has yet to be proclaimed. But it bears some relevance as it contains a definition of 'reside' and 'residence', which offers a glimpse into the

legislature's intention in this regard. Section 1*(h)* thereof defines 'reside' to mean 'to live at a place permanently', and deems 'residence' to have a corresponding meaning. The intended definition fortifies a view already adopted by the courts in relation to land reform matters – that 'the essence of the term is the notion of a permanent home'.[9] But, it too would still have to be given meaning within the relevant context, having regard to ESTA's purpose, if the Amendment Act came into force.

[20] So what meaning is to be ascribed to the term 'reside' here? It bears mention that our courts have grappled with this question since the turn of the last century and determined that the term is capable of bearing more than one meaning, depending on the object and intention of the statute in which it is used.[10] I agree with this view as it dovetails neatly with the interpretive approach advocated in *Goedgelegen* and its ilk.

[21] I should mention at this juncture that I have no objection to the meaning that *Dlamini* ascribed to the term 'land' in s 6(2)*(dA)*, which the Court derived from the fact that ESTA regulates the relationship between occupiers of land and owners of the same land.[11] And as the Court further pointed out, the burial right provided by these provisions is an incidence of the occupier's right of residence contained in s 6(1) of ESTA, which is in the nature of a registrable real right possessed by the occupier over the land at death of a family member, who at the time of death resided on that land.[12] I also agree that because the burial right is a registrable real right in land which reduces an owner's dominium over his or her land, it is claimable only against that owner and

[9] See *Barrie NO v Ferris & another* 1987 (2) SA 709 (C) at 714F; *Mkwanazi v Bivane Bosbou (Pty) Ltd & another and Three Similar Cases* 1999 (1) SA 765 (LCC) para 8; *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* [2009] ZASCA 119; 2010 (3) SA 152 (SCA) paras 8 and 9.
[10] See *Ex Parte Minister of Native Affairs* 1941 AD 53 at 58, which followed the dictum in *Buck v Parker* 1908 TS at p1104; *Kiepersol* ibid.
[11] Para 16.
[12] Ibid.

his or her successors-in-title under s 24 of ESTA.[13]

[22] But do these principles lead to a conclusion that the respondents have no right to bury members of their family in their ancestral burial site at Middel-Plaas since Onder-Plaas and Middel-Plaas are aggregations of separately registered pieces of land, each aggregation currently owned by different entities where: (a) in recognition of the respondents' statutory burial right under s 6(2)(*dA*), the landowner granted them permission to bury their family members next to their home in Onder-Plaas, in accordance with their religious and cultural beliefs, and subsequently allocated them another burial site on the adjacent, unbounded Middel-Plaas to which they always had free access in their daily lives when the Onder-Plaas graveyard reached full capacity; and (b) an established practice developed over many years, in terms of which the respondents and other occupiers were routinely given permission by Mr Engelbrecht and later, successive owners, to bury their deceased family members on Middel-Plaas in accordance with their religious and cultural beliefs?

[23] It is clear from the respondents' affidavits that their burial practices and the location of their family graves near where they live form a vital part of their religion and their day-to-day lives. A question must be asked: Where and how did the legislature contemplate that occupiers in the respondents' position would meaningfully exercise their s 6(2)*(dA)* right if they were excluded from invoking it against a landowner who, as here, allowed them to bury their dead and establish an ancestral

[13] In terms of s 24 of ESTA:
'(1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.
(2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she had given it.'

burial site, not where their homes are built, but on nearby land that he also owned and which has historically been used by the respondents, the deceased herself and their forebears in their daily lives; traversing it, working on it, grazing their livestock on it and burying their loved ones on it?

[24] It seems to me inconceivable that the legislature would have intended to deprive this small category of vulnerable occupiers of a critical right, which was specifically enacted to formally attach the right to bury to an occupier's right to residence and thus fortify her right of security of tenure. It certainly does not strengthen the security of tenure of persons residing on farms to leave them without the means to bury their dead in accordance with their religion and customs. A contextual interpretation of 'reside' that takes into account the peculiar circumstances of the present case and the purpose of ESTA must include the respondents' ancestral burial site which the Middel-Plaas graveyard constitutes for the respondents. I am satisfied that they established a clear, protectable right under ESTA, which allows them to bury the deceased at their ancestral burial site in Middel-Plaas. Any other interpretation of s 6(2)*(dA)* would render the burial right it bestows upon them nugatory.

[25] To return to *Dlamini*, on which the appellant unsurprisingly placed great reliance, the court in that case was not invited to find that the appellants (a widower and son who wished to bury the deceased – their late wife and mother, respectively – on a particular farm) had 'resided' on the farm on which they wished to bury the deceased. The latter farm was adjacent to the one on which their dwelling was situated and the two farms were separately registered pieces of land. If in that case the appellants resided only on the farm on which their dwelling was situated (and this court was not invited to decide otherwise), the conclusion was correct. It is clearly

possible, however, for a person to 'reside' on land which is made up of more than one registered portion of land. To take a straightforward example, a family might have the exclusive use of a fenced area containing their dwelling and a field for crops. I do not think anyone would doubt that the fenced area was the land on which the family 'resided'. Yet it might be situated partly on one registered piece of land and partly on another. The question whether a person has routinely performed sufficient acts in relation to land to regard it as part of the land on which he or she 'resides' is necessarily fact-specific.

[26] Ngoepe JP's comments in his minority judgment in *Buhrmann v Nkosi & another*,[14] even before s 6(2)*(dA)* was introduced, are instructive. He said:[15]

'It is well known that there is a strong relationship between peoples' religion and the way in which, in the manifestation of such a belief, they would want their dead to be buried . . . *To acknowledge the respondent's right to practice and manifest her religion, but bar her from interring her son at a place and in a manner that would give meaning to her right of religion and belief could amount to no more than paying mere lip service to such right.'* (Emphasis added.)

[27] In *Daniels v Scribante*,[16] the Constitutional Court expressed itself against interpreting ESTA in the narrow manner of old that may leave occupiers with hollow rights. The matter implicated two of the rights at issue here – the right to security of tenure and the right to human dignity – albeit in a different context. The Court considered whether an occupier has a right to make improvements to her or his dwelling to make it suitable for human habitation which ESTA does not expressly

[14] *Bührmann v Nkosi & another* 2000 (1) SA 1145 (T).
[15] At 1161 C-G.
[16] Footnote 8.

provide. Madlanga J said in his seminal judgment, at paras 27-29:

'. . . Whether the right exists must depend on what an interpretive exercise yields . . . The question is whether – on a proper interpretation of ESTA – the right contended for by Ms Daniels indeed does not exist. The respondents' argument [that s 25(6) of the Constitution affords an occupier rights to the extent provided by ESTA and that an occupier's rights are listed in s 6 typifies the "blinkered peering at an isolated provision" of a statute that Nienaber JA cautions against in *Thoroughbred Breeders Association* . . . .

[It] places focus only on the rights of an occupier that s 6 of ESTA specifically itemises. It disregards all else: context counts for nothing; nor does the purpose for which ESTA was enacted; and s 39(2) of the Constitution is not taken into account at all. This reading of s 6 is unduly narrow. Part of the context is s 5 of ESTA which the respondents' interpretation ignores. That section decrees that occupiers enjoy certain fundamental rights, including the right to human dignity. On the respondents' interpretation, occupiers have a right that could well be empty. They could live in conditions that infringe their right to dignity with no remedy available to them. That simply cannot be. How does the respondents' interpretation factor in the need for an occupier to live in conditions that conduce to human dignity? It does not. That immediately infringes an occupier's right under s 5.'

In my view, this sentiment applies with equal force in the present case.

[28] The apprehension expressed by the appellant that '[i]f the LCC's order stands, a real possibility will be created that the appellant's land will eventually turn into a graveyard and that the appellant will lose the use thereof *in toto*' has no basis. The burial right is not absolute and must be weighed against the property rights of the landowner or the person in charge of the land.[17]

[29] In terms of s 6(2) of ESTA, the occupier's right to security of tenure must be balanced with the rights of the owner or the person in charge. Zondo J succinctly

[17] GJ van Niekerk '*Death and sacred spaces in South Africa and America: a legal-anthropological perspective of conflicting values' CILSA* vol 40 No 1 (March 2007) 30 at 48; J Pienaar and H Mostert '*The balance between burial rights and landownership in South Africa: Issues of content, nature and Constitutionality*' 2005 (3) *SALJ* 633 - 660.

explained this requirement in *Hattingh & others v Juta*:[18]

'In my view the part of s 6(2) that says: "balanced with the rights of the owner or person in charge" calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the enquiry . . . .'

Therefore, an occupier may not willy-nilly invoke the right. Its exercise evidently depends on the specific circumstances of each case and the satisfaction of s 6(2)*(dA)*'s built-in requirements of standing and 'an established practice'.[19]

[30] It is important to point out as Ngoepe JP did in *Nkosi*,[20] that there is here, as was the case in that matter, already an area demarcated for burial, which the respondents are, in any event, allowed by ESTA to visit as it houses the graves of their deceased family members. And 'the area the appellant loses to the deceased's grave is probably 1m x 2m' which does [not] constitute such a drastic curtailment of the appellant's right of ownership as to justify denying the respondent[s] the right' to bury the deceased in terms of s 6(2)*(dA)*.[21]

[31] Needless to say, once granted the permission to bury could not be unilaterally withdrawn either by the original grantor of the permission or his successors in title,including the appellant, which was aware of the existence of the graveyard when it purchased Middel-Plaas in June 2015.[22] That result does not conflict with the

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[18] *Hattingh & others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) para 63. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23 which described the judicial function in these cases (albeit dealing with the protections provided by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998), as balancing out and reconciling the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.

[19] *Bührmann* at 1161H.

[20] Footnote 14 at 1161H.

[21] At 1161G.

[22] *Dlamini & another v Joosten & others* 2006 (3) SA 342 (SCA) para 24.

Constitution in the context of this case having regard to all relevant factors.

[32] The last aspect relates to mootness ie whether the issues raised in the appeal are of such a nature that the decision sought will have no practical effect or result thus warranting its dismissal on this ground alone.[23] The deceased was ultimately buried on Middel-Plaas directly after delivery of the LCC's judgment. Despite this fact, the parties agreed when the appellant subsequently moved to challenge the decision on appeal that the matter was not moot. The appellant contended that a finding of mootness would deprive it of its right to appeal and right of access to court because the deceased was buried in a matter of hours after an order, which was not accompanied by reasons, before it had an opportunity to consider its options. Furthermore, the LCC's judgment 'opens the door for all people residing in the area to bury more deceased on [its] land only because other deceased family members are already buried there'.

[33] I am persuaded that the appeal warrants adjudication even though its outcome will have no practical effect or result as between the parties. It involves 'a discrete legal issue of public importance' that affect matters in the future' as the interpretation of 'reside' in s 6(2)*(dA)* of ESTA will undoubtedly have profound implications for occupiers and landowners alike.[24]

[23] In terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.
[24] *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5. See also *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); (2012 (4) BCLR 388; [2011] ZACC 34) para 32.

[34] The appeal must accordingly fail. Regarding the question of costs, on the basis of the *Biowatch* principle I am not inclined to mulct the appellant with the costs of the appeal despite its failure.[25]

[35] The appeal is dismissed with no order as to costs.

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MML MAYA

PRESIDENT OF THE SUPREME COURT OF APPEAL

[25] *Biowatch Trust v Registrar, Genetic Resources & Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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