

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **5 February 1999**  
before **Gildenhuis J** and **Bam P**

**CASE NUMBER:** LCC 9/99

In the matter between

**ALBERT SEKOBO SEROLE**  
**ALBERT SEKOBO SEROLE**

First Applicant  
Second Applicant

and

**JACOBUS STEPHANUS JOHANNES PIENAAR**

Respondent

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## JUDGMENT

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### **GILDENHUYS J:**

[1] The First Applicant in this matter is the grandson of the Second Applicant. Both Applicants reside on the farm Leliespan, in the district of the Coligny. The Second Applicant lived with his son (who is the father of the First Applicant). His son died on 19 January 1999. I shall refer to him as “the deceased”. The Applicants want to bury him on Leliespan. The Respondent is the owner of Leliespan. He wants to prevent the burial.

[2] Both Applicants and the deceased are erstwhile employees of the Respondent. The Second Applicant is now too old to work or to care for himself. The First Applicant and the deceased were, after a labour dispute, dismissed during September 1997 as employees of the Respondent. Despite the dismissal, they continued to reside on Leliespan. The Department of Land Affairs is undertaking the acquisition of land for a resettlement area, to which the Applicants will, in due course, become entitled to move.

[3] The Applicants allege in their founding affidavits that they are occupiers of Leliespan, within the meaning given to that term in section 1(1) of the Extension of Security of Tenure Act

(hereinafter “the Tenure Act”).<sup>1</sup> They contend that they are entitled to all the rights given to occupiers under the Tenure Act, including the alleged right to bury the deceased on Leliespan. At the hearing, the matter was argued by both parties on the basis that the Applicants are entitled to the rights given to occupiers under the Tenure Act. For purposes of this judgment, I shall accept that they are entitled to those rights.

[4] When it came to the knowledge of the Respondent that the Applicants intend to bury the deceased on Leliespan, the Respondent, without prior notice to the Applicants, obtained an interdict in the Magistrates’ Court at Coligny on 22 January 1999. The order reads as follows:

“Interdik toegestaan as bevel nisi;

Respondent (*the First Applicant in this case*) of sy familie word verbied om Maruping Simon Serole (*the deceased*) . . . op die plaas Leliespan te begrawe;

Bevel nisi se keerdatum 9/2/99 9:00;

Respondente in geval van opponering gelas om koste van hierdie aansoek te betaal.”<sup>2</sup>

[5] By way of notice of motion dated 1 February 1999, the Applicants applied for a review of the Order of the Magistrate, and prayed (*inter alia*) for the following relief:

- 3 that the above Honourable Court declare the Order by the learned magistrate erroneous in that:
  - 3.1 the learned magistrate failed to consider the provisions of section 15 of Extension of Security of Tenure Act, Act 62 of 1997 (Tenure Act);
  - 3.2 the magistrate made an interim order depriving the first applicant of his rights as an ‘occupiers’ as defined in section 1(x) of the Tenure Act, without any determination of such status;

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<sup>1</sup> Act 62 of 1997, as amended

<sup>2</sup> A translation of the order into English reads as follows:

“Interdict granted by way of rule nisi;  
Respondent or his family is prohibited to bury Maruping Simon Serole . . . on the farm Leliespan;  
Return date of the rule nisi is 9/2/99 9:00;  
Respondent is ordered, in the event of opposition, to pay the costs of this application.”

- 3.3 the magistrate made a pronouncement on the right of occupiers to bury their dead on the farm, giving an interpretation contrary section 6 of the Tenure Act in relation to rights of occupiers.
- 4 the above Honourable Court give a mandatory interdict preventing the Respondent from interfering in any way with the applicants and their families in the arrangement and conducting of the burial of Simon Maruping Serole scheduled to take place on 6 February 1999.
- 5 the above Honourable Court order the respondent from interfering with the applicants in the use of land they have always been entitled to use on or before 4 February 1997, by either express or tacit consent.

[6] The review application was served on the Magistrate. He then he gave the following reasons for his order:

“The provisions of Act 62/1997 (“the Tenure Act”) was erroneously not considered by me. It is clear that respondent in this application, now applicant, is an ‘occupier’ as defined in section 1(x) of this Act and the matter falls within the ambits of this Act. It is in terms of section 6(1) of this act the right of such an occupier if expressly or tacitly agreed to with the owner of the land to bury his deceased relatives there. The owner of ground, applicant, should have applied for the relief in terms of the provisions of the mentioned Act, perhaps section 15.

It is clear that respondent could have applied for the discharge with costs of the order made *ex parte* in terms of Rule 55(7) of the Rules of Court promulgated in terms of the Magistrates’ Court Act (Act 32/1944) with 12 hours notice. The success thereof would have been certain. It is trite that this would have been an easier and less costly application.

I request the honourable judge to set aside my order with the necessary cost order.”

[7] This Court has exclusive jurisdiction to review an act or decision of any functionary acting or purporting to act under the Tenure Act.<sup>3</sup> Although the Magistrate did not consider the Tenure Act when he gave the order, he concedes that he should have done so. The points raised by the Applicants involve the interpretation and application of the Tenure Act. The jurisdiction of this Court to hear this matter was not challenged. I am satisfied that this Court has jurisdiction.

[8] The Respondent, *in limine*, contented that it was not open to the Applicants to approach this Court for a review of the Magistrate’s order without exhausting their remedies in the Magistrates’ Court. Mr de Jager, who appeared for the Repondent, correctly pointed out that the Magistrate’s Order was not a final order, that the Applicants could have anticipated the Order by twelve hours’ notice, could have presented their arguments based on the Tenure Act to the Magistrate, and could, if they were so entitled, have obtained a discharge of the order. The

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<sup>3</sup> Section 20(1)(c) read with section 20(2) of the Tenure Act.

submission find support in the case of *Pretorius v Fourie, NO en 'n ander*,<sup>4</sup> where Smit J P held that an interim order by a Magistrate which could be amended or be rescinded by the Magistrate, will not be reviewed by a superior court before the aggrieved party has exhausted his or her remedies in the Magistrate's Court.

[9] This rule will not be applied without exception. When a grave injustice might otherwise occur, a superior court will intervene.<sup>5</sup> The circumstances where such intervention may occur,

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<sup>4</sup> 1962 (2) SA 280 (O) at 284H-285A:

“Wat die hersiening van die substantiewe bevel betref het mnr. *Linde*, namens verweerder *in limine* betoog dat eiser nie geregtig was om op hersiening te kom nie omdat hy nie eers sy regsmiddels in die laerhof uitgeput het nie. Sy betoog is dat die bevel waarteen beswaar gemaak word ‘n tussenbevel is wat nie aan appèl onderhewig is nie en wat luidens art. 36 (d) van die Landdroshowewet, 32 van 1944, deur die landdros self vernietig kon word. Hy steun in hierdie verband o.a. op die saak van *Schoeman v. Acting Assistant Magistrate of Harrismith and Another*, 1933 O.P.D. 48. Dit is ‘n beslissing van die volle Hof van hierdie Afdeling. Daarin word neergelê dat wat hierdie Afdeling van die Hooggeregshof betref ‘n party nie ‘n uitspraak van ‘n laerhof of op appèl of in hersiening kan neem nie, alvorens hy nie eers sy regsmiddels in die laerhof uitgeput het nie en dat Hofreël 90 van hierdie Hof, waaronder hersieningsake gebring word, handel met sulke onreëlmatighede as wat slegs deur die Hooggeregshof herstel kan word. ‘n Dergelyke prosedure word blykbaar ook in ander Afdelings gevolg. (Kyk *O'Brien v. Gazi*, 1933 E.D.L. 38; *Loteryman v. Steckel*, 1922 S.W.A. 109; *Clark's Dairy (Pty.) Ltd. v. Sentrale Melkery*, 1939 T.P.D. 326; *Ferreira v. Marcus*, 1937 C.P.D. 203; *Hoosen v. Lockhat*, 1926 N.P.D. 130; *Jockey Club of S.A. and Others v. Feldman*, 1942 A.D. 362).”

and at 285D-E:

“Luidens bogenoemde beslissings . . . blyk dit dat die eis vir die hersiening van die gewraakte bevel, voorbarig is, aangesien die landdroshof dit self kan verander of tersyde stel onder art. 36 (d) van die Landdroshowewet, 32 van 1944.”

<sup>5</sup> *Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg and Another* 1978 (4) SA 790 (T) at 793E-G (per Margo J):

“The magistrate points out that the decision to rescind the judgment is interlocutory only, the implication is that the application for review is an attempt to obtain the intervention of the Court in proceedings which have not yet terminated. The rule is that a Superior Court should be slow to intervene in uninterminated proceedings in an inferior court, and should, generally speaking, confine the exercise of its powers to ‘rare cases where grave injustice might otherwise result or where justice might not by other means be obtained.’

See *Ismail and Others v Additional Magistrate, Wynberg, and Another* 1963 (1) SA 1 (A) at 5G, and the other authorities collected in *Anglo American Corp of SA Ltd v Sierzputowski* 1973 (3) SA 709 (T) at 713H-714H.”

go beyond those ordinarily required for review proceedings.<sup>6</sup> Its purpose is to prevent grave injustice.<sup>7</sup> The power to intervene will be exercised in exceptional cases only.<sup>8</sup> It is not sufficient to show that the magistrate was wrong in making the interim order.<sup>9</sup> The wrong decision must, if allowed to stand, result in an injustice which will vitiate the continuation of the proceedings.<sup>10</sup>

[10] Mr Mpofu, who appeared for the Applicants, argued that in this case it would be pointless to go back to the Magistrate, as he had already made up his mind when he issued the rule *nisi*. The same argument was raised in *Pretorius v Fourie*, and was dismissed.<sup>11</sup> *In casu*, it is evident

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<sup>6</sup> *Ginsburg v Additional Magistrate of Cape Town* 1933 CPD 357 at 360; *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119D-120A; *Weber and Another v Regional Magistrate, Windhoek and Another* 1969 (4) SA 394 (SWA) at 397G; *Van Wyk v Midrand Town Council and Others*, 1991 (4) SA 185 (W) at 187G-J, and at 188D, where Lazarus J held that:

“ . . . a Court has the power to interfere with the unterminated course of proceedings in a court below in rare cases where grave injustice might otherwise result or where justice might not by other means be obtained. In general, however, it . . . would hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of the proceedings in the court below and to the fact that redress by means of review or appeal would ordinarily be available.”

<sup>7</sup> The intervention is justified on the basis that it would have been an abuse of the process of the lower court if the proceedings had continued. See *Solomon v Magistrate, Pretoria and Another* 1950 (3) SA 603 at 607E-H;

<sup>8</sup> *Ellis v Visser and Another* 1956 (2) SA 117 (W) at 123F

<sup>9</sup> *Venter v Cassimjee* 1956 (2) SA 242 (N) at 245A (per Broome J P):

“In the present case, the magistrate had to decide a number of points which were raised before him. It may be that he decided some of them wrongly, but if he did the defendant’s remedy is by way of appeal. He cannot base his review solely upon such a wrong decision; he must go further and show that the magistrate committed some irregularity which resulted in his decision not being merely wrong but being in effect no decision at all. Defendant has made no attempt to base his review on any such ground.”

<sup>10</sup> *Brock v SA Medical and Dental Council* 1961 (1) SA 319 (C) at 324F-H

<sup>11</sup> *Supra* n 4 at 285B:

“Dit is aangevoer dat dit blyk ‘n verkwisting van tyd en koste te wees om, in ‘n geval soos hierdie, waar albei partye teenwoordig was en waar die aansoek beredeneer was, die verloorkant verplig is om weer die landdroos te nader vir die tersydestelling van die bevel wat hy alreeds, na oorweging, gegee het. Hierdie arument was egter in *Schoeman* se saak, *supra*, aangevoer sonder sukses. So ‘n aansoek vir die tersydestelling van die tussenbevel hoef dan ook nie deur dieselfde landdroos verhoor te word nie.”

See also *Schoeman v Acting Assistant Magistrate of Harrismith and Another* 1933 OPD 48 and *Clark’s Dairy (Pty) Ltd v Sentrale Melkery* 1939 TPD 326 at 328.

from the reasons subsequently submitted by the Magistrate that he would have been prepared to amend or rescind the rule *nisi* after the existence and contents of the Tenure Act had been brought to his attention. In addition, Mr Mpofo argued, if I understood him correctly, that the interdict granted by the Magistrate is a nullity because a magistrate has no jurisdiction to grant an interdict unless it is interlocutory, linked to an action or application, and that a magistrate cannot rescind an order which is null and void. This argument cannot be sustained. Section 30(1) of the Magistrates' Courts Act<sup>12</sup> clearly empowers a magistrate's court to grant interdicts, subject only to the limits of jurisdiction prescribed by that Act. There is no requirement that an interdict must necessarily be an interlocutory interdict: some interdicts are interlocutory, others are not.<sup>13</sup>

[11] I do not find any reason why the Applicants in this case could not have anticipated the return date of the rule *nisi*. They could have done this by giving twelve hours' notice, and could have applied for the discharge thereof. I fail to find any grave injustice which could result from such conduct. Save in exceptional instances, parties to pending proceedings in magistrates' courts are not entitled to approach this Court to intervene in those proceedings. They must first exhaust their remedies in the magistrates' courts. For this reason alone, mindful though the Court may be of the Applicants' plight, the present application must fail.

[12] I deem it advisable to set forth my views on whether the Applicants have established any right under the Tenure Act to bury the deceased on Leliespan. This aspect of the case was fully argued at the hearing. I do so because I may be wrong in my conclusion that it is not open for the Applicants to approach this Court without exhausting their remedies in the Magistrate's Court.

[13] The rights of occupiers under the Tenure Act are set out in sections 5 and 6 of the Tenure Act. The relevant portions read as follows:-

**“Fundamental rights**

5 Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to -

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<sup>12</sup> Act 32 of 1944, as amended.

<sup>13</sup> Jones and Buckle, *The Civil Practice of Magistrates' Courts*, 9<sup>th</sup> ed by Erasmus and Van Loggerenberg, Vol 9 (Juta & Co Ltd, Cape Town 1997) at 90 *seqq*

- (a) human dignity;
- ....
- (d) freedom of religion, belief and opinion and of expression;
- ....

with due regard to the objects of the Constitution and this Act.

### **Rights and duties of occupier**

6(1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

(2) 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 -

- (a) to security of tenure;
- (b) to receive *bona fide* visitors at reasonable times and for reasonable periods:  
...
- (c) to receive postal or other communication;
- (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997;
- (e) not to be denied or deprived of access to water; and
- (f) not to be denied or deprived of access to educational or health services.

....

(4) Any person shall have the right to visit and maintain his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land.”

[14] In an able argument, Mr Mpofu submitted that the culture of indigenous black people requires the dead to be buried close to the living, and that a denial of burial rights on Leliespan would offend against the Constitutional dictates of human dignity and the right to cultural life,<sup>14</sup> both of which are mirrored in the Tenure Act.<sup>15</sup> Section 6(4) of the Tenure Act, which gives a right to every person to visit and maintain family graves on land which belongs to another person, is in his argument indicative of a right which is given to an occupier of land under the Tenure Act

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<sup>14</sup> Contained in sections 10 and 30 of the Constitution, Act 108 of 1996.

<sup>15</sup> Sections 5(a) and 6(2)(d) of the Tenure Act.

to bury family members on that land.

[15] The Tenure Act gives an occupier of land the right under section 6(1):

- to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997; and
- to have access to such services as have been agreed upon with the owner or person in charge, whether expressly or tacitly.

The nature of the two categories of rights differ. The first emanates from the Tenure Act itself.

The second is dependant on an agreement.

[16] Section 6(2) sets out some instances of use. All of them relate to the occupation of the land, and do not bear upon the land itself. Permission to establish a grave on a property could well amount to the granting of a servitude over that property.<sup>16</sup> The owner of the property and all successors- in- title will, for as long as the grave exists, have to respect the grave, not cultivate over it, and allow family members to visit and maintain it. Although the specific instances of use in section 6(2) are set out “without prejudice to the generality” of the provisions of sections 5 and 6(1), they still serve as an illustration of what kind of use the legislature had in mind when granting to occupiers the right to “use the land” on which they reside.<sup>17</sup> The right to establish a grave is different in nature from the specific use rights listed in section 6(2). It is, in my view, not the kind of right which the legislature intended to grant to occupiers under the Tenure Act. Such a right could constitute a significant inroad into the owner’s common law property rights. A Court will not interpret a statute in a manner which will permit rights granted to a person under

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<sup>16</sup> In *Dibley v Furter* 1951 (4) SA 73 (C) at 83H-84A, Van Zyl J held in relation to permission granted to establish a grave:

“In my opinion the granting of such permission, unless it is hedged around with the necessary safeguards, amounts to the granting of a servitude. In *Willoughby’s Consolidated Co. v Cophall Stores Ltd.*, 1918 A.D. 1 at p.18 , the Court said:  
 ‘Mere permission to make use of property may amount to a servitude if the owner of the property knowingly allows some permanent work to be done under the permission which cannot be removed or restored without substantial damage and prejudice to the thing itself and to the person concerned.’”

See also *Gillespie v Toplis and Another* 1951 (1) SA 290 (C) at 297F.

<sup>17</sup> *S v Arenstein and Others*, 1963 (2) SA 599 (N) at 600G and *Unity Longhaults (Edms) Bpk v Grindrod Transport and Others* 1978 (2) SA 77 (D) at 80E.

that statute to intrude upon the common law rights of another, unless it is clear that such intrusion was intended.<sup>18</sup>

[17] It is possible that the right to bury family members on a farm could be one of the services agreed upon between the owner and the occupier of the land, whether expressly or tacitly.<sup>19</sup> If so, that agreement is protected by the Tenure Act. The New Shorter Oxford English Dictionary<sup>20</sup> defines “service” as:

“Provision of a facility, to meet the needs or for the use of a person or thing”.

In his argument to the Court, Mr Mpofo endeavoured to deduce the existence of a tacit agreement that the Applicants may use the graveyard on Leliespan to bury their dead from the fact that the First Applicant’s grandmother and two of his siblings were buried there, and that the family has used the particular graveyard “over the years”. The Respondent denies that the mere existence of a graveyard which the Applicants may have used in the past, established a right to use it in the future. Nowhere in their affidavits do the Applicants allege, in so many words, that the continued use of the graveyard has been expressly or tacitly agreed upon with the owner of the land. The indications in the affidavits which might point to such an agreement are too meager to justify a finding that such an agreement exists.

[18] It might be appropriate to point out, at this stage, that the Applicants will, in all likelihood, soon move from Leliespan to a resettlement area which the Department of Land Affairs is in the process of establishing. The Respondent has offered to pay for a grave where the deceased can be buried elsewhere. This might go some way towards alleviating the distress of the Applicants.

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<sup>18</sup> *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 552; *Herison v South African Mutual Life Assurance Society* 1942 AD 259 at 263; *Wellworths Bazaars Ltd v Chandler’s Ltd and Another* 1947 (2) SA 37 (A) at 43; *Vrystaatse Ko-operasie Beperk v Minister van Landbou-Ekonomie en -Bemarking en ‘n Ander* 1965 (3) SA 377 (A) op 382D; *Visser v Theodore Sasson & Son (Pty) Ltd* 1982 (2) SA 320 (C) at 321G; *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) at 330I-J; *Commissioner of Taxes v First Merchant Bank of Zimbabwe Ltd* 1998 (1) SA 27 (ZSC) at 30G-H.

<sup>19</sup> As envisaged by section 6(1) of the Tenure Act.

<sup>20</sup> Brown (ed), *The New Shorter Oxford English Dictionary* (Clarendon Press, Oxford 1993) Vol 2 at 2789 sv “service” IV 18.

[19] The Land Tenure Act is social legislation. It is not always appropriate to grant costs orders in respect of litigation under that Act. The Respondent, very properly, did not ask for a cost order.

[20] The application was dismissed after the hearing thereof on 5 February 1999. We undertook to give reasons for the dismissal at a later date. The reasons are as set out above.

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**JUDGE A GILDENHUYS**

I agree

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**PRESIDENT F C BAM**

**Heard on:** 5 February 1999

**Handed down:** 9 February 1999

For the Applicants:

*Adv Dali Mpfu*, instructed by *Ramphela Attorneys*, Lichtenburg

For the Respondent:

*Adv P J J de Jager SC*, with him *adv W J Dreyer*, instructed by *John P de Klerk Attorneys*, Coligny