

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held in **Randburg** on **5 May 2006**  
Before **Ncube AJ**

**CASE NUMBER: LCC63/06**

Decided on: 10 May 2006

In the matter between :

**SARA MATAU**

Applicant

and

**LONGROPS 5 (PTY) LTD**  
**THE MAGISTRATE, BELFAST MAGISTRATE'S COURT**  
**MAKAULA , DON**

First Respondent  
Second Respondent  
Third Respondent

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## JUDGMENT

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**NCUBE A J :**

[1] This is an application for an order on the following terms -

- (i) Dispensing with the forms and time periods prescribed by the Rules of Court and permitting the matter to be heard as one of urgency.
- (ii) Setting aside the settlement agreement entered into on behalf of the first applicant and first respondent dated 3 March 2006, which was made an order of Court by the second respondent.
- (iii) Substituting the order referred to in (ii) above with the following :

“The Applicant and her family have the right to bury the Applicant’s late husband’s body on the property as contemplated in Section 6(5) of the Extension of Security of Tenure Act, 1997”.

[2] The application was received by this Court on 18 April 2006. It was an urgent application. The application was indeed accepted by this Court as urgent. This Court condoned

the applicant's non-compliance with the rules pertaining to service requirements and time limits for the filing of affidavits. Directives were issued which directives had the effect of curtailing the time limits.

[3] The Applicant, Sarah Matau, is a pensioner and a widow of one Gwaff Matau, (hereinafter referred to as the deceased) who died on the 17<sup>th</sup> of February 2006 on Portion 1 (Lindall) of the farm Konterdanskloof 223 JS, Mpumalanga, (hereinafter referred to as the farm). The first respondent is Logoprops 5 (Pty) Ltd, and it is the owner of the farm. Mr Herman Fritjof Walter is the sole director of the first respondent. Mr Walter is the only person who filed an affidavit on behalf of the first respondent. The second respondent is the magistrate Belfast Magistrate's Court. The third respondent is one Makaula Don, an attorney by profession, employed by Nelspruit Justice Centre, which is under the control of the Legal Aid Board. Mr Makaula is the attorney who represented the applicant in the Court *a quo* having been instructed by the Legal Aid Board.

[4] The applicant, Sara Matau, her husband Gwaff Matau together with their children arrived at the farm in 1972. The farm was, at that time, under the ownership of one Mrs de Bruin. On the 13<sup>th</sup> of August 1995, the first respondent started negotiations with Mrs De Bruin concerning the sale of the farm. Negotiations were successful. In 1996, the farm was registered in the name of the first respondent. When ownership of the farm was transferred to the first respondent, the applicant, the deceased and their children were still on the farm. Mrs De Bruin attempted, without success to evict the deceased and his family from the farm when the same was sold to the first respondent. The first respondent took possession of the farm with the deceased and other members of his family thereon.

[5] On 17 February 2006, Mr Gwaff Matau (the deceased) passed away, still resident on the farm. The applicant and other members of the family commenced with funeral arrangements. The first respondent, through Mr Walter became aware of the said funeral arrangements. On 23 February 2006, the first respondent approached the Magistrate's Court on an *ex parte* basis where he applied for and obtained an order of interdict against the applicant and other members of the family. The order of the Court *a quo* was given in the following terms .

"1 The following orders are made with immediate effect :

- 1.1 The respondents are interdicted and restrained from burying the body of the late Gwaff Matau on the following fixed property or any fixed property registered in the applicant's name. a Portion of Portion 1 (Lindall) of the farm Konterdanskloof 223, Registration Division JS, Mpumalanga ("the farm").
- 1.2 The respondents are interdicted and restrained from the making of a road or any form of access on the farm.
- 1.3 The respondents are interdicted and restrained from making any arrangements and/or preparations whatsoever for the burial of the late Gwaff Matau on the farm.
- 1.4 The respondents are interdicted and restrained from digging and/or preparing a grave on the farm.
- 1.5 The respondents are ordered to pay the costs of the application jointly and severally"

The return date of the Rule *Nisi* was the 3<sup>rd</sup> of March 2006.

[6] When the applicant and her family obtained knowledge of the Court Order, they sought and obtained legal assistance from the Legal Aid Board. The third respondent (Mr Makaula Don) was instructed by the Justice Centre of the Legal Aid Board to assist the applicant. The applicant filed an opposing affidavit.

[7] On 3 March 2006, which was the return date of the Rule *Nisi*, an unbelievable sequence of events unfolded. The third respondent arrived at Court. The first respondent's attorney and Mr Walter were in Court already. The third respondent proposed a settlement. This was acceded to by the first respondent's attorney as per the instructions of Mr Walter. The third respondent made calls on his cell phone. Neither the applicant nor any member of the family was present at Court. No settlement was reached. The matter proceeded. At some stage the Court adjourned. The third respondent again proposed a settlement agreement. This time the proposal was rejected by the opposite party as the first negotiations had proved to be fruitless. The third respondent asked to be excused in order to make a call. He was excused. On his return, the third respondent intimated that he was then in a position to enter into meaningful negotiations. As a result of those negotiations, a settlement agreement was concluded. This settlement agreement was subsequently made an order of Court.

[8] It is the abovementioned order which is now the subject matter of the present application. This Court is called upon to make a ruling on whether or not, the settlement agreement which led to the order being made was entered into with the knowledge and mandate given to the third respondent by the applicant and family members.

[9] In paragraph 16 of her founding affidavit, the applicant states :

“I am informed that the legal representative of the first respondent proposed a settlement which the third respondent accepted on our behalf without instructions to do so. I wish to state that the main reason for instituting these proceedings is, *inter alia*, that the third respondent entered into a settlement agreement referred to herein without my mandate or the mandate from my family members, which agreement effectively deprives us of our rights as envisaged in ESTA. Neither my family nor I instructed the third respondent to conclude the said agreement on our behalf. We did not even know about the settlement negotiations or the agreement itself until after it was made an order of Court on 3 March 2006. A copy of the said agreement is attached hereto marked Annexure B.”

[10] In paragraph 16, the applicant states :

“The third respondent admitted to me and my family members that he signed the agreement on our behalf without our instructions due to the pressure exerted upon him by the first respondent’s legal representative who was apparently (sic) senior and experienced than the third respondent. The third respondent was apparently intimidated hence he signed the agreement. A confirmatory affidavit by the third Respondent is attached”.

[11] The third respondent has, indeed deposed to an affidavit which is included in the papers before this Court. Paragraph 3 of the said affidavit states :

“I have read the affidavit of Sarah Matau and confirm its contents in so far as they relate to me.”

[12] The affidavit of the third respondent, therefore confirms that he did not consult and he had no mandate from the applicant or any member of her family to conclude a settlement agreement on their behalf.

[13] It is amazing. It is beyond my comprehension that the attorney can conduct himself in such unbecoming and unprofessional manner. Be that as it may, the confirmatory affidavit of the third respondent is proof that he had no mandate from the applicant or any of her family members to conclude a settlement agreement on behalf of the family. I find therefore that the third respondent had no mandate to conclude a settlement agreement on behalf of the applicant and her family members. For this reason, and this reason alone, the settlement agreement, together with the Court order made pursuant thereto can not be allowed to stand.

[14] Mr Botha, who appeared on behalf of the first respondent contended that should it be found that the third respondent had no mandate to conclude the settlement agreement, and should the order of the Court be set aside, the matter is to be referred back to the magistrate to proceed with it. The reason advanced is, according to Mr Botha, that the matter is now partly heard before the magistrate. The proceedings were stopped because of the settlement agreement. This is true, ordinarily, where a settlement agreement is set aside, the matter would be referred back to the magistrate. *In casu*, because of urgency, it is not reasonably possible to refer the matter back. The deceased passed away on 17 February 2006, the body is still lying in the mortuary as of now. It was not only the settlement agreement which was argued before me but I have also listened to the merits of the case. See *Kahn v Mahomed's Trustee 1927 EDL 192*. There is another reason why this matter may not be referred back to the magistrate. The application before the magistrate was different from the present application. That was an application for confirmation of Rule *Nisi* and the granting of a final interdict. It was not an application in terms of Section 6(5) of ESTA.

[15] What remains for me to decide is whether the applicant is entitled to an order in terms of section 6(5) of the Extension of Security of Tenure Act 62 of 1997 (hereinafter referred to as “the Act”).

[16] Section 6(5) provides as follows :

“The family members of an occupier contemplated in section 8(4) of this Act shall on 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.”

[17] The above subsection was inserted in the Act by the Land Affairs General Amendment Act of 2001. The amendment followed after two court decisions dealing with burial rights which occupiers might have. The first decision was handed down by this Court in the matter of *Serole and Another v Pienaar 2000 (1) SA 328 (LCC)*. In that case it was held :

“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 that statute intrude upon the common-law rights of another, unless it is clear that such intrusion was intended.”

The second decision was given by the Supreme Court of Appeal in the case of *Nkosi and Another v Bührmann 2002(1) SA 372 (SCA)*. In that case it was held (per *Howie JA*) that :

“... 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.”

[18] The present case is the first to be decided on section 6(5) of the Act. By enacting this section, the Legislature made its intention clear. The intention was to give occupiers and members of the family of occupiers the right to bury their dead on the land on which they were resident at the time of their death even if such is against the will of the owner of the land or the person in charge. The use of the word “shall” in section 6(5) is an indication that the land owner or person in charge is obliged to allow the burial on the land on which the deceased occupier was residing at the time of his death.

[19] I must mention, however, that the family members of the occupiers do not have an absolute right to bury the deceased occupier on the land on which he was residing at the time of his death. Section 6(5) has a built-in limitation. The right is to be exercised subject to reasonable conditions that may be imposed by the land owner or person in charge. The difficulty in the present case, is that the first respondent has refused the members of the family to bury the deceased on the land on which he (the deceased) was residing. The first respondent has not imposed any conditions but instead he has given an indication that he will allow the family to bury the deceased on the other land on which he was not residing and which is far from the land on which the deceased was residing with his family and away from the graves of the other deceased members of the family.

[20] The other limitation on this right, is that the right can only be exercised by the family members of the occupier who is contemplated in section 8(4) of the Act, not any other occupier. Any person who wants to rely on section 6(5) must prove that the deceased occupier is an occupier referred to in Section 8(4) of the Act, the so-called long term occupier. In the present case, the applicant has stated in her affidavit that the deceased came to reside on the land in question in 1972. He passed away on 17 February 2006. A simple calculation will show that the deceased had resided on this land for a period of about 33 years. As the deceased was born in 1918, he must have been 87 or 88 years of age when he passed away. I find therefore, that the deceased qualified as an occupier contemplated in section 8(4) of the Act as he had resided on the land in question for more than ten years and had reached the age of 60 years.

[21] Mr Botha's contention was that, for a person to fall under section 8(4), he or she must have grown up on that piece of land and he must have reached the age of 60 on that piece of land. I do not agree. There is nothing in the Act which supports this contention. This could not have been the intention of the Legislature. The aim of the Legislature was to protect long term occupiers like the deceased in the present case. The deceased arrived at the farm in 1972 and he must have been about 53 or 54 years of age at the time. He resided on the land for almost 33 years.

[22] Mr Botha also intimated that Section 6(5) might possibly be unconstitutional, in that it deprives the landowners of their common-law right to property and the right which is enshrined in section 25 of the Constitution of South Africa, Act 108 of 1996. It is not my intention to decide on the Constitutional validity of section 6(5) of the Act, as that is not the issue before me.

[23] The first respondent has, in its affidavit made reference to an abortive application for eviction by respondent in case LCC95/2005 which did not proceed. The application was filed with the Registrar of this Court on 9 December 2005. Nothing transpired thereafter. In the affidavit filed in that case, the first respondent alleges that the deceased had committed a breach which is contemplated in section 10(1)(a), (b) or (c). This argument can not assist the first respondent in the present case. The first respondent did not pursue the application for the eviction of the deceased from the land. No eviction order was granted against the deceased. The deceased died on the land. At the time of his death, the deceased was still an occupier contemplated in section 8(4) of the Act.

[24] In terms of section 6(5), the members of the family shall have a right to bury the deceased occupier in accordance with their religion or cultural belief. The applicant, states in paragraph 45.1 of her replying affidavit :

“There are two family grave sites on the farm already. One grave is in front of the gate of our homestead. It was my late husband's deathwish that he be buried on the said grave site. My family and I want to bury my late husband together with other family members who are already buried on the said grave yard”.

“45.2 . . . it is in accordance with our norms and culture that we bury family members together at the same place where possible and we submit that in this case, it is possible and reasonable to have them buried at the same grave site. Our cultural norms and beliefs inform us that when family members are buried within the same grave site, they will be able to communicate with each other easily.”

From the above it is evident that the cultural belief of the applicant and the members of her family is that deceased members of the family should be buried together so that they can easily communicate. This is their belief. It is not for the Court to pronounce on the quality or acceptability of the belief. It is opportune at this stage to quote from the minority judgment of *Ngoepe JP in Buhrmann v Nkosi & Another 1999 (4) All SA 337 at 352* where the learned Judge President, when dealing with the similar issue of religious and cultural belief said :

“It would constitute nothing else but religious arrogance to question the tenets of her religious belief, in the way that she perceives it. The truth is, religious tenets differ from faith to faith and people see the after-world and the after-life differently. We are here not concerned with the validity of the respondent’s religion and belief, but rather the sincerity with which she hold onto her religion and belief.”

[25] It must be mentioned that section 15(1) of our Constitution which guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion is mirrored in section 5(d) of ESTA.

[26] It follows from the above that the application must succeed.

[27] Order

- (1) The settlement agreement, together with the Court order under case no 103/06 dated 3 March 2006 are hereby set aside.
  - (2) That the applicant is entitled, in terms of section 6(5) of the Extension of Security of Tenure Act, 1977, to bury the body of her late husband Gwaff Matau on the Matau grave site where other family members are buried, on portion 1 (Lindall) of the farm Konterdanskloof 223, JS, Mpumalanga.
  - (3) No order is made as to costs.
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**ACTING JUDGE M T NCUBE**

For the applicant :

*Adv Matsetela* instructed by the *Wits Law Clinic*, Johannesburg.

For the respondent :

*Adv J Botha* instructed by *Buurman Stemela Lubbe Attorneys*, Pretoria.