

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : MTHATHA

CASE NO.: CA & R 21/18

In the matter between:

NTSIKELELO ZWELIHLE SANGONI

Appellant

and

NKOSINATHI TSHEMESE

Respondent

APPEAL JUDGMENT

HUISAMEN AJ

[1] On 10 November 2017 the Appellant in this matter brought an urgent application in the Magistrate's Court, Mthatha, for an order in the following terms:

- "1. That the applicant be granted leave to move this application as a matter of extreme urgency.**
- 2. That the applicant be granted leave to serve the respondent's attorneys.**
- 2.1 That a rule nisi be issued calling upon the respondent to show cause to if any to the above Honourable Court on Tuesday the 14th November 2017 why the following orders should not be made final.**
- 2.2 That the respondent be interdicted from burying his deceased daughter in the garden.**
- 2.3 That the respondent be ordered to pay the costs only in the event of opposing this application.**
- 2.4 That paragraph 2.1 to 2.2 shall operate as an interim interdict and/or mandamus pending final determination of this application."**

- [2] On 10 November 2017, and despite the Respondent having filed a notice of intention to oppose the application, an interim order was granted to the Appellant accordingly.
- [3] On 14 November 2017 the Respondent filed an answering affidavit to which the Appellant replied on 14 November 2017. The matter was then argued on 15 November 2017 and in a judgment, dated 17 November 2017, the interim interdict was discharged and the application dismissed, with costs.
- [4] On 17 November 2017 the Appellant filed a notice of appeal in which he contended as follows:

- "1. The learned magistrate failed to appreciate that the mention of six (6) people comes only from the respondent against the applicant and two (2) witnesses.**
- 2. The learned Magistrate failed to appreciate that in the second meeting many people were there which evidence is not disputed and should have been accepted as true. There is no need for minutes as the meeting is confirmed by the respondent's evidence.**

3. ***The learned Magistrate did not appreciate that the audience of the applicant stood unopposed except by the respondent who was not supported by anyone.***
4. ***The learned Magistrate failed to take into account the provisions of the Extension of Security of Tenure Act 62 of 1997 which specifically deals with burials in rural communities, in particular how that right to bury in the garden is practiced and its requirements."***

[5] The Respondent is opposing the appeal.

[6] The salient facts in the matter can be summarized as follows:

- 6.1 The Appellant is the chief of the Sangoni Traditional Council at Ridge Locality, Qokolweni Administrative Area in the district of Mthatha.
- 6.2 The Respondent and his family are residing at the Ridge Locality.
- 6.3 The parties are neighbours and their respective homesteads are separated by a fence. The Respondent's homestead is

situated on allotment no 290, details of which are discussed more fully below.

- 6.4 On 31 October 2017 a daughter of the Respondent passed away. The Respondent wished to bury his daughter within the confines of his allotment comprising some 2 000 square meters.
- 6.5 According to the Appellant there are no graves in gardens in the locality in question. He contended that all the people of the Ridge Locality buried their loved ones in a demarcated graveyard, as was agreed by the community many years ago.
- 6.6 It is not the Appellant's case that the Respondent was precluded from burying his daughter on his allotment by virtue of some or the other statutory prohibition or bylaw applicable to the area in question.
- 6.7 The evidence of the Appellant was confirmed by two members of the community. They confirmed that meetings were held in the community to discuss the disputed issue.

They also confirmed the tradition in the parties' locality that deceased persons be buried in the graveyard. According to the witnesses the community was strongly opposed to the burial of deceased persons in private gardens, as opposed to the graveyard.

- 6.8 The Respondent disputed, *in limine*, that the Appellant had established a clear right over the Respondent's allotment number 290.
- 6.9 The Respondent raised a further point *in limine* to the effect that the Appellant had failed to show that he would suffer irreparable harm if the Respondent were to bury his daughter on his allotment.
- 6.10 The contention that all the people of the Ridge Locality buried their loved ones in a demarcated graveyard was disputed by the Respondent in his opposing papers. In amplification the Respondent averred that some of the people buried their loved ones at the graveyard and others buried their loved ones at their homes. It was a matter of choice. The Respondent disputed that there was an

agreement in place compelling people to bury their loved ones in the graveyard.

6.11 In amplification of the aforesaid denial the Respondent supplied a list of nine people of the particular locality who were buried in their own gardens.

6.12 The Respondent averred that he would never bury his daughter in the community graveyard as he intended to honour her last wishes. She expressly stated that she wanted to be buried at home. He also contended that the graveyard in question was exposed to animals which destroyed the graves as they were not properly fenced in.

[7] The Respondent, as part of the first point *in limine*, challenged the Appellant's contention that the land in question belonged to the community. According to the Respondent he has been a resident in the Ridge Locality since 1986. He had obtained the allotment where his home was situated by way of a formal certificate issued to him by the Department of Local Government and Land Tenure of the Transkei Government (as it existed at the time), on 10 March 1987.

A copy of the certificate was annexed to the Respondent's answering affidavit. The certificate read, *inter alia*, as follows:

"REGISTER/DUPLICATE REGISTER OF PERMISSION TO OCCUPY AN ALLOTMENT.

In terms of section 3K of Proclamation No. 10 of 1966 permission is hereby granted to the undermentioned Bantu (hereinafter referred to as the Allotment Holder) (a) to occupy, subject to the provisions of Proclamation No. 10/66 for arable or residential purposes, the abovementioned allotments on farm/administrative area No. 11 called Qokolweni in the district of Umtata particulars of which are contained in the subjoined schedule and (b) to graze, on the said farm/administrative area stock of the number and class indicated in the subjoined schedule."

- [8] The certificate furthermore contained the Respondent's name, the date of the establishment of the allotment in question and the area thereof.

- [9] The Respondent contended that his allotment was private property, as entrenched in the Constitution, that the Respondent had a right to occupy the property and that he was entitled to bury his daughter on the property.

[10] The Appellant contended however that the Respondent's allotment was subject to the Extension of Security of Tenure Act No 62 1997 ("the Tenure Act") and that, in terms of the Act the Appellant was the person in charge and vested with the right to consent to the Respondent's occupation of the property.

[11] It seems clear that the Tenure Act is applicable herein. See in this regard Subsections 2(1) and 2(2) of the Tenure Act. Section 2(2) provides as follows:

"Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved."

[12] The Tenure Act defines "**occupier**" as follows:

"'occupier' means a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding- ..."

[13] "**Owner**" is defined as follows:

“‘owner’ means 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;”

[14] ***“Person in charge”*** is defined as follows:

“‘person in charge’ means a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question;”

[15] Section 1(2) of the Act provides as follows:

“(2) In respect of unalienated State land, unsurveyed State land, or land registered in the name of the State or an institution or functionary exercising powers on behalf of the State-

(a) ‘owner or person in charge’ includes a person who has been certified by the Director-General, on application made in the prescribed manner, to be the owner or person in charge, subject to the conditions that the Director-General may determine; and

(b) a certificate purporting to have been issued by the Director-General in terms of paragraph (a) shall constitute prima facie evidence of the authority of the person named in it to act as owner or person in charge of the land concerned, and shall be admissible in evidence on its production in a court."

[16] Section 6 of the Act sets out the rights and duties of an occupier. Section 6(2) provides as follows:

"(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-
...

(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;"

[17] It is common cause between the parties that the Appellant is the Chief of the Ridge Locality. As such the customary powers of the Appellant as the traditional leader of the locality become a relevant consideration herein. Section 211(1) of the Constitution recognizes

the institution, status and role of traditional leadership, subject to the Constitution.

[18] In considering the parties' divergent claims to autonomy over the land occupied by the Respondent herein, it must be recognized that occupiers have been denied, in the unfortunate past era of Apartheid, the normal and generally accepted statutory and common-law rights to the land which they occupied. Occupiers of land are therefore presently constrained to demonstrate their legally secured right to the land occupied by them in alternative ways.

[19] In the very helpful article of Dr Aninka Claassens of the Department of Public Law at the University of Cape Town, which article was published in July 2014 under the heading "**'Communal Land', Property Rights and Traditional Leadership**", she said, *inter alia*, as follows:

"One of the structural problems confronting the recognition of customary land rights is the nature of the deeds registration systems inherited from Apartheid. It is designed to map exclusive ownership rights vesting in specified owners onto discrete and clearly defined parcels of land. Customary systems are more nuanced: they provide for relative rights that prioritise claims based on belonging, participation and need, over those of absent individuals..."

Tenure reform is complicated and difficult. To succeed it needs to acknowledge and accommodate the underlying dynamics of deeply embedded constructs of family, relative rights and fairness. Customary systems of land rights have a lot to offer the rest of South African property law. They prioritise claims of need and enable nuanced accommodations between concurrent interests in the same land. But they are inherently vulnerable because of the legal and ideological strength of common law assumptions about the dominance of western ownership models, and the plethora of statute laws that have denied and overridden them for generations. They need to be recognized and protected on their own terms. But that does not mean that they exist in a separate universe from day-to-day urban life and other law."

[20] Also relevant in this regard is Section 25(6) of the Constitution which provides as follows:

"(6) 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."

[21] The Appellant has presented no evidence as part of his papers relating to the ownership, title to, or authority over, the land in

question, and in particular in respect of the Respondent's allotment number 290, save to assert that he is the chief of the Ridge Locality. The Appellant has also not established that he is the person in charge, with the legal authority to determine the use rights over allotment number 290 in terms of the provisions of Section 1(2) of the Tenure Act.

[22] Insofar as the Respondent is not the owner of allotment 290 in the sense that he does not possess a valid title deed to the property the Respondent is, in my view, an occupier of the property, as defined in the Tenure Act, in that he occupies the property by consent of the owner, being the State, or in terms of "***another right in law to do so***", with particular reference to his Certificate of Tenure issued by the Transkei Government.

[23] The Respondent made it plain in his answering affidavit that it was in fact an established practice in the community that members of the community could bury their deceased in their gardens, should they wish to do so. The Respondent furthermore stated that it was a custom of *Amaxesibe*, which relates to his cultural belief, to not bury loved ones in public spaces, "***as we are required to perform certain rituals***". The stance taken up by the Respondent was therefore in

accordance with his religion or cultural belief. As such, the Respondent, in my view, enjoys the protection of Section 6(2)(dA) of the Tenure Act. See also in this regard *Mathebula and Another v Harry* (LCC72/2015) [2015] ZALCC 6; 2016 (5) SA 534 (LCC) (2 June 2015).

[24] The Respondent's entitlement to bury his daughter in terms of his particular culture and belief is furthermore protected in terms of Sections 30 and 31 of the Constitution, which provide as follows:

"30. Language and culture.—Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities.—(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[25] In my view the Appellant has therefore failed to establish the necessary *locus standi* to impose his will over allotment number 290 and over the Respondent's decision to bury his daughter on his allotted land.

[26] As far as the requirement of an injury actually committed or reasonably apprehended is concerned, which, together with the requirements of a clear right and the absence of any other satisfactory remedy available, is one of the requisites of a final interdict, the Appellant stated in his founding papers that if the Respondent proceeded with the burial there would be bloodshed. This contention is denied by the Respondent where he stated as follows in his answering affidavit:

"Save to add that there will be no blood shed if I bury my daughter at my own yard, if there was such a thing the other members who buried their loved ones at their yards would have experienced that... Not even a single member of the community has made threats to me, the applicant is simple (sic) the one who is threatening me not to bury my daughter [in] my own yard."

[27] In addition the Appellant stated in his founding papers that he would personally have no objection to the burial, provided that the Respondent could convince the community to agree thereto. This concession did not, in my view, justify an inference of any impending harm on his part if the burial were to proceed. This shortcoming was fatal to the relief sought by the Appellant.

[28] This finding is not aimed at undermining the common law authority of the Appellant as the chief of the Ridge Locality. The enquiry was simply whether or not the Appellant had, in the particular circumstances of this matter, established the legal requirements for the interdictory relief sought by him. In my view he did not.

[29] We were informed by Counsel, at the hearing of the appeal, that the Respondent has in fact buried his daughter on his allotment after the discharge of the *rule nisi*. Common sense and fairness dictate, in the interests of all concerned, that the matter should be regarded as finalised on this basis.

[30] In the circumstances, and in the absence of any other legal impediment to the burial, which we have not been referred to, I am

of the view that the *rule nisi* was correctly discharged by the learned Magistrate, with costs.

The appeal is therefore dismissed, with costs.

J D HUISAMEN

ACTING JUDGE OF THE HIGH COURT

GRIFFITHS, J. : I Agree

R E GRIFFITHS

JUDGE OF THE HIGH COURT

ATTORNEY FOR APPLICANT : Mr Mantyi

INSTRUCTED BY : Mantyi Attorneys

ATTORNEY FOR RESPONDENT : Mr Mthambo

INSTRUCTED BY : L. Mthambo Attorneys

HEARD ON : 10 AUGUST 2018

DELIVERED ON : 21 AUGUST 2018