IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case Number: LCC 71/2022

Before: The Honourable Acting Judge President Meer

Heard on: 14 May 2022

Delivered on: 14 May 2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: ~~YES~~ / NO

14/05/2022
DATE

SIGNATURE

In the matter between:

BUSISIWE GLORIA NKOSI First Applicant

NKOSINGIPHILE GRACE NKOSI Second Applicant

and

ZANDSPRUIT TRUST First Respondent

BAREND PETRUS GREYLING Second Respondent

DR. PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY Third Respondent

JUDGMENT

MEER AJP

Introduction

[1] On 11 May 2022 the First Applicant applied on an urgent basis for an order that she be entitled to bury her deceased son, Richard Bonginkosi Mabaso ("the deceased"), at the burial site on the farm, Remainder of Buitenzorg Farm, 114 HT, 2 Wakkerstroom district, Dr Pixley Ka Isaka Seme Municipality ("the farm"). The application was brought in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 ("the Act"), which provides:

> "(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."

[2] The application was necessitated by refusal of permission for the burial by the Second Respondent who is the person in charge of the farm. Permission was

refused because, according to the Second Respondent, the deceased was not residing on the farm at the time of his death, a precondition for burial as prescribed in section 6(2)(dA).

[3] Directions were issued in terms of Rule 34(3)(b) for filing of pleadings and the hearing. On 12 May 2022, I convened a pre-trial conference via Microsoft Teams and encouraged the parties to attempt to reach a resolution. Regrettably this did not transpire and the application was heard also via Microsoft Teams on 14 May 2022. Only the Second Respondent, who opposed the application, participated in the matter. The First Respondent, who was incorrectly cited as the owner of the farm, and the Third Respondent Municipality, did not enter the fray. After hearing argument I dismissed the application and delivered judgment.

[4] The crisp issue to be determined was whether the deceased resided on the farm at the time of his death and was therefore entitled in terms of section 6(2)(dA) of the Act to be buried on the farm. In support of the contention that the deceased resided on the farm, the founding affidavit of the First Applicant stated:

4.1 She is residing on the farm. Her family arrived there in 1979.

4.2 The deceased was born on the farm and he has no other paternal homestead. He worked on the farm between 2003 and 2005. He left the farm in 2005 for purposes of employment in Delmas. He came back home at any given time to visit the family during Christmas, Easter or "when he gets leave from work". When he passed away he was working elsewhere but still regarded the farm as his homestead.

[5] The answering affidavit of the Second Respondent pointed out that the First Applicant is untruthful about her place of residency. She does not reside on

the farm as she alleged – she has lived on the Farm Kleinfontein 3, Amersfoort District, since 2018. The relief sought by her, he contended was therefore problematic. This prompted the filing of a supplementary affidavit by the First Applicant in which she admitted that she did not live on the farm Buitenzog but on Kleinfontein 3 as alleged by the Second Respondent, without explaining her false averment in the founding affidavit. It also prompted a joinder application, (which was granted unopposed), by the Second Applicant, the deceased's sister who resides and works on the farm. The Second Applicant confirmed the contents of the First Applicant's affidavit.

[6] Concerning the deceased's residence on the farm, the Second Respondent emphasized that the deceased had not resided on the farm since 2005, when he voluntarily left to take up employment, as stated by his mother. The Second Respondent disputed that the deceased would have returned to the farm for visits, as alleged in the founding affidavit, given that his mother no longer lived there. The established practice on the farm concerning burials, said the Second Respondent, is that current permanent residents who are employees or retired employees are allowed to be buried on the farm. As the Applicants did not file a replying affidavit, the Second Respondent's averments about the deceased's visits and burial practice on the farm, are undisputed, and applying the *Plascon Evans* test, [1] must be accepted.

Discussion

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (1984) (3) SA 623 (A) at 634H-635C.
The general rule is that in proceedings where disputes of fact have arisen in motion proceedings, a final order may only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify such an order. The Applicants have failed to dispute the Second Respondent's version in reply, and the Second Respondent's version must therefore be accepted.

[7] The Act does not define the term "reside".[2] The meaning of the term in relation to occupiers and labour tenants has however been considered in a number of cases. In *Mkwanazi v Bivane Bosbou (Pty) Ltd and another; Msimango v De Villiers and another; Ngema and others v Van der Walt and another; Mdletshe v Nxumalo and others* [1999] 1 All SA 59 (LCC), cited with approval in *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* [2009] JOL 24295 (SCA)this Court held:

> "[8] The word "reside" has not acquired any technical content and can have a wide variety of meanings. In each case, it must be determined what meaning the legislature had in mind. The following content given to the word "reside" by Baker J in the matter of *Barrie NO v Ferris and another*, where it was used in a will, conforms in my view to what the legislature intended by using the word "residing" in the definition of labour tenant:
>
> > "'Reside' means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done ... It does not include one's weekend cottage unless one is residing there ... The essence of the word is the notion of 'permanent home'."
>
> This accords with the dictionary definition of "reside" given in The New Shorter Oxford English Dictionary: "dwell permanently or for a considerable time, have one's regular home in or at a particular place."

[8] In *Sandvliet Boerdery (Pty) Ltd v Mampies and another* [2019] 3 All SA 709 (SCA), which dealt extensively with section 6(2)(dA), it was stated at paragraph 20 appropro the meaning of reside 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."

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[2] It is worth mentioning that the Extension of Security of Tenure Amendment Act 2 of 2018, which was published in *Government Gazette* 42046 on 20 November 2018, but which is not yet operational as the date of commencement has yet to be proclaimed, contains a definition of "reside" and "residence". Section 1(h) thereof defines "reside" to mean "to live at a place permanently", and deems "residence" to have a corresponding meaning.

In *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) at paragraph 40, this Court held that "a person resides on land if he considers the land to be his permanent home."[3] In *Sandvliet Boerdery*, the court held that "the essence of the term is the notion of a permanent home".[4]

[9] In *Mathebula and another v Harry* 2016 (5) SA 534 (LCC), the term was analysed within the social context of the Act and the social and economic concerns which prevail in our society. At paragraphs 21 and 22, the Court stated:

> "[21] The meaning of "reside" as used in section 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week a person spends on a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of actual physical presence. But this need not necessarily be continuous. Importantly, the court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to return on a permanent basis to one's residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should ipso facto exclude their residence on a particular farm.
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> [22] The enquiry therefore must be directed at establishing one's permanent home: this should take into account the history, the overall objects of ESTA, and the actual physical location of the occupier at the time of his death. In relation to the objects of ESTA, an important consideration is that an occupier has a real right to be buried on a property which belongs to another person arising from one's status as a former

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[3] See also *Drumearn (Edms) Bpk v Wagner and others* 2002 (6) SA 500 (LCC) at para [10]; *Robertson v Boss*, LCC6R/98, 30 September 1998 at para [4]–[6]; *Van Rensburg and another v De Bruin and others*, LCC93R/02, 27 January 2003, at para [3].

[4] *Sandvliet Boerdery (Pty) Ltd v Mampies and another* [2019] 3 All SA 709 (SCA) at para 19. See also *Barrie NO v Ferris and another* 1987 (2) SA 709 (C) at 714F; *Mkwanazi v Bivane Bosbou (Pty) Ltd and another and Three Similar Cases* 1999 (1) SA 765 (LCC) at para [8]; *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* 2010 (3) SA 152 (SCA) at paras [8] and [9].

employee and resident on the farm. This must always be taken into account when deciding whether the residency requirement is met".

[10] I accord with this approach. Economic necessity and dire poverty in South Africa have over the years fostered a system of labour migrancy where individuals leave their homes to become units of labour, living in compounds and hostels, be it on the mines or elsewhere. They however return to their physical homes and families on a regular basis, thereby exhibiting an intention to return to their place of residence. Whilst they may be forced through economic necessity to spend their working life elsewhere, this does not equate to their giving up their place of residence or homes.

[11] In *Mathebula*, like in this case, the deceased worked and stayed during the week away from the farm on which his burial was sought and on which it was alleged he resided. There was however evidence in *Mathebula*, unlike in the instant case, that whilst the deceased stayed near his workplace during the week, he returned to the farm every weekend. Such was stated in the Applicant's affidavit, and confirmed in supporting affidavits and a telephone note of the Applicant's attorney with the deceased's wife. There is no such evidence here. The high watermark evidencing the deceased's residence on the farm is reliance on his visits during Christmas, Easter and leave, evidence which is placed in jeopardy by the Applicants' failure to refute in reply the Second Respondent's denial of such visits in the answering affidavit, on the basis of his mother's relocation from the farm. There has been no evidence of an intention by the deceased to return to the farm on a permanent basis or even evidence of a precise dwelling where the deceased stayed on the farm or where he kept his belongings. The high water mark of the Applicants' claim to his residence on the farm are his visits. A degree of physical presence on the farm has thus not been displayed.

[12] Similarly, the facts of this case are distinguishable from two other burial applications in which this court found the deceased had resided on the farms in question. In *Selomo v Döman* [2014] ZALCC 1, the deceased had lived away from the farm temporarily in order to further her education and to receive medical treatment. In *Majola v Mothime* 2010 JOL, the deceased, an occupier, had resided on the farm for 10 years with family members. He was in the habit of visiting relatives, returning to the farm for a day and then going off to visit relatives again. He was away visiting a relative when he died.

[13] A further difficulty I have with the evidence presented by the Applicants is that it is adduced by the First Applicant, who has admitted without explanation that a key element of her evidence, and a precondition for burial of her son flowing from her occupancy, namely whether she resides on the farm, was false. This puts in issue the probative value of her averments pertaining to the residency of the deceased. The Second Applicant's confirmation of this evidence takes the matter no further.

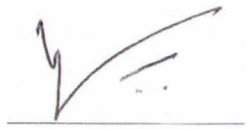
[14] In view of all of the above, I am unable to find that the deceased resided on the farm at the time of his death, and for this reason the application cannot succeed. My finding does not detract from the great degree of empathy I have for a mother who wishes to bury her son. I am mindful of the trauma the family must have experienced given that they wished to bury the deceased the day after the hearing. I pause to mention that it is extremely unfortunate that the parties were unable to resolve this matter, an outcome which I hoped might have been achieved at the conference convened by the Court.

Costs

[15] In keeping with this Court's practice not to grant awards of costs, except in exceptional circumstances, of which I find there to be none in this matter, I intend making no order as to costs.

[16] I accordingly grant the following order:

1. The application is dismissed.
2. There is no order as to costs.



Y S MEER
Acting Judge President
Land Claims Court

APPEARANCES

For the First and Second Applicants:	Adv. B. Maphumulo ***Instructed by:*** Shabangu Lulamile Attorneys
For the Second Respondent:	Adv. I. Oschman ***Instructed by:*** C Pretorius Attorneys