ESTA and occupiers rights to historical family graveyards

The Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another case and the consequent Supreme Court of Appeal judgement, is an excellent example of the extent of occupiers' rights in relation to property rights as per the Extension of Security of Tenure Act 62 of 1997 (ESTA).

ESTA protects and balances the rights of occupiers of land and the rights of the owners.

In essence, this case dealt with whether the Mampies family was entitled to bury a deceased family member on land owned by the Sandvliet Boerdery, in terms of s 6(2) (dA) of ESTA.

Section 6 of the Act relates to the rights and duties of an occupier. These rights include 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.

Sandvliet Boerdery owns various parcels of land, commonly known as Bo-Plaas and Middel-Plaas. These farm portions form part of a historic trilogy, collectively referred to as the Montina farms, which included the farm Onder-Plaas.

Mrs Mampies, the respondent, was born on the Montina farms and has lived and worked on them all her life. Her husband moved to Onder-Plaas in 1997 to work for the erstwhile owner, Mr Engelbrecht, who owned all the farms, as a permanent employee.

The respondents regarded the Montina farms as one unit. They were allowed use and an unrestricted movement across the farms, working, living as families, rearing and grazing their livestock and burying their dead on them. Mrs Mampies' mother predeceased her father and was buried in a graveyard next to their home at Onder-Plaas. When that graveyard reached full capacity, Mr Engelbrecht allocated the occupiers of Montina farms another burial site on Middel-Plaas. Mrs Mampies' father, two children and other members of her

extended family were buried in that graveyard with other deceased family members of the occupiers of the Montina farms.

Ownership of the farms passed from Mr Engelbrecht to several successive owners over the years. Despite these changes, the occupiers' living and employment conditions remained unchanged in the beginning, and they continued to have access to the Middel-Plaas graveyard until 2015.

It was during this time that the deceased past away . The respondents and her parents wished to bury her in the Middel-Plaas graveyard which they considered their ancestral burial site in accordance with their religion, cultural belief and practice so that she could be buried among her deceased family members near her home.

The appellant refused to give permission for the burial in Middel-Plaas on the ground that the respondents lived on Onder-Plaas and could not invoke the burial right contained in s 6(2)(dA) against it in respect of Middel-Plaas, to which they had no connection.

The Supreme Court of Appeal held that the question to be answered was whether the respondents and the deceased resided on the land in which it was sought to bury her, i.e. Middel-Plaas, at her death. According to the Court, the legislature could not have intended to deprive vulnerable occupiers in the respondents' position of a critical right, which was specifically enacted to formally attach the right to bury an occupier's right to residence and thus fortify their right of security of tenure. The Court held that on a contextual interpretation, which balanced the occupier's right to security of tenure with the rights of the owner, the meaning of the term 'reside', which ESTA does not define, must include the use of a graveyard in the circumstances of this case. The court reiterated that once permission to bury was granted, it could not be unilaterally withdrawn either by the original grantor or his successors in title, including the appellant, who was aware of the existence of the Middel-Plaas graveyard when it purchased the farm in June 2015.

The Mampies family was therefore entitled to bury their deceased family member on the farm portion.

It is therefore important for property owners with historical graveyards located on these properties to note that families of those who have been buried there, and

who enjoy protection under ESTA, might have a right to continue to use these graveyards depending on the facts of the particular case even if they do not reside on the aforementioned property. This should also be disclosed to a purchaser who wishes to buy a property where a historical graveyard of ESTA occupiers of the land is located.

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