

# Extending Recognition of Indigenous Burial Practices in *Selomo v Doman* 2014 JDR 0780 (LCC)

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## Abstract

Burying deceased family members in familial gravesites close to the homestead of the living has been a well-established practice in Southern Africa for many centuries. In terms of indigenous cultural and religious norms proximate burials are essential for enabling ancestors to commune amongst themselves and with their living descendants. In the colonial and apartheid eras many African communities lost ownership of their land. One of the consequences was that they needed permission from white landowners to continue with burials in established gravesites. In the democratic era the legislature sought to reintroduce a burial right for rural black land occupiers. Section 6(2)(dA) of the *Extension of Security of Tenure Act* 62 of 1997 allowed occupiers to assert a right of familial burial as against landowners, provided certain conditions were met. In *Selomo v Doman* 2014 JDR 0780 (LCC) Spilg J permitted a burial despite the fact that the applicant and deceased had not been resident near their family gravesite for many years. In our analysis of the judgment we suggest that the court's attempts to find justification in the *Extension of Security of Tenure Act* 62 of 1997 and the *Land Reform (Labour Tenants) Act* 3 of 1996 were misconstrued. With proximate familial burials being essentially a matter of respect for dignity and indigenous culture, the court should have engaged in a deeper analysis of constitutional rights.

## Keywords

African burial practices; rural land occupation rights.

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## 1 Introduction

This constitutes the holistic philosophy of Africans, to bury our loved ones so that we can always have reference to their resting places and to ensure continuity.<sup>1</sup>

In Southern Africa, proximate burials of family members have for many centuries been an established indigenous cultural practice. To facilitate communing with ancestors deceased family members have traditionally been buried close to homesteads where relatives live.<sup>2</sup> As stated by the applicants in *Serole v Pienaar*<sup>3</sup> (hereafter *Serole*) "...the culture of indigenous black people requires the dead to be buried close to the living".<sup>4</sup> Aside from deceased members of a family being kept close to the homes of the living it is also envisaged in indigenous culture that the ancestors may commune amongst themselves.<sup>5</sup> For this reason, familial group gravesites have tended to be maintained. Remaining close to the members of one's extended family after death is regarded as so important that dying is often referred to as "going home".<sup>6</sup> In the traditional view, burying deceased family members in a familial communal gravesite is therefore an essential part of respecting their dignity.<sup>7</sup>

However, during the colonial and apartheid eras the traditional practice of establishing multiple gravesites for extended family members became more difficult to implement.<sup>8</sup> An increasing proportion of the black population was

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<sup>1</sup> Ngubane 2004 *Indilinga* 171, 173.

<sup>2</sup> As noted by Setsiba *Mourning Rituals and Practices* 27: "African people have traditionally used their homestead as a final resting place where their dead would be buried. As an example a man would be buried in a kraal in the yard of the homestead. This was done because there was a specific meaning attached to the dead being buried at their home. Dlukulu (2010) explains this concept as place identity. There is often an attachment to place, which has become woven into the individual's personal identity. Every person has an environmental past that consists of places, spaces and their properties which have served instrumentally in the satisfaction of one's biological, psychological, social and cultural needs which serve as part of the socialization process during which self-identity is developed."

<sup>3</sup> 2000 1 SA 328 (LCC).

<sup>4</sup> *Serole v Pienaar* 2000 1 SA 328 (LCC) (hereafter *Serole*) para 14.

<sup>5</sup> It is believed that it is essential for family members to be buried near each other in a familial graveyard to allow such communing: Setsiba *Mourning Rituals and Practices* 17; Ngubane 2004 *Indilinga* 173.

<sup>6</sup> Setsiba *Mourning Rituals and Practices* 27.

<sup>7</sup> Ngubane 2004 *Indilinga* 171-172; Setsiba *Mourning Rituals and Practices* 27.

<sup>8</sup> Setsiba *Mourning Rituals and Practices* 27.

concentrated in urban environments where it was not possible to establish proximate familial gravesites, and in rural areas many kraal locations became encompassed as part of white owned farms. While white farm owners frequently allowed occupiers on their land to bury deceased family members on long-established familial gravesites, this was never in the form of a right and was always subject to consent. No indigenous black person had a right to bury a deceased loved one on land that he or she occupied but in which he or she had no ownership rights. The Roman-Dutch law, in providing owners with extensive powers to decide how their land should be used, forced many landless members of the black majority to seek favours from white landowners when implementing the practice of proximate familial burials.<sup>9</sup>

In the democratic era, the legislature sought to ameliorate some of the numerous problems resulting from the fact that many members of the rural black population had been excluded from land ownership and left in the position of mere occupiers in places where their families had resided for centuries. Important in this regard is the *Extension of Security of Tenure Act*<sup>10</sup> (hereafter ESTA). Although ESTA provides other forms of protection for rural land occupiers, in our discussion we consider it primarily as a mechanism for supporting the traditional practice of perpetuating proximate familial group gravesites. In particular, we evaluate the most recent and far-reaching interpretation of ESTA by Spilg J in *Selomo v Doman*<sup>11</sup> (hereafter *Selomo*). We show that, although this judgment contains numerous technical flaws, Spilg J appreciated that for those holding traditional indigenous beliefs appropriate familial burials are a crucial matter of dignity and respect. In recognition of this, he supportively extended the law governing indigenous burial practices.

## 2 Background

When promulgated in 1997 ESTA provided immediate security of tenure to persons qualifying as rural land occupiers. To qualify, a person needed to have been living on rural land with the landowner's consent, not using the land for commercial or industrial purposes, and earning less than R5 000 per month.<sup>12</sup> ESTA also provided a number of other rights. Section 5(a)

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<sup>9</sup> See, for example, the comments made in paras 23 and 24 of *Dlamini v Joosten* 2006 3 SA 342 (SCA) (hereafter *Dlamini*).

<sup>10</sup> 62 of 1997.

<sup>11</sup> 2014 JDR 0780 (LCC).

<sup>12</sup> Section 1 of the *Extension of Security of Tenure Act* 62 of 1997 (hereafter ESTA), definition of occupier together with GN R1632 in GG 19587 of 18 December 1998.

makes it clear that the constitutional right to human dignity is generally relevant to land occupation issues. Section 5(d) similarly imports freedom of religion, belief and expression. Of particular importance to the burials of family members of land occupiers is section 6(4). This states that:

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.

Although visitation and the maintenance of graves were thus expressly provided for, ESTA did not specifically include a right for an occupier to bury a deceased family member on the land occupied. Nor did it seem to include a right for an occupier to be buried by family members on the land he or she had occupied. This was tested in *Serole and Nkosi v Bührmann*<sup>13</sup> (hereafter *Nkosi*).

In *Serole* it was argued on behalf of the applicants, as occupiers, that consent to bury family members could not be denied by the landowner. This was claimed on the basis of their rights to dignity and culture, both of which are protected in the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) and reiterated in ESTA in sections 5 and 6, respectively. It was also submitted that, because section 6(4) provides a right to visit graves, this must imply a right to bury.<sup>14</sup> The court concluded, however, that granting consent to bury and establish a grave could amount to the creation of a servitude over the property in the sense defined in *Dibley v Furter*.<sup>15</sup> The court reasoned that once such consent was granted all successors in title would have to allow family members to visit the grave and would not be able to use that portion of their land.<sup>16</sup> The court concluded that the right to bury therefore cannot merely be seen as one of the general rights granted to occupiers. It makes serious inroads into the owner's ownership rights. In dismissing the application Gildenhuys J concluded that:

[a] Court will not interpret a statute in a manner which will permit rights granted to a person under that statute to intrude upon the common law rights of another, unless it is clear that such intrusion was intended.<sup>17</sup>

In *Nkosi* the facts were similar, but this time the matter went to the Supreme Court of Appeal (hereafter the SCA). In this case the appellant, who was an occupier of a farm owned by the respondent, applied for consent to bury her

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<sup>13</sup> 2002 1 SA 372 (SCA).

<sup>14</sup> *Serole* para 14.

<sup>15</sup> *Dibley v Furter* 1951 4 SA 73 (C) 83H-84A.

<sup>16</sup> *Serole* para 16.

<sup>17</sup> *Serole* para 16.

son on the farm. The SCA categorised the dispute as producing a conflict between the right to practise one's religion and the right not to be deprived of land.<sup>18</sup> The main argument raised by the appellant was that when the legislature gave occupiers the right to occupy along with the right to practise their religion it must have envisaged that long-term occupation would result in deaths and that the only land available for burial would be the land occupied.<sup>19</sup> Furthermore, the landowner/respondent was well aware that the familial burial practice was part of the religion of the occupiers.<sup>20</sup> The respondent countered with an argument that the legislature could not have intended to deprive landowners of a right in their land without any compensation.<sup>21</sup>

In delivering judgment in *Nkosi*, Howie JA noted that ESTA already resulted in a permanent diminution in the rights of the landowner if a grave was established on land. This was because section 6(4) gave family members the right to visit and maintain the grave.<sup>22</sup> The court then considered two leading freedom of religion cases, *S v Lawrence*; *S v Negal*; *S v Solberg*<sup>23</sup> and *Christian Education South Africa v Minister of Education*.<sup>24</sup> It concluded that these were of limited relevance in the instant case because they related to the vertical application of freedom of religion.<sup>25</sup> However, neither of them

... suggested that for the practice of one's religion one may demand assistance, whether financial or patrimonial, from another, much less that one may actively diminish another's patrimony by way of appropriation.<sup>26</sup>

Howie JA conceded that all citizens have a right to observe and carry out their religious practices when burying their dead. However, there was no authority for the proposition "that everyone is totally free to choose where such burials are to be effected".<sup>27</sup> He then held that

... the right to freedom of religion and religious practice has internal limits. It does not confer unfettered liberty to choose a grave site nor does it include the right to take a grave site without the consent of the owner of the land concerned. It follows that s 5(d) of ESTA does not, when viewed in isolation, confer the right which the appellant claims.<sup>28</sup>

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<sup>18</sup> *Nkosi v Bührmann* 2002 1 SA 372 (SCA) (hereafter *Nkosi*) para 1.

<sup>19</sup> *Nkosi* para 32.

<sup>20</sup> *Nkosi* para 32.

<sup>21</sup> *Nkosi* para 33.

<sup>22</sup> *Nkosi* para 38.

<sup>23</sup> 1997 4 SA 1176 (CC).

<sup>24</sup> 2000 4 SA 757 (CC).

<sup>25</sup> *Nkosi* para 44.

<sup>26</sup> *Nkosi* para 45.

<sup>27</sup> *Nkosi* para 47.

<sup>28</sup> *Nkosi* para 49.

The court added that, although ESTA provides for certain rights of occupation, it does not additionally provide a right to take land for the purpose of burial. Howie JA reasoned that inferring such an addition would not be logical. It does not make sense to say that the legislature would have envisaged that consent for a person merely to occupy land also entitles such a person to use the land permanently as a grave for a relative.<sup>29</sup> In support of this he noted that ESTA did not accord either occupiers themselves or labour tenants a right to be buried on the land. And if they did not have such a right, their non-occupying family members could surely not claim one.<sup>30</sup> In addition, if the legislature had wanted to create a burial right it could have done so expressly, but it had not. The court then concluded by dismissing the appeal and did not allow the burial.<sup>31</sup> Just as in *Serole*, the court in *Nkosi* thus chose to protect the concept of ownership as understood in Western law, rather than an indigenous custom.

Reportedly as a reaction against the approach taken in *Serole*,<sup>32</sup> the legislature amended ESTA by promulgating the *Land Affairs General Amendment Act*.<sup>33</sup> A new section 6(2)(dA) was inserted into the former. It read:

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 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.

As can be seen, this amendment created a right to burial for certain deceased family members. The deceased would need to have been resident on the land at the time of the death, and the familial graveside must have already been in existence. Generally, the legislature was sending a signal that it wished to tip the scales at least slightly against the Western concept of the supremacy of land ownership rights, and more in favour of indigenous custom and religion.

Just over a year after it came into force, section 6(2)(dA) was challenged in *Nhlabathi*, which was heard in the Land Claims Court (hereafter the LCC). In this matter a landowner claimed that the section was contrary to section

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<sup>29</sup> *Nkosi* para 51.

<sup>30</sup> *Nkosi* para 53.

<sup>31</sup> *Nkosi* para 56.

<sup>32</sup> See *Nhlabathi v Fick* 2003 JDR 0226 (LCC) (hereafter *Nhlabathi*) para 17.

<sup>33</sup> 51 of 2001.

25 of the *Constitution*.<sup>34</sup> In passing, it should be noted that at the time of writing this case remains the only constitutional challenge to the right provided by section 6(2)(dA). In considering the claim of unconstitutionality, at the outset the court *per* Bam P noted that the right created by section 6(2)(dA) is not absolute. The right to bury a family member must be balanced against the rights of the owner, and the right exists only if there has been an established practice of burials on the land.<sup>35</sup> The court then considered whether the section breached section 25(1) of the *Constitution* by creating an arbitrary deprivation of property.<sup>36</sup> In order to answer this question Bam P considered the seminal case on arbitrary deprivations, *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (hereafter *FNB*).<sup>37</sup> Following the approach of Ackermann J in *FNB*, Bam held that the deprivation in *Nhlabathi* was not arbitrary.<sup>38</sup>

In support of his decision Bam P reasoned that deprivations permitted in terms of the wording of section 6(2)(dA) are not arbitrary because of the limitations placed on them. Read as a whole, ESTA requires that all the rights of an occupier (including the right to bury) be balanced against the rights of the owner or person in charge of the land. There is thus an imperative to consider section 25 of the *Constitution* when deciding on rights created by section 6(2) of ESTA.<sup>39</sup> More specifically, section 6(2)(dA) of ESTA inserted what might be termed four threshold requirements. Firstly, the deceased must have been a family member of the occupier. Secondly, the deceased must have been living on the land at the time of death. Thirdly, the burial must be in accordance with the occupier's religion or cultural belief. Fourthly, there must be an established practice of allowing such burials on the land, which is defined in section 1 as "a practice in terms of which the owner or person in charge ... routinely gave permission ...".

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<sup>34</sup> *Nhlabathi* para 20.

<sup>35</sup> *Nhlabathi* para 18.

<sup>36</sup> *Nhlabathi* para 27. S 25(1) of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

<sup>37</sup> 2002 4 SA 768 (CC).

<sup>38</sup> *Nhlabathi* para 31. In particular, Bam P followed the test for arbitrary deprivations formulated by Ackermann J in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereafter *FNB*) para 100.

<sup>39</sup> *Nhlabathi* para 27.

The logic of the court on this point was apparently that this is something that has to be proved before the right to bury can be claimed. The owner will thus have to allow burials only if he had previously and routinely given permission. Although the judgment is cryptic on this point, Bam P appears to have reasoned that deprivation for a landowner when a new grave is added is only slight if a burial site already exists. Bam P reasoned further that the purpose of the deprivation is also relevant in considering whether it is unlawful or not. He noted that the type of burial contemplated by section 6(2)(dA) of ESTA is a very important imperative for many people who are rural land occupiers. This section had been inserted by the state to help fulfil its constitutional obligation to protect the tenure of persons who had been racially discriminated against in the past. Section 6(2)(dA) of ESTA was thus created to facilitate the implementation of section 25(6) of the *Constitution*.<sup>40</sup>

The court then considered arguments raised by the respondent as the landowner. The respondent had contended that the use of land for a grave as envisaged by section 6(2)(dA) of ESTA amounted to an expropriation as referred to in section 25(2) of the *Constitution*. The respondent argued further that because it contains no provision for compensation, section 6(2)(dA) of ESTA contravenes section 25(2)(b) of the *Constitution*, which requires compensation.<sup>41</sup> Because of this, burials without a landowner's consent amount to an unconstitutional expropriation.<sup>42</sup> In responding to these submissions Bam P assumed, without deciding, that it may well be correct that section 6(2)(dA) of ESTA produces expropriations as referred to in section 25(2)(b) of the *Constitution*. However, as per the dominant academic view on the point, any duty to compensate could be subject to the limitations clause in section 36 of the *Constitution*.<sup>43</sup> Furthermore, section 25(3) of the *Constitution* requires factors such as the history of the acquisition of the land and the purpose of the expropriation to be taken into account when considering compensation.<sup>44</sup> The court concluded that the cumulative effect of sections 25(3) and 36 of the *Constitution*, as well as

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<sup>40</sup> The latter states that "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".

<sup>41</sup> Section 25(2) of the *Constitution* states that: "Property may be expropriated only in terms of law of general application - (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed by those affected all decided are approved by a court".

<sup>42</sup> *Nhlabathi* para 32.

<sup>43</sup> *Nhlabathi* para 34. Citing with approval Van der Walt *Constitutional Property Clause* 94-95.

<sup>44</sup> *Nhlabathi* para 34.



section 6(2)(dA) of ESTA, is to require a balancing of interests between affected parties. In this regard the court held that

[t]here can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest (which includes the nation's commitment to land reform).<sup>45</sup>

Thus an obligation on a landowner to allow an occupier to bury without paying compensation can sometimes be justifiable in terms of the limitations clause in section 36 the *Constitution*.<sup>46</sup> This is likely to be the case where the right to bury is not a major intrusion on the rights of the landowner. Applying this to the instant case Bam P concluded that a right not to pay compensation would be

... reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>47</sup>

Having rejected the argument that section 6(2)(dA) is unconstitutional because of its failure to provide for compensation, the court then considered whether its requirements had been met.<sup>48</sup> As will be remembered the three requirements in the section are: that the interests of the parties must be balanced, that the deceased was residing on the land, and that the land was already subject to an established burial practice. On the question of balance, despite evidence that the occupier might be evicted, the court found that his interests were not outweighed by those of the landowner.<sup>49</sup> It is noteworthy that in reaching this conclusion the court took into account that the evidence concerning a potential eviction was inadequate and inconclusive.<sup>50</sup> In relation to the second requirement, that the deceased must have been residing on the land with the occupier, the court stated that the fact that the deceased had, after taking up residence with his son (the occupier), left the farm in order to get medical attention and then died in hospital did not mean that he was not residing on the land. So this requirement had also been met.<sup>51</sup> In relation to the final question as to whether or not there was an established practice of allowing burials on the land, the court found that consent had previously been given for only two members of the Nhlabathi family. However, what was also relevant was the fact that members of other families had also been buried with consent. This

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<sup>45</sup> *Nhlabathi* para 34.

<sup>46</sup> *Nhlabathi* para 35.

<sup>47</sup> *Nhlabathi* para 35.

<sup>48</sup> *Nhlabathi* para 36.

<sup>49</sup> *Nhlabathi* para 37.

<sup>50</sup> *Nhlabathi* paras 38-39.

<sup>51</sup> *Nhlabathi* para 40.

helped to show that a practice had been established in relation to the land. It was not necessary to prove that a practice had been established specifically in relation to a particular family.<sup>52</sup> The application to bury in *Nhlabathi* was thus successful.<sup>53</sup>

The next case in which indigenous burial practices were considered was *Dlamini*. In this case the husband and son of a deceased woman applied to bury her either on the land they had previously occupied or on the land they currently occupied. The first issue in dispute related to the definition of land as referred to in ESTA. The argument raised by the appellants in support of their application to bury on the land they had previously occupied was that land should be given a meaning broader than its cadastral meaning. They pointed out that the pieces of land they had previously and currently occupied were farmed as one enterprise and owned by different members of a single family. They submitted that the two pieces should therefore be regarded as a single land entity for the purposes of ESTA. However, the court rejected this argument. Even though the word "land" was not defined in ESTA, the Act referred to relationships between a specific landowner and occupier. Thus the only relevant owner was the one recognised in the Deed's Registry as owning the land currently occupied.<sup>54</sup> The consent necessary for the establishment of a burial practice could also be given only by that owner or predecessors in the title.<sup>55</sup>

In holding that the cadastral description of land is essential for establishing which piece of land may be subject to a burial practice, the court made the following important statement:

The burial right in s 6(2)(dA) of the Act is an incidence of the right of residence contained in s 6(1), which creates a real right in land. Such a right is in principle registrable in a Deeds Registry because it constitutes a "burden on the land" by reducing the owner's right of ownership of the land and binds successors in title. The burial right is in the nature of a personal servitude which the occupier has over the property on which he possesses a real right of residence at death of a family member who at the time of death was residing on the land.<sup>56</sup>

The court thus conceptualised burial rights created in terms of ESTA as being in the nature of limited real rights. More specifically, the court conceptualised them as constituting personal servitudes which are registrable. The SCA also affirmed that "land" can be understood only in its

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<sup>52</sup> *Nhlabathi* paras 41, 42.

<sup>53</sup> *Nhlabathi* para 44.

<sup>54</sup> *Nhlabathi* para 14.

<sup>55</sup> *Dlamini* para 15.

<sup>56</sup> *Dlamini* para 16.

cadastral sense. It was for this reason that the appellants had no right to bury their deceased family member on land they had previously occupied. The right applied only to the land (and hence the owner) where they were living at the time of the death of the family member.<sup>57</sup> A further clarification of ESTA was that an established burial practice does not have to relate to the specific family claiming burial, but to "people residing on the land".<sup>58</sup>

An argument raised by the landowner in *Dlamini* was that since it was he who had initially given consent for other burials, he was now at liberty to withdraw that consent.<sup>59</sup> The court correctly concluded that, while this had been the position prior to the passing of the amendment of ESTA, it was no longer the position. The effect of the insertion of section 6(2)(dA) was that once a burial practice has been established a durable right is conferred on the occupier. The landowner may not subsequently withdraw consent because this would render the section meaningless.<sup>60</sup> The court clarified this by stating that the right of a rural occupier to reside is a real right granted by ESTA to an occupier in someone else's land, with burial rights being an incidence of this right. Thus a subsequent withdrawal of burial permission would be an unlawful deprivation of this right.<sup>61</sup> The appeal thus succeeded, and the SCA ordered that the deceased be buried on the land on which she had been living at the time of her death.

The subsequent case of *Bashe v Meyer*<sup>62</sup> (hereafter *Bashe*), focused further attention on the meaning of the phrase "established practice" in section 6(2)(dA). Here the court stated that the applicant should prove a "habitual way of acting on the part of the owner of the farm over the years".<sup>63</sup> The court clarified further that what was required was that the

... occupiers of the farm have been "consistently allowed in a sufficient number of cases" to bury members of their families on the farm.<sup>64</sup>

On this aspect the court relied on *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd*,<sup>65</sup> a case involving tax law. In our submission, the phrase "over the years" suggests a relatively slow maturing requirement for a long-standing practice, and the phrase "sufficient number

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<sup>57</sup> *Dlamini* para 17.

<sup>58</sup> *Dlamini* para 19.

<sup>59</sup> *Dlamini* para 22.

<sup>60</sup> *Dlamini* para 24.

<sup>61</sup> *Dlamini* para 26.

<sup>62</sup> 2008 JDR 1378 (E).

<sup>63</sup> *Bashe v Meyer* 2008 JDR 1378 (E) (hereafter *Bashe*) para 7.

<sup>64</sup> *Bashe* para 7.

<sup>65</sup> 1990 4 SA 529 (A).

of cases" is vague. It should be noted, however, that these interpretations in *Bashe* were *obiter*. The applicant had not claimed that she was relying on ESTA for a right to bury. In giving evidence she had merely averred that she had been told that her grandparents were buried on the land.<sup>66</sup>

In the next relevant matter of *Nortje v Maree* (hereafter *Nortje*),<sup>67</sup> a magistrate granted an interim order allowing an occupier to bury his wife on land on which they were residing. The order was granted, unbeknown to the applicant and magistrate at the time, against someone who was neither the owner nor the person in charge of the land. Subsequent to the rule *nisi* the deceased was buried. On the return day, when the magistrate realised that the order had been granted against the incorrect party, he refused to confirm it. The appellant then appealed against this refusal. The appeal was upheld on the basis that the magistrate had erred in classifying the interdict as an interim order. By its nature it was in fact a final order. He could not discharge it because he was *functus officio* in the matter.<sup>68</sup>

Although it upheld the appeal, in *Nortje* the land claims court was not satisfied that the evidence presented to the magistrate had been sufficient for the granting of a final order. In particular, the court evaluated if the applicant had satisfied the grounds in section 6(2)(dA) of ESTA. It found that there was no evidence to establish that the rights of either party would be unfairly prejudiced if the court favoured the other.<sup>69</sup> Nor was there evidence that the deceased had been residing on the land at the time of her death.<sup>70</sup> Furthermore, the applicant had merely stated that it was his culture to bury within a week and did not give reasons why it had to be on the farm. The court thus found that the applicant had not proved that it was part of his culture to bury deceased family members on the same land where they had lived. However, because the court had already found that the decision by the magistrate was a final order, his decision could not be overturned and so these findings as to facts were irrelevant to the case.

In summary, it was clear by 2013 that the right to burial conferred on rural land occupiers by section 6(2)(dA) of ESTA had survived constitutional challenge. Proponents of Western notions of the inviolability of land ownership had clearly been unsuccessful in subverting it. Three requirements for the implementation of this right, namely, balancing in the

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<sup>66</sup> *Bashe* para 9.

<sup>67</sup> 2013 JDR 1285 (LC).

<sup>68</sup> *Nortje v Maree* 2013 JDR 1285 (LC) (hereafter *Nortje*) para 23.

<sup>69</sup> *Nortje* para 31.

<sup>70</sup> *Nortje* para 31.

sense of weighing up respective degrees of prejudice to the parties, relevant religious or cultural beliefs, and an established practice of consent to burials had been clarified by judgments interpreting the section. A noticeable feature of those judgments was acceptance of a fourth requirement that both the occupier seeking to assert a right to burial and the deceased person must have been resident on the land at the time of the death.<sup>71</sup>

### **3 *Selomo v Doman* 2014 JDR 0780 (LCC)**

Judgment was delivered by Spilg J of the Land Claims Court. The case involved an urgent application by Mr Selomo in terms of section 6(2)(dA) of ESTA to bury his deceased daughter at the family gravesite on a farm where he had previously resided. In the subsections below we set out the facts and contentions of the parties, explain the judgment and then discuss it.

#### **3.1 *The facts of the case***

The case was heard as an urgent application a month after the death of the 22 year-old daughter of the applicant. He had not as yet been able to bury her and her body was therefore still lying in a morgue. He sought permission from the court to bury her on a farm where he and she had previously resided. Specifically, he wished to bury her in a family gravesite which had been fenced off and contained the bodies of his parents and three others of his children.<sup>72</sup> He was an elderly man who had been born on the farm in 1948. Both he and his parents had lived on the farm most of their lives and three of his children still lived there. However, he and his deceased daughter had left the farm approximately eight years previously.<sup>73</sup> In 2005 he had been paid R8 000 for vacating the farm and signing a waiver of any rights to it. Many of his relatives, including ancestors several generations back, were buried on the farm. The application was for a burial the following day.<sup>74</sup> The family gravesite on the farm where the applicant wished to bury his daughter had been recognised by previous landowners.<sup>75</sup> However, the current landowner (the respondent) refused to allow access to the burial site and so the planned burial could not take place.<sup>76</sup>

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<sup>71</sup> In accepting that the deceased could have been temporarily moved to hospital for treatment shortly before his death *Dlamini* was not an exception. The deceased was still legally resident on the land when death occurred.

<sup>72</sup> *Selomo v Doman* 2014 JDR 0780 (LCC) (hereafter *Selomo*) para 4.

<sup>73</sup> *Selomo* para 7.

<sup>74</sup> *Selomo* para 1.

<sup>75</sup> *Selomo* para 4.

<sup>76</sup> *Selomo* para 5.

### **3.2 Contentions of the parties**

The two main points at issue were whether the applicant was an occupier in terms of ESTA and whether he and his daughter were still residing on the farm at the time of her death.<sup>77</sup> Fulfilment of these requirements was necessary in order to bring them within the ambit of section 6(2)(dA).

#### **3.2.1 Applicant**

The applicant averred that it was crucial for the practice of his religion and his Bapedi culture that his daughter be promptly buried on the family gravesite close to her ancestors in order to receive their company and counsel.<sup>78</sup> He conceded that in 2005 he had in return for payment signed a letter in terms of which he agreed to leave the farm and waive his rights to it, but he alleged that this waiver of rights was unenforceable.<sup>79</sup> The applicant contended further that his daughter had remained resident on the farm at the time of her death, because she had only temporarily moved elsewhere for education and then later for health care reasons. Similarly, he himself had temporarily moved elsewhere merely in order to facilitate his children's education by living close to their schools.<sup>80</sup>

#### **3.2.2 Respondent**

Dr Doman, the landowner, alleged that neither the applicant nor his daughter were currently occupiers in terms of ESTA, both having left the farm in the distant past some seven to nine years previously.<sup>81</sup> In an attempt to further weaken the applicant's family connection to the farm, he pointed out that the remaining three children of the applicant who still resided on the farm were currently defending an eviction application which he had brought against them.<sup>82</sup> He also averred that the applicant had failed to prove that he earned less than R5 000 a month, which evidence was essential to bring him within the ambit of ESTA.<sup>83</sup>

### **3.3 The judgment**

After summarising the claims of the parties Spilg J expressed the opinion that the key legal issue was whether the applicant's rights to bury were

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<sup>77</sup> *Selomo* para 10.

<sup>78</sup> *Selomo* para 1.

<sup>79</sup> *Selomo* paras 11-13.

<sup>80</sup> *Selomo* paras 15-16.

<sup>81</sup> *Selomo* para 7.

<sup>82</sup> *Selomo* para 8.

<sup>83</sup> *Selomo* para 12.

"strictly limited to those provided for under section 6(dA) (*sic*) of ESTA".<sup>84</sup> He thus signalled early on that he was willing to consider authority not raised by the parties. He accepted that from the facts neither the applicant nor his daughter was living on the farm at the time of her death. However, the question was whether they could nevertheless still be regarded as residing on the farm. The court considered the argument by the applicant that his daughter lived elsewhere only for education and then later for health care reasons, and that he himself lived elsewhere merely to facilitate his children's education.<sup>85</sup> The court assessed this contention in the light of the SCA decision in *Kiepersol Poultry farm (Pty) Ltd v Phasiya*.<sup>86</sup> Here the SCA had accepted the definition of "reside" from *Barrie v Ferrois*<sup>87</sup> as

... his place of abode, the place where he sleeps after the work of the day is done ...The essence of the word is the notion of "permanent home."<sup>88</sup>

In then applying this definition to the instant facts in *Selomo Spilg J* commented:

... the allegations of continued residence are challenged to a material degree and there is the issue of a waiver of rights, in consideration for being paid compensation.<sup>89</sup>

This implied strongly, although it was not stated in as many words, that there would be a finding that the applicant and his daughter were no longer residing on the land as required by section 6(2)(dA) of ESTA and thus did not qualify as occupiers with burial rights in terms of that Act.<sup>90</sup>

Before making this somewhat vague statement, however, the court took a brief side-step and considered whether or not the applicant might perhaps qualify as a labour tenant in terms of the *Land Reform (Labour Tenants) Act* (hereafter *Labour Tenants Act*).<sup>91</sup> The applicant had not alleged that he was a labour tenant, nor had he claimed any rights in terms of the *Labour Tenants Act*. Despite this, the court decided that, on the agreed facts, the applicant was a labour tenant in terms of the *Labour Tenants Act* and that his daughter would therefore have qualified as an associate in terms of that

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<sup>84</sup> *Selomo* para 14.

<sup>85</sup> *Selomo* paras 15-16.

<sup>86</sup> 2010 3 SA 152 (SCA).

<sup>87</sup> 1987 2 SA 709 (C) 714F.

<sup>88</sup> *Selomo* para 17.

<sup>89</sup> *Selomo* para 23.

<sup>90</sup> The subsequent case of *Mathebula v Harry* 2015 JDR 1029 (LCC) considered the question of residence in more detail. In the light of the finding in *Selomo* that the parties were not resident it is not necessary to consider this judgment.

<sup>91</sup> 3 of 1996. See *Selomo* paras 20-21.

Act.<sup>92</sup> The court concluded that it was justified in considering this, even though it had not been raised by the applicant. This was because, first, the matter was an urgent one and so the parties had had little time to prepare on what was a very sensitive issue. Secondly, even though the respondent claimed that the applicant's residence had terminated some eight years previously, the former landowner had, five years after that, consented to the burial of a child of the applicant and also to the burials of other relatives still residing on the land.<sup>93</sup>

The court went on to assert that the rights legislatively afforded to a labour tenant and his dependents included the right to continue to occupy and use land they had been using on 2 June 1995. Interpreting this extensively, the court concluded that this right would include access to a gravesite for burial, and was not dependent on current residence.<sup>94</sup> In then applying this to the instant matter the court decided that the rights of the applicant and his children existing as at 2 June 1995 could be taken into account. It was common cause that he had been using land on the farm at that date and there would be no prejudice to the respondent.<sup>95</sup> The court stated that the applicant's claim to bury under ESTA was "bolstered" by his rights in terms of the *Labour Tenants Act* and by the fact that he had been given such a right by a previous owner some three years prior to the application.<sup>96</sup> The court then concluded that

[t]he effect is that the applicant has a right exercisable by the applicant to bury his daughter on the ancestral gravesite on the farm Pennsylvania.<sup>97</sup>

After reaching this conclusion, the court noted that s 6(2)(dA) of ESTA had been created to reverse the position taken in *Nkosi*, and that *Dlamini* had subsequently confirmed that this section prevents landowners from terminating a practice of allowing burials once it is well established.<sup>98</sup> Spilg J then stated:

[d]espite the amendments ESTA therefore has limitations which do not simply permit subsequent burials on established ancestral gravesites of family members and that "residence" remains a key requirement. In short, fervent religious or cultural beliefs that the spirits of the ancestors should be close to those who are recently departed or close to the homestead of those living are not alone a

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<sup>92</sup> Section 1 of the *Land Reform (Labour Tenants) Act* 3 of 1996 (hereafter *Labour Tenants Act*); *Selomo* para 22.

<sup>93</sup> *Selomo* paras 23-24.

<sup>94</sup> *Selomo* para 21.

<sup>95</sup> *Selomo* para 25.

<sup>96</sup> *Selomo* para 26.

<sup>97</sup> *Selomo* para 27.

<sup>98</sup> *Selomo* para 35.



sufficient basis to grant a continued right of burial on even a well-established ancestral gravesite.<sup>99</sup>

In further support of its main conclusion that a burial should be allowed, the court then referred to *Hattingh v Juta* (hereafter *Hattingh*).<sup>100</sup> In this matter the Constitutional Court had considered how to balance the rights of occupiers with those of landowners in cases falling within the ambit of ESTA, although not specifically in respect of burial. What Spilg J found significant was that the Constitutional Court, in interpreting the phrase "balanced with the rights of the owner or person in charge" in the preamble to section 6(2) of ESTA, had decided that broad concepts of justice and equity could guide courts in determining the rights of the occupiers of land.<sup>101</sup>

The court then went on to indicate that there were two additional factors that it "bears in mind" in granting the applicant a right of burial.<sup>102</sup> However, it is entirely unclear from the judgment what role these factors played and whether the court considered them relevant to ESTA and/or the *Labour Tenants Act*. The court listed them as: first, the applicant could be said to have retained a "residual" right to bury because the previous landowner had permitted one of the applicant's children to be buried on the farm in 2010.<sup>103</sup> No authority was provided for this proposition. Secondly, the applicant's position was strengthened by virtue of the fact that the respondent had permitted the applicant's children who still lived on the farm to visit and maintain the family gravesite. Spilg J also noted that ESTA is silent on whether there is a right to visit for a non-occupier, but stated, without giving any reason, that it was still relevant that the respondent had permitted the applicant to continue to visit the family gravesite even after the applicant had vacated the farm.<sup>104</sup>

The court then returned to the issue of fairness although, surprisingly, without again referring to *Hattingh*, which would have been a useful authority for court powers in this regard. Spilg J reasoned that the addition of a new grave at the existing familial gravesite would cause very little prejudice to the respondent. The gravesite was a piece of land that he already could not make use of and which the applicant was already entitled to visit and maintain. Thus, the addition of one more grave would not result

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<sup>99</sup> *Selomo* para 35.

<sup>100</sup> 2013 3 SA 275 (CC) paragraphs 32-33. See *Selomo* paras 36-37.

<sup>101</sup> *Hattingh v Juta* 2013 3 SA 275 (CC) (hereafter *Hattingh*) paras 30-33.

<sup>102</sup> *Selomo* para 38.

<sup>103</sup> *Selomo* para 38.

<sup>104</sup> *Selomo* para 39.

in any greater diminution of the respondent landowner's real rights than that which he had already suffered.<sup>105</sup> The court weighed this slight diminution of rights against the freedom to exercise one's beliefs and religion in respect of the applicant's need to bury his daughter near other deceased family members for her comfort. The court stated:

[to] refuse to respect these deeply held convictions of a father, particularly when they relate to a child who passed away much too soon and before his eyes, is to strip him of dignity.<sup>106</sup>

He recognised that dignity, religion and culture should not overshadow real rights, but reasoned that the diminution of a real right in this case was negligible.<sup>107</sup>

The court then returned to further consideration of ESTA. As elsewhere in the judgment,<sup>108</sup> Spilg J speculated on possible considerations without reaching definitive conclusions on whether or how they supported a right to burial for the applicant's daughter. First, he pondered on whether the term "residing" in section 6(2)(dA) could possibly be very widely interpreted by a court as including a non-resident child of a resident.<sup>109</sup> Secondly, he questioned whether the fact that the previous landowner had allowed the burial of one of the applicant's children in 2010 might not allow the applicant to be classed as a resident, despite the fact that he had left the farm about eight years ago.<sup>110</sup> Thirdly, the court questioned whether it might not be proper to adopt an extremely wide interpretation of burial rights in terms of ESTA, given that it had been developed to protect occupiers, and in view of the purposes of the *Labour Tenants Act* and sections 7 and 25(6) of the *Constitution*. Finally, Spilg J speculated on whether, even if the applicant himself did not have a right to be buried on the farm because he had left it, his daughter still had an entitlement. After raising but not answering any of these four questions, he finally concluded again that the applicant did have a right to bury his daughter at the family gravesite.<sup>111</sup>

### **3.4 The appeal**

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<sup>105</sup> *Selomo* paras 40-41.

<sup>106</sup> *Selomo* para 42.

<sup>107</sup> *Selomo* para 43.

<sup>108</sup> See further the next section below.

<sup>109</sup> *Selomo* para 44(a).

<sup>110</sup> Here Spilg J raised a query concerning a possible extended interpretation of ss 5, 6(2) and 8 of ESTA.

<sup>111</sup> *Selomo* para 44.

Before discussing the judgment of Spilg J, it is appropriate to refer briefly to an appeal from it which occurred.<sup>112</sup> Doman appealed to the SCA. This appeal was heard some two and a half years after the burial. The SCA simply confirmed the fact that the LCC had allowed the burial in terms of the *Labour Tenants Act*<sup>113</sup> and stated "We specifically refrain from endorsing the reasoning of the court below".<sup>114</sup> However, the appeal was dismissed in terms of section 16(2)(a)(i) of the *Superior Courts Act* 10 of 2013, which states that when the "issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone". The court, with the appellant conceding, stated that it would be "highly offensive" to exhume and rebury the daughter, and this rendered the appeal moot.<sup>115</sup> Thus the nature of the matter being dealt with (a completed burial) effectively prevented this decision from being considered by the SCA, and so it still stands.

#### 4 Discussion

In considering the rather meandering nature of some of Spilg J's reasoning in the LCC decision in *Selomo* it needs to be kept in mind that the matter was presented urgently at court on the day prior to the requested burial on the farm.<sup>116</sup> In view of this and the length of time that the applicant's daughter's body had remained unburied, Spilg J understandably felt it necessary to give a decision on the same day as hearing the submissions of the parties. He was thus sensitive to the fact that in terms of the applicant's culture prompt decisions on burials of family members were essential. In ordering immediately after hearing the evidence that the burial could lawfully take place, he had had very little time to contemplate the issues deeply. He provided his reasons in favour of the requested burial just over a year later.<sup>117</sup> In formulating those reasons, he was to some extent limited by the fact that the SCA in *Nkosi* had found that ESTA had provided no burial right for occupiers prior to the insertion of section 6(2)(dA). This became a difficulty because of his own finding that even the latter provision was of limited use because the applicant in *Selomo* had not made out a good case in terms of it.<sup>118</sup>

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<sup>112</sup> *Doman v Selomo* 2015 JDR 1982 (SCA) (hereafter the Appeal).

<sup>113</sup> The Appeal para 9.

<sup>114</sup> The Appeal para 9.

<sup>115</sup> The Appeal para 10.

<sup>116</sup> *Selomo* para 1.

<sup>117</sup> The Appeal para 9.

<sup>118</sup> See the discussion of *Selomo* para 23 in the previous section above.

Spilg J got around the difficulties imposed by ESTA's restrictions and the applicant's departure from the farm with his averment that the applicant's rights were not "strictly limited to those provided for under section 6(dA)(sic) of ESTA".<sup>119</sup> This enabled him to apply the *Labour Tenants Act*. In so doing, he helped the applicant to strengthen his case in a manner that would certainly offend traditional proponents of judicial neutrality as per the accusatorial system.<sup>120</sup> From the perspective of such proponents, Spilg J's introduction in his judgment, *mero motu*, of an entirely fresh line of argument based on the *Labour Tenants Act* that had never been advanced by the applicant's legal representative<sup>121</sup> would be questionable. Had the possible applicability of the *Labour Tenants Act* been put to the respondent during the hearing, he would at least have had an opportunity to offer counter arguments. Although judges of course have an obligation to consider all potentially relevant law, the construction by the court of a legal argument on behalf of one of the parties *ex post facto* the hearing, based on legislation that had not been considered by either of the parties, and which was interpreted as being of crucial importance for the ultimate result, is a technical weakness in the approach taken by Spilg J.

Aside from the fact that the *audi alteram partem* principle was thus not properly applied, there are further difficulties with the *Selomo* judgment. Since the court purported to frame its initial reasoning in favour of a right to bury in terms of the *Labour Tenants Act*, it is strange that it dealt only briefly with this, and then considered throughout the judgment mainly the requirements set by ESTA. The purported application of the latter Act is in many respects problematic. For example, as has been noted, in *Dlamini* the court held that a right to burial cannot exist on land not currently occupied. Although that aspect of the facts was the same in *Selomo*, Spilg J made no reference to this ruling. However, after accepting that the applicant had completely failed to meet the residence requirements needed for a right to

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<sup>119</sup> *Selomo* para 14.

<sup>120</sup> In *Take and Save Trading CC v Standard Bank SA Ltd* 2004 4 SA 1 (SCA) 5 para C, Harms JA asserted that "a balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray". This *dictum* was subsequently cited with approval in *City of Johannesburg Metropolitan Council v Ngobeni* 2012 ZASCA 55 (30 March 2012) para 29. Here, Mhlantla JA stressed the importance of judicial officers remaining entirely neutral in civil matters. He also cited with approval some remarks by Lord Denning in *Jones v National Coal Board* 1957 2 All ER 155 (CA) 159A-B to the effect that judicial officers must always be careful to maintain a passive, completely neutral role function.

<sup>121</sup> In *Selomo* para 22 of his judgment he noted in regard to the applicant's submissions that: "I accept that no case was made out for rights either as a labour tenant or associate and that in the eviction proceedings his children only asserted rights under *ESTA* without amplifying that the right claimed might include those of a labour tenant".

bury in terms of s 6(2)(dA) of ESTA,<sup>122</sup> Spilg J still claimed - strangely - that the applicant's residence at the farm until 2005, and the continued occupation thereafter by some of his children, were nevertheless factors "bolstering" his right to bury.<sup>123</sup> In our submission, the logic which the court should have applied in relation to ESTA should have been binary. Either the applicant qualified in terms of ESTA and thus had a right to bury in terms of ESTA, or he did not. Since according to the court's own reasoning he did not qualify in terms of ESTA, it should have been impossible to use any other factors to "bolster" his claim in terms of it.

The specific conclusion of the court about halfway through the judgment<sup>124</sup> that as a result of the bolstering of his claim the applicant could lawfully bury his daughter on the farm is also surprising. It will be remembered that Spilg J concluded here that

[t]he effect is that the applicant has a right ... to bury his daughter on the ancestral gravesite on the farm Pennsylvania.<sup>125</sup>

This finding seems odd when just four paragraphs earlier the court had stated that two of the ESTA prerequisites for a burial right – that the applicant must be a current occupier and that the deceased must have been residing on the land – had been "challenged to a material degree".<sup>126</sup> The court thus appears to have tried to apply ESTA in support of its earlier decision in terms of the *Labour Tenants Act* without recognising that this was impossible because the prerequisites of section 6(2)(dA) of ESTA had not been met.

Presumably because of an appreciation that its reasoning so far could be open to challenge, the court continued to provide many additional justifications in support of its decision to accord a right to burial to the applicant. Spilg J's purported reliance on the Constitutional Court judgment in *Hattingh* then followed. Although *Hattingh* concerned the application of ESTA, it did not specifically concern a right to burial. As will be remembered, what Spilg J considered to be of particular relevance was the Constitutional Court's emphasis upon the application of broad principles of fairness when balancing the rights of the parties. Since the applicant in *Selomo* had completely failed to meet the burial right requirements of ESTA when he abandoned residence and accepted payment for a waiver of his rights to the

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<sup>122</sup> *Selomo* para 23 read with para 26.

<sup>123</sup> *Selomo* para 23.

<sup>124</sup> *Selomo* para 27.

<sup>125</sup> *Selomo* para 27.

<sup>126</sup> *Selomo* para 23.

land, there was arguably little to put in the balance from his side. Furthermore, since Spilg J's original argument had been framed in terms of the *Labour Tenants Act*, this reliance on an authority interpreting ESTA was problematic.<sup>127</sup>

In seeking further reasons to buttress the burial right of the applicant the court then concluded that it could also be argued that he had a residual right to burial.<sup>128</sup> As will be remembered, Spilg J characterised this right as arising from the fact that the previous landowner had permitted one of the applicant's children to be buried on the land. In the court's view, the resulting residual right was strengthened by the fact that the respondent had permitted the applicant and his children to visit and maintain the family gravesite subsequent to the applicant's departure from the farm. With respect, these factors are of very little relevance. There is no authority for the proposition that a single burial permitted by a previous landowner should reduce the rights of the present landowner.<sup>129</sup> And since the applicant's rights of visitation and gravesite maintenance were not in dispute in *Selomo*, the fact that the respondent permitted these activities was completely irrelevant.<sup>130</sup>

In the next part of the judgment, the court's analysis of the very limited prejudice that a burial would cause for the respondent, as weighed against the considerable prejudice and harm to his dignity suffered by the applicant through the delay in the burial of his daughter and the contravention of his religious beliefs, potentially provided it with perhaps the strongest argument at its disposal in favour of the applicant.<sup>131</sup> The court quite correctly appreciated that respect for the dead in this instance required respect for the culture and dignity of the applicant. However, it failed to strengthen this argument by citing the constitutional rights of respect for dignity and religious and cultural freedom at this point in the judgment.<sup>132</sup> Nor did it cite

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<sup>127</sup> We further discuss the applicability of *Hattingh* below.

<sup>128</sup> *Selomo* para 38.

<sup>129</sup> As has been noted, in *Nhlabathi* even two burials from the same family were not regarded as sufficient. Additional burials were needed to constitute an established practice showing that consent had routinely been granted by the landowner.

<sup>130</sup> *Selomo* paras 39-40. There is nothing in either ESTA or the *Labour Tenants Act* to suggest that allowing visitation and the maintenance of gravesites compels landowners to subsequently allow more burials.

<sup>131</sup> *Selomo* paras 41-43. As noted above, in *Nhlabathi* para 35 Bam P treated a minimal degree of prejudice to a landowner as a factor weighing in favour of a right to burial for an occupier. Spilg J could therefore have cited *Nhlabathi* as authority on this point, but did not do so.

<sup>132</sup> Section 10 of the *Constitution* requires respect for human dignity. S 15 upholds freedom of religion, belief and opinion. S 31(1) supports rights to engage in cultural and religious practices.

here the Constitutional Court's judgment in *Hattingh*, which could have been of some assistance by supporting court discretion and consideration of issues of fairness.<sup>133</sup> Instead of making the most of reasoning based on fundamental constitutional rights, the court moved on to consider four possible further grounds supposedly in favour of the applicant.<sup>134</sup>

In relation to the four grounds presented as unanswered questions immediately before the court reached its final conclusion on the question of the burial,<sup>135</sup> the idea that the word "residing" in section 6(2)(dA) of ESTA might be extensively interpreted to include the previously resident child of a previously resident occupier seems far-fetched. It is weakened further by Spilg J's own previous finding that the applicant was not an occupier in terms of ESTA and his daughter was not residing on the land at the time of her death.<sup>136</sup> Such an interpretation would also not have been supported by the previous SCA judgments relating to the concept of residence in ESTA.<sup>137</sup> In relation to the second query concerning the application of the wording of sections 5, 8 and the preamble to section 6(2) of ESTA, these are all of limited assistance because they do not deal directly with the issue of burial. As noted earlier, the fact that a previous landowner had granted the applicant a right to bury another child is also of limited relevance. On the third query raised by Spilg J, sections 5 and 6(2) of ESTA were not designed to be read with the *Labour Tenants Act*, and in any event the court did not follow through by actually undertaking that exercise. The same criticism of incomplete reasoning applies to the court's brief references to sections 7 and 25(6) of the *Constitution*. The court could, for example, have picked out

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<sup>133</sup> Admittedly, and as we have noted above, *Hattingh* would have been of limited assistance because it was an interpretation of ESTA. However, it did support the notion of wide discretionary powers for courts based on broad considerations of fairness when assessing the rights of rural land occupiers. Also, in seeking constitutional court authorities Spilg J need not have confined himself only to *Hattingh*. As pointed out by Cornell *et al Dignity Jurisprudence* xiii, there is a substantial body of Constitutional Court case law affirming the importance of upholding dignity. As the authors point out (at xiii), there are many cases showing that the Constitutional Court's dignity jurisprudence has been "shaped and influenced by the African ethical notion of *Ubuntu* which demands the recognition and respect of the dignity of all others".

<sup>134</sup> *Selomo* para 44.

<sup>135</sup> *Selomo* para 44 as discussed in the previous section, above.

<sup>136</sup> *Selomo* para 23.

<sup>137</sup> *Barrie v Ferrois* 1987 2 SA 709 (C) 714F cited with approval by the SCA in *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* 2010 3 SA 152 (SCA) defined "reside": "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'". Also, as has been noted, in *Nhlabathi* the deceased had left the land only shortly before dying and in order to receive hospital treatment. This contrasts with the situation of the deceased in *Selomo* who had left the land many years before her death.

the issues of the protection of dignity as referred to in section 7(1) and redress for land occupiers affected by past discriminatory laws as referred to in section 25(6), and then analysed the nature of their applicability to the instant case. By not doing so, it left the judgment incomplete on this important aspect.

In relation to the brief reference to the *Labour Tenants Act* in paragraph 44c, it is important to note that this Act does not expressly refer to any right to burial. If one reverts back to the court's original discussion of the Act in paragraphs 20-25, it appears that the court's reasoning was that, although burial rights are not specifically referred to in the *Labour Tenants Act*, they could impliedly be included in the use rights conferred on labour tenants.<sup>138</sup> And these rights, Spilg J seemed to surmise, could even outlive occupation of the farm by a labour tenant. Both the original discussion and paragraph 44c are once again inconclusive. They seem to have been added in as part of the process (seen throughout the judgment) of attempting to bolster a right of the applicant to bury his daughter.

For the fourth and last proposition in paragraph 44 the court surmised that, quite apart from possible interpretations of the *Labour Tenants Act* and ESTA, the applicant had a right to continue using the familial site for burials, at least for his children.<sup>139</sup> It is not clear where this right originated. It appears that perhaps the court was referencing the fact that three years before the hearing in the instant case the applicant had been permitted by the previous landowner to bury another deceased child. The relevance of this is unclear in the light of the fact that the current landowner had now refused consent for the burial of the daughter. As appears from our summary of it above *Dlamini* is authority for the proposition that a right to bury is either dependent on the consent of the landowner, or it must be derived from ESTA, in which case the landowner is no longer free to withdraw such consent. It would seem that, as the right *in casu* did not exist within ESTA, it could have arisen only out of consent given by the landowner, which consent was not forthcoming in *Selomo*.

The positing of four largely irrelevant grounds in paragraph 44 without following through by stating definitively what their consequences were for

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<sup>138</sup> *Labour Tenants Act* s 3(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members (a) to occupy and use that part of the farm in question which he or she or his or her associate was using and occupying on that date.

<sup>139</sup> *Selomo* para 44d.



the instant case strengthens the impression of a judgment composed as a meandering journey by a judge seeking authority for a decision already made. In considering the judgment as a whole, it is curious that the court, after having decided early on that the applicant did qualify as a labour tenant, after having claimed that it was permissible for the court to reach such finding even though this was not sought by the applicant,<sup>140</sup> and after having decided that the rights the applicant enjoyed in terms of the *Labour Tenants Act* included the right to bury, did not merely decide the matter on this basis alone. It is difficult to fathom why the court, after concluding that an implied burial right existed in terms of the *Labour Tenants Act*, felt the need to devote the bulk of the rest of its judgment to attempting to support this right by deploying a range of mostly strained or incomplete interpretations of ESTA. It appeared to view ESTA and the *Labour Tenants Act* as two halves which needed to make a whole. It is the tendency to try to read these two Acts together when they are in fact stand-alone Enactments which explains much of the vagueness of the judgment.

## 5 Concluding remarks

In conclusion, Spilg J was confronted with the dilemma – faced by many courts – that a strict application of the most explicit legislation – even with an infusion of principles of justice and equity – would result in an outcome which would be outrageously unfair to poor, rural and very vulnerable dependant people, and where the only way to assist them in the retention of some dignity and to show respect for their religion and culture was to fudge the legal principles or, as in this case, make a decision that could not easily be undone and then hope for the best. It appears that, having permitted a burial to occur on the farm and in subsequently composing his reasons, Spilg J had to hunt around to find grounds in the law. When these were not forthcoming and appeared to have been negated by the fact that the applicant was not an occupier and had relied only on ESTA, he added together various possible rights, hoping that together, somewhere, they would total a burial right – which right had already been granted. Although the decision can therefore be criticised as bad in law, that does not necessarily make it a bad decision from the point of view of either party. For the applicant it was welcome relief during a stressful time of bereavement. For the respondent it appears that the impact was minimal, if anything at all. Thus, in fairness to Spilg J, despite being under considerable time pressure when first hearing the matter, he achieved a result which was humane and compassionate. He appreciated that for adherents of indigenous culture

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<sup>140</sup> *Selomo* paras 23-24.

respect for the dignity of a deceased family member requires a burial in the familial gravesite.

It is difficult to predict how *Selomo* will stand the test of time as a precedent guiding future litigants. On the facts, it serves as an affirmation of greatly extended legal recognition of indigenous familial burial practices. A right of burial can now be claimed even where both a land occupier and the family member to be buried have been absent from the land for many years. Even receipt of payment in return for a waiver of rights to the land will not defeat an occupier's right to bury a family member at a rural family gravesite. However, it remains to be seen whether any future court would accept the serpentine reasoning in *Selomo*, particularly concerning the applicability of ESTA in such circumstances. It seems likely that future courts would have some difficulty in agreeing that section 6(2)(dA) of that Act is worded broadly enough to accord burial rights to previous occupiers who no longer have residence. Whether they would accept the alternative but undeveloped reasoning based on an implied right arising in terms of the *Labour Tenants Act* or directly from the *Constitution* remains to be seen.<sup>141</sup> They might be tempted to do so where prejudice to a landowner is limited, given the importance of respecting indigenous burial practices. As we have suggested, although the *Labour Tenants Act* provides little scope because it makes no reference to burial, an argument based directly on constitutional rights could potentially be developed to provide a strong case.<sup>142</sup> The court in *Selomo* should have considered this further. Two lessons for landowners involved in similar matters in the future are that they should come to court prepared to prove significant prejudice relating to the use of their land and not base their submissions only on ESTA.

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<sup>141</sup> Section 10 of the *Constitution* - human dignity, s 15 - the right to freedom of religion and belief, and ss 30 and 31 - the protection of cultural and religious rights.

<sup>142</sup> Arguments based on the protection of dignity, the protection of cultural and religious rights, and the reversal of past discriminatory practices could all potentially be applied to previous occupiers of rural land.

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GN R1632 in GG 19587 of 18 December 1998

### **List of Abbreviations**

ESTA	<i>Extension of Security of Tenure Act</i> 62 of 1997
LCC	Land Claims Court
SCA	Supreme Court of Appeal