IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 1/2000

In the matter between:

GRACE CHRISSIE NKOSI First Appellant

JOSEPH MANDLA NKOSI Second Appellant

and

GIDEON WILHELMUS BÜHRMANN Respondent

CORAM: HOWIE, HARMS, STREICHER, MPATI JJA and NUGENT AJA

Date of Hearing: 4 September 2001

Date Delivered: 25 September 2001

Occupier under Extension of Security of Tenure Act - whether has right to bury family member on land of owner without owner's consent.

J U D G M E N T

HOWIE JA

The Background

[1] This case raises a sensitive and emotionally contentious question involving, on the one hand, the right to religious freedom, and particularly the right to practise one's religion, and, on the other hand, the right not to be deprived of one's land except by law. Central to the dispute are the provisions of the Constitution (Act 108 of 1996) and the Extension of Security of Tenure Act 62 of 1997 ("the Act"). The first appellant, who, by agreement between the parties, is to be regarded for the purposes of this litigation as an "occupier" within the meaning of the Act, and as entitled to relief, if any, from the High Court and not the Land Claims Court, wishes to have the body of her late son, Petros Nkosi, buried on a farm in the Ermelo district where she resides as such an occupier. The respondent, who is the owner of the farm, refuses consent for the burial.

[2] Petros Nkosi died in 1999. When the first appellant indicated her intention

to have him buried on the farm the respondent sought an order in the High Court at Pretoria interdicting the burial. The application failed. An appeal to the Full Court of the Transvaal Provincial Division succeeded by a majority and an interdict was granted. On appeal with the necessary leave, the first appellant maintains that she is, despite the respondent's refusal of consent, entitled as of right to have her deceased son's body interred on the farm.

[3] The judgments of the Full Court are reported as *Bührmann v Nkosi and Another* (1999) 3 All SA 337, 2000 (1) SA 1145 (T). The second appellant is another son of the first appellant. While he supports her cause, his involvement is of no greater present significance than that and for convenience I shall refer in what follows to the first appellant as "the appellant".

[4] The respondent having sought relief in final form, it is trite law that the decisive facts where, as here, there are conflicts on the papers, are those alleged or admitted by the appellant.

The relevant facts

[5] The appellant first came to the farm with her husband and family in 1966. It was then owned by the respondent's late father. Both rural people, the appellant and her husband had been farm workers from an early age. In return for their labour they had been afforded the right to live on the land, to graze their stock in areas allocated by the land owner and to raise their own crops. In precisely the same way they continued to earn their livelihood when they worked for the respondent's father. They established a homestead on the farm and while her husband was a tractor driver and general labourer the appellant worked in the farmhouse as a domestic employee. In due course Petros Nkosi was born to them. That was in January 1968.

[6] Shortly before that a grandchild of theirs died and they reported this to the respondent's father. In that regard the appellant says the following in her opposing affidavit (referring to the respondent's father):

"He then pointed out an area on the farm we could use to bury the child and that area was subsequently set aside for our family burials. Consistent with our tradition and cultural beliefs, my husband and his mother (my mother-in-law) performed the rituals necessary to declare and introduce that piece of ground as an official home for our ancestors. I must state that it is our custom and religious belief that when a member of our family passes away, he/she gets only physically separated from us but spiritually that person will always be with us and is capable of sharing a day to day life with us though in a different form.

It is against this background that a graveyard to us is not only a place to bury our deceased, but a second home for those of us who live in the world of spirits. Once a certain piece of ground is declared a home to our ancestors, it remains so until another ritual is accordingly performed by the elders clothed with the necessary capability. We then buried our grand-child. Since the death of our first grandchild we have buried seven more family members in the area that was allocated to us by Mr Bührmann, the eldest being Jane Nkosi (my husband's mother) and Mjalimane Nkosi (my husband's younger brother) and the rest are my grandchildren.

[7] The respondent became the owner of the farm in 1970 and the appellant and her husband worked for him until about 1981 when they moved to an adjacent farm. There, in 1986, the appellant's husband died and, with the consent of the

owner of that property, was buried. The appellant says that that burial, not being on the respondent's farm, was contrary to her custom and religious beliefs.

[8] In about 1987 the appellant and her family returned to the respondent's farm and, with one or more of her sons, she has lived there since then with the respondent's consent, residing in what she refers to as the family homestead and running their stock on a communal grazing area.

[9] In the context of the appellant's assertions quoted in paragraph [6] above it would seem that all the burials in the area pointed out by the respondent's father took place during the latter's time as owner. She does not allege that any of the burials she refers to occurred after that or, if they did, that the respondent either consented to them or knew of them but did not object. It is not clear, moreover, whether the respondent's father gave consent for each burial or whether he gave consent at the outset which covered all future burials that there might be during his time as owner. Finally, she fails to explain who "subsequently set aside" the area

for future burials and in what circumstances that demarcation occurred.

[10] There are indications in the appellant's opposing affidavit that in view of the time constraints imposed by the respondent's interdict application she contemplated leading oral evidence relevant to her alleged right to bury her son on the farm. However the litigation proceeded without her having sought that opportunity.

[11] For the sake of completeness it should be mentioned that the respondent's refusal of consent in the present case is, to judge from his replying affidavit, based on the attitude that the appellant and her sons, including the deceased, were not his employees and that not even employees or their families are in his view entitled as of right to burial on the farm. However, so he says, his staff are aware that he will usually give favourable consideration to any request from them for such burials. The papers also indicate that a labour dispute arose during 1995 between the respondent and some of the appellant's sons (not involving the deceased) and that this history may have engendered some antipathy on both sides. However,

as will emerge presently, the issue before us is essentially one of principle and statutory construction.

The decisions of the Courts below

[12] In the proceedings at first instance the Court (Cassim AJ) held that although the Act did not afford the appellant the right she sought, she had nonetheless acquired it by way of an unregistered servitude granted by the respondent's father.

[13] On appeal to the Full Court three judgments were handed down. Du Plessis J held that in the absence of evidence that the respondent took ownership of the farm with the knowledge that his father had agreed that burials could occur without the owner's consent, any unregistered servitude did not bind the respondent. The learned Judge also held that on a proper construction of the Act it did not afford an occupier the right to bury without the owner's consent. In a concurring judgment, Satchwell J concluded that the right to practise one's religion

could not, as of right, be exercised in a manner which permanently deprived a land owner of the rights of ownership over portion of the land.

[14] In the minority judgment, Ngoepe JP referred to a number of international instruments and to constitutional writers, stressing that the right to freedom of religion and belief included the freedom manifestly to practise one's religion. That right having been conferred upon occupiers *vis-a-vis* owners by s 5(d) of the Act, a balancing of their competing rights warranted the conclusion that in this particular case the appellant had the right to bury her son even if its exercise would cause some curtailment of the rights of ownership.

The Constitution

[15] Under the Constitution's Bill of Rights everyone has, among other rights, the respective rights to human dignity (s 10), privacy (s 14), freedom of religion, belief and opinion (s 15(1)), freedom of association (s 18) and freedom of movement (s 21). All those specific rights are, in s 5 of the Act, conferred on

occupiers, owners and persons in charge of land. The provisions of s 5 will be reverted to later in this judgment.

[16] In terms of s 25 of the Constitution no one may be deprived of property except in terms of law of general application, no law may permit arbitrary deprivation of property and no expropriation may be without compensation.

[17] Under s 36 of the Constitution the rights entrenched by the Bill of Rights may only be limited by a law of general application where such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. A limitation of the same import is contained in s 5 of the Act, to be effected, not by another law but by the exercise of the competing rights conferred upon the persons referred to in that section.

[18] In construing the Act the courts are enjoined by s 29(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.

The provisions of the Act

[19] The Act came into operation on 28 November 1997. Its own spirit, purport and objects are encapsulated by its long title and preamble. They read as follows:

> "To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the condition of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.
>
> WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;
>
> WHEREAS this situation is in part the result of past discriminatory laws and practices;
>
> AND WHEREAS it is desirable -
>
> that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners and government bodies.
>
> that the law should extend the right of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;
>
> that the law should regulate the eviction of vulnerable occupiers from land in a fair manner,

while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances;

to ensure that occupiers are not further prejudiced;

[20] Chapter I of the Act comprises three sections. Section 1 is the definition section. The relevant definitions are these:

" **'consent'** means express or tacit consent of the owner or person in charge of the land in question ...;

'evict' means to deprive a person against his of her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, ...'

...

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

(a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount; ...

'**off-site development**' means a development which provides the occupants thereof with an independent tenure right on land owned by someone other than the owner of the land on which they resided immediately prior to such development;

'**on-site development**' means a development which provides the occupants thereof with an independent tenure right on land on which they reside or previously resided;

'**owner**' means the owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land;

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

'**suitable alternative accommodation**' means alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to -

(a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;

(b) their joint earning abilities; and

(c) the need to reside in proximity to opportunities for employment or other economic

activities if they intend to be economically active;

'**terminate**' includes to withdraw consent to a person to occupy or use land;"

[21] Under the provisions of s 2 read with s 1(2) the Act applies, with one exception, to all land, including State land. The exception is land in or encircled by an area which by law is an established, approved, proclaimed or recognised township. Despite that exception, there are two instances in which land even within a township falls within the sphere of application of the Act. One is land legislatively designated for agricultural purposes and the other is land "occupied" under the Act and which is included within a township that comes into existence after 4 February 1997.

[22] In terms of s 3, consent to an occupier to reside on or use land may only be terminated in compliance with the requirements of s 8.

[23] Chapter II is entitled "Measures to facilitate long-term security of tenure for occupiers" and comprises s 4 of the Act. Section 4 empowers the Minister of

Land Affairs to grant applications for subsidies for the establishment of on-site and off-site developments. The subsidy monies have to be appropriated by Parliament for this purpose and in the establishment of such developments the Minister may enlist the aid of provincial and municipal authorities. The provisions of the section which are of particular present relevance are those of s 4(1)(b), in terms of which these subsidies will "enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land" and those of s 4(5):

> "(5) No transfer duty shall be payable in respect of any transaction for the acquisition of land in terms of this section or in respect of any transaction for the acquisition of land which is financed by a subsidy in terms of this section."

[24] Chapter III of the Act is entitled "Rights and Duties of Occupiers and Owners". It contains three sections reading as follows:

> **"5. Fundamental rights.** - Subject to limitations which are reasonable and justifiable in an

open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to –

(a) human dignity;

(b) freedom and security of the person;

(c) privacy;

(d) freedom of religion, belief and opinion and of expression;

(e) freedom of association; and

(f) freedom of movement,

with due regard to the objects of the Constitution and this Act.

6. Rights and duties of occupier. – (1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

(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 –

(a) to security of tenure;

(b) to receive *bona fide* visitors at reasonable times and for reasonable periods:

Provided that –

(i) the owner or person in charge may impose reasonable conditions that are

normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and

(ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage;

(c) to receive postal or other communication;

(d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997;

(e) not to be denied or deprived of access to water; and

(f) not to be denied or deprived of access to educational or health services.

(3) An occupier may not –

(a) intentionally and unlawfully harm any other person occupying the land;

(b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;

(c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or

(d) enable or assist unauthorised persons to establish new dwellings on the land in question.

(4) 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.

7. Rights and duties of owner. - (1) The owner or person in charge may have a trespassing animal usually or actually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so: Provided that the owner or person in charge may take reasonable steps to prevent the animal from causing damage during those 72 hours.

(2) An owner or person in charge may not prejudice an occupier if one of the reasons for the prejudice is the past, present or anticipated exercise of any legal right.

(3) If it is proved in any proceedings in terms of subsection (2), that the effect of the conduct complained of is to prejudice an occupier as set out in that subsection, it shall be presumed, unless the contrary is proved, that such prejudice was caused for one of the reasons referred to in subsection (2)."

[25] Chapter IV, comprising s 8 to s 15, contains detailed provisions applicable to the termination of occupiers' rights and their eviction. Demanding requirements are set before an occupier can, by due process, be lawfully evicted. Of present

relevance are certain terms of s 8 and s 14.

[26] Section 8 contains the following:

> "(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and -
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> (a) has reached the age of 60 years; or
>
> (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge,
>
> may not be terminated unless that occupier has committed a breach contemplated in section 10(1) (a), (b) or (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.
>
> (5) On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1)"

[27] In s 14 there appears the following in relation to the restoration of an occupier's rights consequent upon unlawful eviction:

> "(3) In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order -

(a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;

(b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;

(c) for the restoration of any service to which the person had a right in terms of section 6;"

[28] The last provision of the Act to which reference should be had is s 24. It reads:

"24. **Subsequent owners.** - (1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.

(2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it.

The argument for the appellant

[29] Consideration was given to the question whether the appellant's allegations provide a possible foundation for the inference that the respondent's father tacitly

agreed or consented that subsequent burials of the appellant's relatives could take place in the allocated ground without reference to him for permission (in which event the possible applicability of s 24(2) could arise). However, counsel for the appellant accepted that this was not her case on the papers and he did not contend for such agreement or consent. Counsel's approach in this regard was correct.

The consent on which her residence and her ancillary right depend is, in view of the definition of "occupier", the consent which prevailed on or after 4 February 1997 and that consent was the consent of the respondent, not his father. Consequently s 24(2) does not assist the appellant. The consent to which it binds a later owner is consent "contemplated in (the) Act" and the father's consent was not such consent. Moreover the consent of the father, if given, would probably only have been effective up till the time the appellant left the farm in 1981.

[30] In addition, although mindful of such impetus as the existence of the established family graves might appear to give her case, counsel made it clear that

his argument in support of the claimed burial right would have been exactly the same even had there been no prior graves and even had the appellant been a new "occupier" whose first family bereavement this was. In essence his argument was that, simply as "occupier", the appellant was entitled in terms of the provisions of the Act, properly construed, to bury as of right as an adjunct of the right of freedom of religion.

[31] With regard to the limitations clause in the introductory word of s 5, counsel contended that s 5(d) and s 6(1) were by themselves sufficient to create the claimed right and he urged that the appeal should be upheld without recourse to a limitations balancing analysis. He pointed out that the respondent had not in fact sought on the papers to establish any basis for a limitations exercise.

[32] In developing his argument, counsel contended that the fundamental rights conferred by the Constitution, as enumerated in s 5 of the Act, were imported into that statute to ensure that occupiers can use and enjoy those rights, not just in

general or in the abstract, but effectively and in the very setting where they live and where they pursue their essential livelihood. The section therefore requires owners to tolerate the exercise of those rights on their land. In this way content is given to the s 5 rights and those rights in turn give content to the s 6(1) rights of residence and land use. Basic to the use of land by rural people is the association between the land, the family and the exercise of religious rights. This link is recognised by s 6(4). Central to religious practice are the rituals of burying the dead. It follows, so ran the argument, that because the land they occupy is the only resource by means of which occupiers such as the appellant can exercise their religious right and manifest its practice, such right must include the right to bury their dead on that land. To that right, therefore, the right of ownership has to yield. It follows, said counsel, that the majority in the Court below gave too narrow a meaning to the right of use conferred by s 6(1). Use, he said, had to include use for burial purposes not only by reason of the submissions I have

already summarised, but also because the Legislature, in aiming to provide for long-term security of tenure, must necessarily have envisaged connections of long duration between occupiers and their families with the land. In the lifetime of such occupiers family deaths are an inevitability and it was intended that the rights of occupation should accommodate and include the right to bury the family's dead.

The respondent's argument

[33] In the submission of the respondent's counsel s 5 of the Act did not add anything to the content of the right of freedom of religion that was not already part of the right conferred by s 15(1) of the Constitution. The purpose of s 5 was to effect horizontal application of the constitutional right as between the three categories of person referred to in the section. Accordingly the legislative object was not to confer rights of use in respect of the land but to regulate the relationship of owners, persons in charge and occupiers as between themselves. It was s 6, said counsel, that conferred rights in respect of the land itself. In s 6(1) those

were limited to residence and to a degree of agricultural use of the land as was connected with such residence, with s 6(2) adding certain subsidiary residence-related rights. In the circumstances the Act did not seek to deal with burial at all and the legislature certainly cannot be understood as having intended to deprive landowners of rights in their property without compensation. Finally, it was to be borne in mind that burials were throughout the country regulated by subordinate legislation. In the case of land within the jurisdiction of the Town Council of Ermelo, such legislation required that burials take place only in a public cemetery set apart by the council for such purpose and that the council's written permission was necessary for burials elsewhere.

Laws concerning burials

[34] Close legislative regulation of burials is obviously necessary both in regard to considerations of public health and in order to control and record the incidence of burials, particularly when deaths due to unnatural causes may be involved. In

Mpumalanga Ordinance 17 of 1939 of the former province of Transvaal authorises municipal councils to establish cemeteries and to compel burials in a proper burial-ground or cemetery both within their municipal areas and even in outside areas held by such municipalities for cemetery purposes. The relevant provision relating to Ermelo is contained in a by-law approved by the erstwhile provincial Administrator and published in Provincial Gazette of 4 June 1980 under Administrator's Notice 658. This was handed up by the respondent's counsel as being the currently operative provision.

[35] It is nowhere suggested on the papers that the respondent's farm is within any area of municipal jurisdiction but it is also not alleged by the appellant that for monetary or practical reasons it would have been impossible or even difficult to have Petros buried in a cemetery lawfully established.

The nature and property implications of a grave

[36] Apart from a variety of legislative provisions which criminalise violations of

graves it is an offence at common law to desecrate a grave. In addition, establishment of a grave could also involve a servitude over the land in which it is sited. Nonetheless the common law does entitle an owner, in the absence of a breach of contract or a servitude, to remove a grave's railing and tombstone as long as no violation of the grave occurs. In these respects see *Lawsa*, First Reissue, vol 20, part 2, 279, paras 324 and 325.

[37] Section 6(4) alters the common law position in that everyone may now, as of right, visit and maintain family graves on land belonging to someone else. Subject to reasonable conditions imposed by the owner or person in charge as to safeguarding life or minimising work disruption on the land concerned, this subsection, apart from imposing what is in effect a right of way over the land, entitles family of the buried deceased to maintain graves indefinitely, including tombstones and railings, if any.

[38] The impact of all these provisions is that a grave, practically and legally,

effects a permanent diminution of the right of ownership of the land. If a grave site could be taken by an occupier as of right this would amount to an appropriation.

Interpretation of the Act's relevant provisions

[39] Counsel for the appellant presented his case on the basis that s 15 of the Constitution did not afford the appellant the right she claimed and that she was necessarily dependent on the terms of s 5(d) of the Act. Nevertheless he did not contend that the right conferred by s 5(d) was any different in scope and content form the right granted by s 15(1) of the Constitution.

[40] It seems to me to be convenient to undertake the interpretative exercise by starting with a discussion of the s 5(d) right to religious freedom. If that right includes the right to effect burials on the land without the owner's consent then "use" in s 6(1) will obviously have to be interpreted as including that entitlement.

On the other hand, if the right claimed by the appellant is not included within the

ambit of s 5(d) then one will have to enquire whether the other provisions of the Act nevertheless confer that right. Of course, dividing up the exercise in this way is purely a matter of discursory convenience. The required analysis must in the end cover all the relevant statutory provisions read as a whole particularly when, conceivably, s 5(d) may bear on the rest or the rest may bear on s 5(d).

[41] Of the right to freedom of religion the following was said in *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at 1208 in the judgment of Chaskalson P [para 92]:

> "In the *Big M Drug Mart* case [*R v Big M Drug Mart Ltd* (1985) 13 CRR 64 at 97, a decision of the Supreme Court of Canada] Dickson CJC said:
>
> > 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."
>
> I cannot offer a better definition than this of the main attributes of freedom of religion. But, as Dickson CJC went on to say, freedom of religion means more than this. In particular he stressed that freedom implies an absence of coercion or constraint and that freedom of

religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs."

[42] And at 1216 [para 122] O'Regan J, in a passage relied on by the appellant's counsel, said this:

"Requiring that the government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality. Indeed, at times giving full protection to freedom of religion will require specific provisions to protect the adherents of particular religions, as has been recognised in both Canada and the United States of America. The requirement of even-handedness too may produce different results depending upon the context which is under scrutiny,"

[43] The right of religious freedom and practice came under consideration again in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) where the focus was on the freedom to manifest one's religion not just individually but in community with others as allowed by the rights conferred by s 31(1) of the Constitution. Appellant's counsel did not rely on s 31(1) and the appellant laid no claim to be one of a religious community as such but it is not

without significance that when s 31(1) allows persons belonging to a religious community to practise their religion s 32(2) requires that the exercise of that right be not inconsistent with any provision of the Bill of Rights. Although tension between different entrenched rights is sometimes unavoidable the law would be unacceptably contradictory if it barred communal religious practice from infringing property rights but permitted individual religious practice to do so.

[44] Both in *Lawrence* and *Christian Education* the Constitutional Court was concerned with the application of the Bill of Rights in so far as it affected, or was affected by, the rights and obligations of the State. In neither case was it necessary or relevant to consider the horizontal application of the entrenched rights as between fellow citizens.

[45] Apart from that, in neither case was it said or 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. True, one is entitled to freedom from conduct which forces one to act contrary to one's beliefs. And it could be argued that interdicting the proposed burial in this case was a measure aimed at constraining the appellant's practice of her religious beliefs. However, that was not argued by the appellant's counsel and the argument would in any case not have assisted her cause. That is because the very question under consideration is whether the right to freedom of religion does in law entitle her to take some of the respondent's land for a grave.

[46] It is undeniable that funeral and graveside rites, rituals and ceremonies are very much part of religious beliefs and practice. What the evidence in this case shows is that the appellant's beliefs are that the existing family graves constitute a spiritual home for her ancestors and therefore the site where subsequent family dead should be buried. What renders this particular land appropriate for the burial (apart form its convenience) is that it has been consecrated for family burials. She

does not, and cannot, claim that this grave site comprises the only place where her religious burial dictates could possibly be satisfied. Obviously that was not the position before she lived on the farm or when her residence there was interrupted for some six years. Nor does she allege, as I have said, that burial of Petros's body anywhere else would pose problems from the point of view of expense or logistics. In other words she is able to bury her son. It is not the case that all possible burial has been denied her. And she does not claim that funeral and graveside rituals could not be observed in the case of a burial elsewhere. In those circumstances it cannot be said, without more, that the appellant's constitutional rights to practise her religious and cultural beliefs (that are protected by s 15 and s 31) will be denied to her if the burial is not permitted. That does not exclude the possibility, however, that where religious or cultural beliefs are so inherently attached to particular land that the right to hold and practise them would be denied if the rights of ownership are asserted, the latter rights might be required to give

way. That does not arise in the present case.

[47] It is the right of all citizens to observe and carry out their religious practices when burying their dead. But the Court was referred to no legal provision or authority for the proposition that everyone is totally free to choose where such burials are to be effected. A burial requires an appropriately-sized piece of ground to be available. Everyone living within a municipal area can only acquire the necessary ground in a lawfully established cemetery. Burial elsewhere requires not only the necessary acquisition of a site but special permission as well. Outside the jurisdiction of a local authority one is necessarily dependent on the consent of the land owner, be it the State, a juristic person or an individual. These are legal constraints that bind everyone. No one religion can demand more than another. Although the Act aims to treat occupiers specially, the right of religious freedom is the right of all.

[48] As far as concerns the comment quoted above from the judgment of

O'Regan J in *Lawrence*, the learned Judge was referring to situations in which the State might constitutionally be obliged to be more than neutral itself in coming to the assistance of lesser known or less prevalent religions in order to secure their equality of opportunity and treatment compared with the major religions. That being so, I do not think that the appellant can derive support for her case from that statement. What her counsel's submission amounts to is that the Act should be construed as obliging an owner to provide burial land where the occupier's religious beliefs prompt the wish to have a burial on the owner's land and to take land for that purpose. The Act in the present case, however, aims, subject to its territorial application, to deal with all occupiers and all owners, including those of different religious persuasions and those who have no religious beliefs or practices at all. This is not to overlook that the Act aims to redress past inequities burdening an entire class that was, and still is, seriously disadvantaged economically, educationally and residentially. Nevertheless to benefit some occupiers and not

others would be inconsistent with the Constitution and the objectives of the Act.

To the possible rejoinder that the right to bury without the owner's consent is something available to all occupiers which some can simply waive, the answer is, as will become plain when considering the other provisions of the Act, that it is simply not possible to deduce the legislative intention to confer that right. On the appellant's argument an owner would be at risk of diminution of the rights of ownership depending on the religious belief of the occupier. That is an arbitrary situation in conflict with s 25(1).

[49] My conclusion, therefore, is 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 the Act does not, when viewed in isolation, confer the right which the appellant claims.

[50] As far as s 6(1) is concerned, it confers the rights of residence, "use" and

services, subject to the owner's consent or agreement. Making residential accommodation available to people at the lowest end of the national income scale who otherwise have no security of tenure is the prime and understandable objective of the Act. To secure their residential tenure as far as possible without their having acquired real rights in the land itself, stringent eviction requirements are set. But the fact is that until real rights are obtained, residence and use must be understood as having, subject to proper eviction by due process, a temporary quality. "Use" in any event suggests land use in connection with residence and the definition of "suitable alternative accommodation" reveals what it is for which an alternative must be found, namely, residential accommodation and agricultural land. In ordinary parlance agricultural involves cultivation and stock farming.

[51] Nothing in that scheme of things conveys expressly or even impliedly that occupiers have the additional right to bury their dead on the land and to take ground for that purpose even against the owner's will. To uphold the argument

for the appellant would be tantamount to saying that residence and the use of land and services (none of which detracts permanently from the substance of the land) require consent, but burials (involving diminution of the owner's land rights) do not require consent. Apart from the lack of logic which such a construction involves there is simply no wording in the Act which, on either a literal or a purposive approach, renders such an interpretation tenable. Accordingly the land use intended is use in association with the right of residence and the latter does not confer any right to, or in, the land itself.

[52] This conclusion is reinforced when it is borne in mind that occupiers do not and cannot acquire land or rights in land until the subsidy scheme outlined in s 4 of the Act is implemented. That such rights, once obtained, will be real rights, or equatable with real rights, seems clear, particularly from s 4(5), which does away with the transfer duty that acquisition transactions would otherwise attract. Until then, however, the tenure of an occupier will not have the envisaged long-term

security. Armed with real rights in future, occupiers may well be able to take burial land (that may still depend on the provision of the acquisition transaction) but on a proper construction of the Act they cannot do so at present.

[53] It remains to point out that were the argument for the appellant correct it would lead to certain anomalies. The first is that as occupier one has no right oneself to be buried on the land. This the appellant's counsel conceded. The legislature was mindful of an occupier dying while in residence (see s 8(5)) but any indication that burial there was an acquired or obtainable right is conspicuously absent. In the second place it is incongruous that labour tenants under the Land Reform (Labour Tenants) Act, 1996, who arguably have at least as close a link with the land on which they live as occupiers under the Act, have no right to take burial ground on that land.

[54] A further feature militating against acceptance of the appellant's argument

is that despite the recognition in s 6(4) of the sanctity of existing family graves and despite the reduction of the rights of ownership to the extent demanded by the exercise of the rights conferred in s 6, the legislature stopped short of obliging owners to accept against their will the creation of further graves. Had

it been the legislature's intention to impose that burden by granting occupiers the corresponding right it would not have occasioned any real drafting problem to say so expressly. It is improbable that the creation of that right was left to a matter of obscure inference.

[55] I have not lost sight of the possible reliance that the appellant could have placed on the consideration that the right to bury one's dead is a matter within the ambit of the right to human dignity. Funeral and burial rituals, after all, serve to express final acknowledgment by the bereaved of the human dignity of the deceased. Resort could also arguably have been had to the constitutional right to

one's own culture and the statutory right to family life in s 6(2)(d) of the Act. However, those rights seem to me to offer even less scope for deducing a right to take burial land than the right to freedom of religion. That was possibly why counsel for the appellant limited his submission as he did. In addition, the argument may have been influenced by the case of *Serole and Another v Pienaar* 2000 (1) SA 28 (LCC) in which it was held, in a case very similar to this one and under the same Act, where the pro-burial right argument was founded not upon s 5(d) and s 6(1), but on s 5(a) and s 6(2), that the right to establish a grave was not one of the rights conferred by the statute. The reasons for that conclusion appear at 335 B-G . That decision was not debated in this Court but, with respect, it appears to me to be correct.

[56] To sum up, whether one construes s 5(d) separately from the Act's other provisions or all together the result is the same: the appellant's rights as occupier do not entitle her to take burial land without the respondent's consent. It follows

that the appeal cannot succeed.

[57] It remains to mention that the Ermelo Cemetery by-law, to which I have referred, contains race classifications and racial constraints which are greatly offensive. Given the abundance of such provisions that once existed it is perhaps realistic to think that their elimination would have taken some time. It is nevertheless frankly startling to see that these still exist. They must be replaced as soon as possible. The Registrar will accordingly be directed to draw this situation to the attention of the relevant provincial and municipal authorities.

[58] The following order is made:

1. The appeal is dismissed with costs.

2. The Registrar is directed to bring the contents of para [57] above to the attention of the Director of Local Government of Mpumalanga and the Chief Executive Officer of the Local Authority in which

Ermelo is situated.

CT HOWIE
JUDGE OF APPEAL

CONCURRED:
Harms JA
Streicher JA
Mpati JA
Nugent AJA