THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20455/2014
Reportable

In the matter between:

DESMOND ETTIENNE DÖMAN **APPELLANT**

and

KGABO GABRIEL SELOMO **RESPONDENT**

Neutral citation: *Desmond Ettienne Döman v Kgabo Gabriel Selomo (*20455/14) [2015] ZASCA 124 (21 September 2015)

Coram: Navsa, Theron, Swain and Mbha JJA and Baartman AJA

Heard: 1 September 2015

Delivered: 21 September 2015

Summary: Power of court of appeal – power in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 to dismiss appeal where judgment or order sought would have no practical effect or result.

REASONS FOR ORDER GRANTED ON 1 SEPTEMBER 2015

Baartman AJA (Navsa, Theron, Swain and Mbha JJA concurring):

[1] On 1 September 2015, this appeal was heard and dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (the Act). The following order was made:

(a) The appeal is dismissed with no order as to costs.

Reasons were to follow. These are the reasons.

[2] Section 16(2)*(a)*(i) and (ii) of the Act, the successor to s 21A and 21A(3) of the Supreme Court Act 59 of 1959, provides:

'…(i) When at the hearing of an appeal 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.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[3] In *Radio Pretoria v Chairman, ICASA*,[1] this court referred to a number of reported decisions where appeals had been dismissed on the basis that a judgment would have no practical effect stating that this indicated that appeals with no prospect of being heard on the merits were being persisted with. This matter illustrates that the practice is ongoing.

[4] In this matter, it was necessary to consider whether this court's judgment would have any practical effect. The facts in the matter are largely common cause. The appellant, Doctor Desmond Ettienne Döman – a prosthodontist (Dr Döman) is the registered owner of the farm Pennsylvania in Limpopo Province (the farm). On 23 February 2013, Ms Caroline Celia Selomo, the daughter of the respondent,

[1] *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA) para 3.

Mr Kgabo Gabriel Selomo (Mr Selomo), passed away. Mr Selomo approached Dr Döman for permission to bury his daughter on the farm in an area where other members of his family including his parents were buried. Dr Döman refused the request. On 18 March 2013, Mr Selomo launched an urgent application in the Land Claims Court, claiming inter alia that he is 'entitled in terms of Section 6(2)(dA) of the Extension of the Security of Tenure Act, 1997 [ESTA], to bury the body of his late daughter, Caroline Celia Selomo, in the burial site on the farm Pennsylvania number 326, …on Saturday 23 March 2013'.

[5] Mr Selomo provided the following details: He had been resident on the farm from 7 October 1948 until the date of the urgent application. Initially, he had lived with his parents on the farm and later in his own homestead with his wife and 12 children. Mr Selomo's brother, sister and some of his adult children still reside on the farm. He further claimed that the deceased had been resident on the farm at the time of her death. Mr Selomo, a pensioner, alleged that he had been in the employ of the previous owner of the farm who had given him grazing rights for his own stock. He went on to allege that the previous owner had allocated a fenced-off portion of the farm as a burial site to be used by those who lived and worked on the farm. In addition to his parents, his sister and three of his children are buried on the farm, the last burial having occurred in 2010. Mr Selomo maintained that his cultural beliefs dictated that where possible family members be buried at the same grave site. Mr Selomo alleged, therefore, that as an occupier in terms of ESTA and in terms of s 6(2)*(dA)*, he was entitled to bury his daughter on the farm.

[6] Dr Döman, acknowledged Mr Selomo's historic link to the farm, but resisted the relief sought on the basis that he no longer resided on the farm. According to Dr Döman, Mr Selomo had left the farm in terms of an agreement, concluded on 10 January 2005 with Mr Kobus van Staden, who attended to the estate of the previous owner, in terms whereof Mr Selomo had accepted R8 000 as compensation for leaving his residence and the farm. Since then, so the allegation went, Mr Selomo and his dependent children, including the deceased, lived in an area called Steilloop, 35 kilometres from the farm. In response, Mr Selomo denied that he had entered into an agreement with Mr Kobus van Staden as alleged. He alleged that he had been requested to sign the document as an acknowledgment of receipt of his annual

bonus and did not know that he was in fact signing the agreement on which Dr Döman relied.

[7] On Friday 22 March 2013, Spilg J heard the application and granted the relief sought. On Saturday 23 March 2013, Mr Selomo buried his daughter on the farm. That was more than 2½ years ago. On the face of it, this matter is moot; the deceased already having been buried on the farm.

[8] Nonetheless, Dr Döman pursued the appeal, apparently motivated by the concern that the judgment and order of the court below would serve as a precedent on which Mr Selomo and others could rely to establish more graves on the farm. Counsel on behalf of Dr Döman submitted further that the reasoning of the court below resulting in the order referred to above was clearly wrong.

[9] It is necessary to consider very briefly the basis Spilg J provided for the granting of the order. In his reasons furnished on 3 April 2014, a year after the order, the learned judge accepted that Mr Selomo had failed to prove he was entitled in terms of s 6(2)*(dA)* of ESTA to bury his daughter on the farm, but went on to find that the provisions of the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA) applied and that Mr Selomo was in terms thereof entitled to bury his daughter on the farm. Mr Selomo, however, had not relied on the LTA for any relief. The issue was not dealt with in the papers. According to counsel for Dr Döman, no submissions were made on this aspect at the hearing in the court below. We specifically refrain from endorsing the reasoning of the court below.

[10] In an attempt to cross the mootness hurdle, counsel for Dr Döman contended that if he were to succeed on the merits, the body of Mr Selomo's daughter could be exhumed for burial elsewhere. In oral argument before us, counsel on behalf of Dr Döman rightly accepted that an exhumation, particularly given the time lapse, would be highly offensive, and accepted further that the matter should rightly be dismissed on the basis of s 16(2)*(a)*(i). Mr Selomo was assisted in this litigation by the Minister of Rural Development and Land Reform. Counsel on behalf of Mr Selomo informed the court that in the light of Dr Döman's concession that the matter ought to be dismissed in terms of s 16(2)*(a)*(i), he would not insist on a costs order in Mr Selomo's favour.

[11] For these reasons the appeal and the related costs order were dismissed in terms of s 16(2)*(a)*(i) of the Act.

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E D BAARTMAN

ACTING JUDGE OF APPEAL

Appearances

For Appellant:	J J Botha Instructed by: Pieter Moolman Attorneys, Randburg Symington & De Kok, Bloemfontein
For Respondent:	A T Ncongwane SC Instructed by: Noko Maimela Attorneys, Johannesburg Matsepes, Bloemfontein