IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN, JOHANNESBURG

Case No.: CCT 157/2025
SCA Case No.: 133/2025
Land Court Case No.: LCC40/2024

In the matter between:

SOPHIE DLAMANGA BUTA	First Applicant
ROSE BUTA	Second Applicant
THEMBI BUTA	Third Applicant
THEMBINKOSI BUTA	Fourth Applicant
AARON BUTA	Fifth Applicant
JULIA MENGAYI BUTA	Sixth Applicant
JOHN BUTA	Seventh Applicant
JOSEPH BUTA	Eighth Applicant
and	
MAFUBE COAL MINING (PTY) LTD	Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	First *Amicus curiae*
CENTRE FOR ENVIRONMENTAL RIGHTS	Second *Amicus curiae*

CENTRE FOR APPLIED LEGAL STUDIES (FIRST AMICUS CURIAE) HEADS OF ARGUMENT

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INTRODUCTION

1. Graves are signicant for a majority of the landless as a result of South Africa's painful history of land disposeessions. Graves are a connection to those who have passed on and as in the Buta Family's case - they are evidence that the Buta Family occupied and resided on the land (the Farm Nooitgedacht), before land dispossessions took place as a result of past discriminatory practices.

2. The Buta Family laid claim to the land under the Restitution of Land Rights Act 22 of 1994 and are awaiting an outcome from the Department of Rural Land Affairs, in this regard.

3. CALS has been granted leave to intervene in these proceedings as *amicus curiae*, and files these heads of argument in accordance with this Court's directions.

4. The intervention by CALS addresses three pertinent issues of public nterest arising from the appeal before this Court.

5. First - The Land Court's conclusion placing the primacy of ownership rights over the burial rights of occupiers under the Extension of Security of Tenure Rights Act 62 of 1997 *("ESTA")*, is not compatible with Constitution of the Republic of South Africa, of 1996, and established jurisprudence on property rights;

6. Second - An occupier's right to be buried on the land which she occupied at the time of her death is an ancillary right to and incidental to the rights of an occupier under ESTA. The Land Court cannot without more evidence extinguish this right on the basis of lack of consent by the owner;

7. Third - Exhumation of bodies must be a remedy of last resort granted only after the Court has been furnished with all the relevamt facts and determined whether there are less restrictive means to protect the owner's property rights.

8. Below, CALS addresss the questions raised by the judgment of the Land Court in turn.

The Land Court erred in its approach to the rights in section 25 of the Constitution.

9. The Land Court found that once ownership is established, that is the end of the inquiry.[1] This approach is unconstitutional and flies in the face of established jurisprudence that ownership does not sit at the helm of property rights. This is moreso where there is an established practice of occupiers burying their family members in the homestead.

10. It is precisely because the Land Court misguidedly placed ownership at the helm of the inquiry that the Court failed to engage in a balancing exercise of the intra-competing rights all located in the same section of the Constiution, in section 25(1) and section 25(6).

1 Mafube Coal Mining Proprietary Limited v Buta and Others [2024] ZALCC 23 ("Land Court judgment"), CaseLines 010.4-20 – 010.4-22, paras 23–25.

11. Apart from this error resulting in the exclusion of any meaningful engagement with the rights of occupiers under ESTA and the interrogation of the rights of occupiers against the owner's contention that the Buta's did not have consent to bury their father in the homestead. This error also led the Court to not appreciate and engage with jurisprudence from the Land Court and the Constitutional Court that absence of consent on its own does not extinguish the rights of occupiers to bury a deceased member of the family in their homestead.

12. The Land Court failed to pay due regard to purpose of section 25(6) of the Constitution which is best articulated in this Court's decision in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[2], albeit in the context of restitution of land rights, as follows:

"It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing 'as a result of past racially discriminatory laws or practices". In its setting as section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to identify the mischief sought to be remedied. In part, that is why it is helpful where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of

[2] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12 2007(6) SA 199 (CC) at para 53.

the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."

13. The judgment on appeal did not engage with ESTA as remedial legislation aimed at protecting the rights of the vulnerable sections of the South African population. This exercise was critical for the determination of a just and equitable relief in the circumstances of this case. The court ought to have applied the process adopted by Cowen J of the Land Court, which approach was approved by this Court in *Mereki and Others v Moladora Trust and Another*[3] to request for more information from the litigants.

The Right to Bury a Deceased Family Member

<u>The ESTA protections</u>

14. An occupier's right to bury a deceased family member on the farm land on which they are residing, forms part of their rights to security of tenure guaranteed by section 25(6) of the Constitution and ESTA. The occupiers right to reside on the land, includes the right to use the land on which they reside.[4]

15. Section 6(2)(dA) of ESTA provides that an occupier shall have the right:

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[3] *Mereki and Others v Moladora Trust and Another* [2025] ZACC 16

[4] Section 6(1) of ESTA provides: "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."

"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."

16. Section 1(1) of ESTA defines established practice to mean *"a practice in terms of which the owner or person in charge or his or her predecessor in title routinely gave permission to people residing on the land to bury deceased members of their family on that land in accordance with their religion or cultural belief".*[5]

17. ESTA defines consent as "*express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder."* Section 3(1) of ESTA provides that "*[c]onsent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8*". Section 3(4) of ESTA provides that "*[f]or the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved*".

18. The Buta family met the requirements of consent. Although this was not pleaded in the papers, on the facts, it can be inferred that the previous owners had granted consent (tarcit or otherwise). Furthermore, members of the Buta family were occupiers who resided on the farm and had a right to use the land so occupied, which includes the right to bury a deceased member.

[5] Section 1(1) of ESTA, definition of "established practice" **(our own emphasis)**.

19. The Land Court merely accepted the owner's version without demanding more in circumstances where the very natire of the protection forms the grid of protection.

20. The occupier's right to bury a deceased family member under section 6(2)(dA) of ESTA is by no means unqualified. The section 6(2)(dA) right is to be exercised *"balanced with the rights of an owner or person in charge*."[6] CALS maintains that the key issue that serves before this Court, is this balancing exercise which, with respect, the Land Court failed to consider. Such an approach by the Land Court is at odds with the protections given to the Buta family under ESTA. Instead, the Land Court reasoned that Mafube's right to ownership of the land, trumped all else. This was a material misdirection of the law which this Court ought to correct on appeal.

21. In *Dlamini v Joosten*[7] the SCA held that the burial right created in section 6(2)(dA) of ESTA is an incidence of the right of residence in section 6(1) and creates a real right in land. The SCA held:

> *"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.*[8] *The burial right is in the nature of a personal servitude which the occupier has over*

[6] Section 6(2) of ESTA provides: "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."

[7] *Dlamini and Another v Joosten and Others* 2006 (3) SA 342 (SCA) *("Dlamini v Joosten")*.

[8] Section 24(1) of the Act provides that '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'. See further G Budlender, J Latsky and T Roux '*Juta's New Land Law*' 1 ed 1998 p 7A-19, n2.

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. These rights are claimable against the owners of registered land only. And the only objective determination of the extent of the land which has been registered by an owner is by reference to its cadastral description."[9] ***(our own emphasis)***

22. The SCA also dealt with whether an owner is entitled to terminate an established practice unilaterally. The respondents in *Dlamini v Joosten* contended that the granting of permission was a unilateral act on the part of the owner and it may similarly be unilaterally terminated by the owner.[10] The SCA made the following salutary findings:

"The Legislature introduced s 6(2)(dA) to deal with this lacuna by 'obliging owners to accept against their will the creation of further graves'. The obligation however only arises if the owner has routinely granted permission for burials, resulting in an established practice. But once a practice has been established, a right is conferred on an occupier to bury a deceased family member who, at the time of that person's death, as is the case in the instant matter, was residing on the land on which the occupier was residing. The respondents cannot be correct that such a right may be withdrawn unilaterally, because, if this were so, the entire purpose of the amendment would be rendered nugatory.

"As mentioned earlier, the Act grants to an occupier a real right in land that belongs to another person. And the right of an occupier to bury a deceased family member

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9 *Dlamini v Joosten* at para 16.

10 *Dlamini v Joosten* at para 22.

on such land is an incidence of this right. The withdrawal of consent by an owner for an occupier to bury a deceased family member is therefore an unlawful deprivation of this right. It follows that once it is accepted that an established practice to bury deceased persons on Sandspruit came into existence, and I do not understand the respondents to contend otherwise, the appellants were entitled to bury the deceased there." [11] (**emphasis added**).

23. In *Mathebula v Harry*, the owner tried to stop the practice of permission being routinely given for burials. The Land Court's findings are instructive when it held:

> *"It appears that during his time, the respondent has tried to stop the practice. But the law prohibits him from doing so. Once a practice is established, a right is created by law, which may not be reversed by the actions of an individual."* [12] (**emphasis added**).

24. Moreover, ESTA expressly recognises that consent given by an owner or person in charge of the land, shall be binding on his successor in title as if it had given it.[13] By operation of law, Mafube is bound by the permission given by previous farm owners, to the people residing on the farm to bury deceased members of their family on that farm, in accordance with their religion or cultural beliefs.

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[11] *Dlamini v Joosten*, at paras 24 to 26.

[12] *Mathebula and Another v Harry [2015] ZALCC 6; 2016 (5) SA 534 (LCC) ("Mathebula v Harry") at para 59.*

[13] Section 24 of ESTA provides: "(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." **(emphasis added)**.

25. The application of section 24 of ESTA together with the SCA's findings in *Dlamini v Joosten* and the Land Court's findings in *Mathebula v Harry* reaffirm that once it is accepted that an established practice to bury deceased persons on the Nooitgedacht farm came into existence, the Buta family is entitled to bury the late Mr Buta there.

26. The proper enquiry in the present case is not whether Mafube itself gave consent. The correct enquiry is whether the Mafube and or the previous farm owner/s have routinely granted permission for burials, resulting in an established practice. On Mafube's own papers, there were about 172 existing graves which were located in Graveyard 1.[14] The established practice was clearly in existence without limitations.

The balancing of rights under section 6(2) of ESTA

27. The actual dispute between the parties is that Mafube as the current owner is pursuing activities that require the ESTA occupiers to be removed from the farm. The main issue is not simply that Mafube owns the farm. In particular, Mafube wants to use and/or is using the land surrounding the existing Graveyard 1 for mining operations.[15] This is the basis upon which Mafube approached the Land Court to prevent the occupier from using Graveyard 1. The question that arises is therefore how and to what extent the new mining operations, that the owner seeks to advance, must be balanced against the Buta family's right to bury their father on the farm. Section 6(2) of ESTA points

[14] Mafube Answering Affidavit in this Court dated 30 June 2025, para 100 - CaseLines 003-99.

[15] Mafube Answering Affidavit in this Court dated 30 June 2025, para 101, lines 4 to 7 - CaseLines 003-99.

us to the answer a balancing exercise has to be undertaken to weigh up Mafube's rights against the Buta family's rights to bury under section 6(2)(dA) of ESTA.

28. The Land Court's focus was two-fold, which focused exclusively on Mafube's rights as owner. This in itself is contrary to the balancing exercise that the ESTA demands under section 6(2).

29. First, the Land Court focused on the consent of the land owner, Mafube. In this regard, the Land Court was *"mindful that the burial at the Buta homestead was without the consent of [Mafube] being the owner of the farm on which the Buta homestead is established."*[16] The Land Court also held that *"there was no established practice of burying the remains of the deceased family members on the homesteads. Residence of farm occupiers and labour tenants on farms belonging to other persons is subject to the terms and conditions set up by the landowner unless the court determines otherwise. The main consideration with regard to the use of land by occupiers and labour tenants is the consent of the landowner."*[17]

30. Second, the Land Court emphasised Mafube's section 25(1) right to property to the exclusion of the Buta family's real right to bury the late Mr Buta on the farm under section 6(2)(dA) of ESTA. The Land Court held that the *"burial of the deceased on the farm without consent deprives [Mafube] of the use and enjoyment of its property."* The Land Court also held that the Buta family failed

[16] Land Court judgment - para 22 - CaseLines 010.4-20

[17] Land Court judgment - para 23 - CaseLines 010.4-21

to respond to Mafube's allegation that it owned the farm and its constitutional right not to be arbitrarily deprived of its property.[18] We submit with respect that the court erred in failing to balance section 25(1) with section 25(6).

31. This approach fails to give effect to the balancing exercise required by the Constitution.

Exhumation as a Remedy of Last Resort

32. In determining whether an order for exhumation was competent,[19] the Court *a quo* appears to have accorded dispositive weight to the landowner's lack of consent, without adequately interrogating the statutory framework governing the rights of persons who occupy rural land. This approach reduced a dispute implicating property, lawful mining, family, cultural and potentially statutory occupation rights to a question of the landowner's permission, thereby overlooking the need to determine the dispute within the full legal framework established by the Constitution and land-reform legislation.

33. The judgment records the allegation that the deceased was a labour tenant, but appears to have treated the absence of evidence that any portion of the farm was registered in his name as material to the rejection of that claim. This is another error of law and with respect, the rejection of the alleged labour-tenancy claim is inconsiste with pleaded case by mafube.[20]

[18] Land Court judgment, para 24 - CaseLines 010.4-21

[19] Land Court Judgment para 23 - CaseLines 010.4-20 – 010.4.21

[20] Mafube's founding affidavit dated 15 March 2024, paras 6–7 - CaseLines 010.1-17

34. The error of law lies not only in the conclusion reached by the court, but in the omission of a distinct inquiry into the statutory rights that might have qualified the ordinary incidents of ownership and mining against the appropriateness of the remedy sought.

35. CALS submits that the question was therefore not simply whether the landowner held title or withheld consent, but what the law permitted, required or prohibited in the circumstances of this particular dispute.

36. The relevant inquiry had to be directed at the applicable statute and the evidence bearing upon them. Indeed, the judgment's own recognition of the alleged labour-tenancy relationship demonstrated that the deceased's asserted legal status was a material, however this was not an issue in dispute.

37. A further difficulty in the reasoning of the Court a quo lies in the apparent progression from the absence of the landowner's consent to the conclusion that the burial was unlawful and that exhumation was consequently warranted. The latter question required an independent judicial assessment informed by the all the applicable statutory framework, the nature of the interests affected and the consequences of the relief sought.

38. Exhumation is an intrusive remedy with consequences extending beyond the physical removal of human remains. It may disrupt the family's continuing relationship with the deceased, offend religious or customary observances, and impair the dignity and cultural interests of surviving relatives and the wider community. In addition to the pain of losing a loved one.

39. CALS further proposes that the Court distinguish applications concerning the establishment of a new grave from disputes involving access to or the maintenance of existing family graves. Where section 6(4) of ESTA is relevant, its independent protections should be considered, including whether any conditions imposed on access are reasonable and directed at the purposes contemplated by the provision.

CONCLUSION

40. CALS submits that the Court should distinguish between a finding that a burial was unlawful and the further determination that exhumation is justified. The latter requires a separate assessment of the nature and seriousness of the infringement, the interests affected, the consequences of disturbing the grave, the legitimate objectives advanced by the applicant and the proportionality of the relief sought. Exhumation should not follow automatically from a finding of unlawfulness; its justification must be established by reference to the applicable law and the circumstances of the particular case.

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