# NOTES / AANTEKENINGE

# Enduring Legacy: The Impact of ESTA's Burial Rights on the Property Rights of the Landowner*

## 1 Introduction

The Extension of Security of Tenure Act (62 of 1997) (ESTA) was enacted to redress the historical injustices of land dispossession in South Africa and to provide legal protection for people residing on land that they do not own. While primarily concerned with the security of tenure, ESTA also contains provisions that speak to the ties that people maintain with the land – most notably, the right to bury and be buried on private land. These burial rights, while grounded in statutory language, raise profound questions about the enduring nature of cultural practices, the limits of ownership, and the broader meaning of property in post-apartheid South Africa. This note interrogates the possibility that burial rights may exist independently of the right of occupation. It critically examines whether customary practices, once established under section 6(2)(*dA*) of ESTA, can confer burial rights that survive the termination of lawful residence. At its core, the note asks whether the descendants of former occupiers, who themselves may not reside on the land, can assert a legally cognisable interest in burial on that land solely by virtue of ancestral connection and established custom. In doing so, it considers whether the law should recognise burial rights as distinct, enduring and possibly inheritable rights that outlast occupation and reshape the contours of property law.

ESTA provides for the right to bury a deceased member of someone's family (who, at the time of death, was living on land that the occupier occupies lawfully) in accordance with their religion or cultural beliefs. (The Land Affairs General Amendment Act 51 of 5 December 2001 introduced a provision dealing with burial rights. Paragraph (*dA*) was inserted in s 6(2) of ESTA and subs (5) was added to s 6. S 6(2)(*dA*) affords occupiers in terms of the Act, 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".) The Act also provides for the right of family members of an occupier contemplated in section 8(4), to

* This note is based on excerpts of work produced by the author in an LLD thesis (*To Remain* (doctoral thesis, Bloemfontein, University of Free State) 2022).


https://doi.org/10.17159/dvdhyc57

bury that occupier on the land on which they were resident at the time of death, in accordance with their religion or cultural belief, subject to any reasonable conditions, which are not more onerous than those prescribed, that the owner or person in charge may impose. (S 6(5) provides: "The family members of an occupier contemplated in section 8(4) of this Act shall on his or her death have a right to bury that occupier on the land upon which he or she was residing at the time of his or her death, in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge.") While these provisions appear to be narrowly framed, they invite a broader legal and cultural enquiry into the relationship between customary burial practices and statutory rights, and the durability of such rights beyond the termination of lawful occupation.

Recent case law reveals an emerging judicial trend towards a more flexible interpretation of these burial rights, particularly where constitutional values such as human dignity, cultural identity, and freedom of religion are at stake (*Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 (3) All SA 709 (SCA); *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC)). This jurisprudential shift has opened the door to recognising a third, less formalised basis for asserting burial rights, one grounded not in present or past occupation, but in enduring familial or spiritual ties to those already interred on the land. This evolving understanding challenges the conventional, occupation-centric framework embedded in ESTA and reflects a broader move towards a transformative and inclusive property-rights regime that is sensitive to historical dispossession and the cultural realities of affected communities.

In tracing the potential evolution of burial rights into autonomous legal entitlements, the note engages three core themes. First, it examines the cultural and constitutional significance of burial in African communities, particularly the notion that burial sites function as sacred familial spaces. Secondly, it analyses the statutory and jurisprudential contours of burial rights under ESTA, highlighting areas of contestation and doctrinal ambiguity. Thirdly, it evaluates whether the extension of burial rights beyond occupation constitutes an unconstitutional deprivation or expropriation of property in terms of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution).

Ultimately, this note argues that burial rights should be understood not as mere incidents of residence, but as enduring interests rooted in custom, identity and constitutional values. It calls for a reimagining of property rights in private law, one that reconciles ownership with spiritual continuity and affirms the dignity of historically marginalised communities.

## 2 Distinguishing the rite from the right

### *2 1 The Burial Rite*

The significance of the rite of burial is eloquently set out by the appellants in *Nkosi v Bührmann* (2002 (1) SA 372 (SCA) 376 par 6), led by a widow who sought to secure her deceased husband's burial site on land belonging to

another individual. Emphasising the ceremony of burial in its traditional context, the appellants stated:

> "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." (*Nkosi v Bührmann supra* par 6)

This perspective establishes a framework for examining the tension between legal and property rights on the one hand and the intangible realm of cultural and spiritual beliefs on the other. It highlights how the different interests intersect in the context of burial rights.

African culture has traditionally held that departed family members should be buried in family graveyards close to the residences of their surviving kin (Ngubane "Traditional Practices on Burial Systems With Special Reference to the Zulu People of South Africa" 2004 3 *Indilinga African Journal of Indigenous Knowledge Systems* 171 177). Where this is not possible, burial should at least be among family members who have also departed. The spiritual unification and bonding of the living and the deceased are thought to depend on this cross-cultural practice (Ngubane 2004 *Indilinga* 173). The land anchors these traditions in space and time, serving as an existential conduit between the living and the dead. To this end, the burial of a family member in African custom has an indefinite role that extends beyond the physical act of interment into the ethereal space (Ngubane 2004 *Indilinga* 174; Mhlanga *To Remain* (doctoral thesis, University of the Free State) 2022).

Traditional burial customs in postcolonial South Africa have experienced numerous challenges because of shifting material conditions and colonial legacies. In addition to seizing land, colonialism – and its continuation via apartheid – also aimed to break long-standing ethereal ties. Ancestral burial sites, involving practices essential to a community's identity, became collateral damage. Through their self-given titles, new White landlords were placed in a position either to allow or prohibit the practice of burial on their land (Parker and Zaal "Extending Recognition of Indigenous Burial Practices in Selomo v Doman 2014 JDR 0780 (LCC)" 2016 19 *PELJ* 1 28). This discretionary power meant that the continuation of burial practices was subject to the new landowner's consent (Parker and Zaal 2016 *PELJ* 2 3). As expressed by Parker and Zaal (2016 *PELJ* 1 28), native Black people were dependent on the generosity of landlords. To exist and conduct their customs on the land that had been theirs before, the outlawed Black native now required consent from the White dispossessors, now landowners (Ndebele *The Cry of Winnie Mandela* (2013) 1 301).

This physical dominance over the land has also served as a means of metaphysical dispossession, eroding the practice and memory of these customs. These challenges have been made more pronounced by modernisation and urbanisation (Bekker, Labuschagne and Boonzaaier "African Burial Practices at the Crossroads: Observations on the Right to Bury" 2004 37 *De Jure* 203 223). As seen in *Nkosi v Bührmann*, these factors create persistent difficulties in maintaining cultural continuity.

The legislature, under the new constitutional era, created regulations under ESTA to guide, among other things, the practice of burial rites on such lands in response to the challenge of landlessness. (S 6(2) of ESTA (before amendments) provided: "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 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." S 6(4) of ESTA (before amendments) in turn provided: "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 to safeguard life or property or to prevent the undue disruption of work on the land.") The following section examines the mechanics of ESTA in response to this challenge (see also *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC) par 53; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); *Daniels v Scribante* 2017 (4) SA 341 (CC)).

## *2 2 The right to bury and be buried*

The burial right, as envisaged in ESTA, combines two unique rights. The first is that an occupier is entitled to bury a deceased family member who was living with them at the time of death on land that belongs to another. The second is the right of a resident to be buried by their family members on land that belongs to another. The debate that follows uses these two entrance points to explore the plausible establishment of a right to bury that, once established, outlasts occupation as envisaged in ESTA.

### 2 2 1 First entry

The first entry point concerns an occupier's right to bury a family member who passed away while both were living on the land belonging to another. According to ESTA, an "occupier" (farm dweller) has the right to bury a deceased relative on the farm if three conditions are satisfied: the person requesting permission to bury a family member must be an occupier (an occupier is defined in ESTA as any "person residing on land which belongs to another person", who has, or on 4 February 1997 or thereafter had, consent of the owner or another right in law to reside on the land, but

excluding any person who uses the land for industrial, mining, commercial or commercial farming purposes or any person earning over R5 000 a month (s 1(1)(*x*) read with par 2 of Regulations GN R1632 in *GG* 19587 of 1998-12-18). Until amendments to ESTA in 2001, the definition excluded labour tenants as defined by the Land Reform (Labour Tenants) Act 3 of 1966 (par (a) of ESTA's definition of "occupier" was deleted by s 6(*a*) of the Land Affairs General Amendment Act 51 of 2001); the deceased must have lived on the farm with the occupier prior to their death (see, for example, *Bührmann v Nkosi* 2000 (1) SA 1145 (T) par 49 54; *Serole v Pienaar* 2000 (1) SA 328 (LCC) 335B–G; *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 (3) All SA 709 (SCA)); and there must be a long-standing custom of granting farm dwellers or occupiers permission to bury deceased family members on the farm. (For a full discussion on burial rights, see Van Niekerk "Death and Sacred Spaces in South Africa and America: A Legal-Anthropological Perspective of Conflicting Values" 2007 40 *Comparative and International Law Journal of Southern Africa* 30 56; Van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Model to Evaluate South African Land Reform Legislation" 2002 *Journal of South African Law* 254 289; Bekker *et al* 2004 *De Jure* 203, 223; Parker and Zaal 2016 *PELJ* 1 28).

The term "established practice" is defined in section 1(1) of ESTA 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."

The Supreme Court of Appeal (SCA) in *Dlamini v Joosten* (2006 (3) SA 342 (SCA) par 19) had the opportunity to speak to this right. The court upheld the right of an occupier to bury a family member, provided that there is an established practice that exists for "people living on the land" (*Dlamini v Joosten supra* par 15). The approach laid out in *Dlamini* views the burial right as a personal servitude that the occupier has over the land on which they have a legitimate right of occupation (*Dlamini v Joosten supra* par 16; s 6(2)*(dA)* of ESTA). Its effect is that once granted to any person on the landowner's property, it cannot be withheld or denied to another (*Dlamini v Joosten supra* par 22). Ordinarily, it would follow that an occupant who does not have the legal right to be on the land cannot exercise burial rights on such land without first obtaining permission to do so (Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998). Once this permission has been granted, the established practice will undoubtedly bind the land to the exercise of burial rights by lawful occupiers in the future. However, a more complex issue arises when considering whether a once-off permission granted to an unlawful occupier can establish a practice linked specifically to that unlawful occupation. A deeper exploration of this matter, including the concept of establishing residency through practices like grave visits and rituals, is considered in the next section. Definitively, an occupier exercising occupation by way of right has a right to bury those living with them. This conclusion addresses the first of the two entry points identified.

## 2 2 2 Second entry

The second entry point concerns the right of a resident to be buried by family members on land belonging to another where the occupier was in lawful occupation at the time of death. Notably, this right does not hinge on the existence of a customary burial practice. The mere fact of legitimate residency at the time of death is sufficient to ground this claim. This right, however, is limited to those qualifying as an "occupier" as contemplated in section 8(4) (s 6(5) of ESTA). The "occupier" envisioned in that particular provision is a long-term resident who has lived on land belonging to another for a minimum period of 10 years, and has reached the age of 60 years or is an employee or former employee of the owner or person in charge, and because of ill health, injury, or disability is incapable of rendering their services to the owner. (S 8(4) of ESTA provides; "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– (*a*) has reached the age of 60 years; or (*b*) is an employee or former employee of the owner or person in charge, and because 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 (*e*): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach). In this note, a clear distinction is drawn between "occupiers" and "residents". The term "resident" aligns with the definition in section 8(4) of ESTA (as above), while "occupier" adheres to the broader definition in section 1(1) of ESTA (see under heading 2 2 1 above). The collective term "living" is used to describe the situating of individuals on the land as either occupiers or residents.

In the second entry point, as in the first, the burial right is contingent on lawfulness. This interpretation ensures the first and second entry points are in harmony. A critical question arises concerning the second entry point: who holds the burial right – the resident or the resident's family? If the right is vested in the resident, it ceases upon their death, potentially limiting subsequent burials. Conversely, if it belongs to the family, the burial right is exercised by individuals who may not be current residents of the land. Unlike the first entry point, where the occupier actively exercises the right to bury family members residing with them, the second entry point hints at a burial right that is not tied solely to the act of living on the land. This broader conception of the right has implications for the landowner's control over their property.

While this note acknowledges the existence and distinction between the two primary entry points to burial rights, its primary focus lies elsewhere. Specifically, it explores a third potential entry point – the burial right of a family member who ordinarily lacks residency rights but is otherwise connected to the land through family members buried on such land. This scenario prompts a reconsideration of the enduring character of burial rights established through residency. The following section considers the mechanics of establishing residency for the purpose of claiming burial rights through this third entry point.

## 3 Burial rights and residency

This section explores the possibility of acquiring a claim to be buried on land belonging to another through the third entry point – that is, through residency founded on the establishment of an enduring link to the burial space. The following analysis looks at two key South African cases – *Nhlabathi v Fick* (*supra*) and *Sandvliet Boerdery (Pty) Ltd v Mampies* (*supra*).

### *3 1 Case discussion*

#### 3 1 1 *Nhlabathi v Fick*

In the *Nhlabathi* case, an application was brought in terms of sections 6(2)(*dA*) and 6(5) of ESTA, seeking an order to bury the applicants' deceased family member who, at the time of death, no longer resided on the farm (*Nhlabathi v Fick supra* par 1–4). *Nhlabathi v Fick* remains significant for several reasons (*Nhlabathi v Fick supra* par 40–42. The LCC also addressed the question of an established practice. It relied on the presence of other burial plots reserved for farm labourers to affirm that an established practice only needs to exist concerning the land itself, not specific families or tenants.) The Land Claims Court (LCC) made two relevant findings: first, a non-occupier who is not living with the occupier at the time of death can be buried on land belonging to another; secondly, this right is contingent on the existing right of occupancy of the living occupier (*Nhlabathi v Fick supra* par 39). The significance of the *Nhlabathi v Fick* case in this discussion hinges on its interpretation of what it means to be a resident. More significantly, the court emphasised that the potential future eviction of an occupier does not automatically outweigh their right to bury on the land (*Nhlabathi v Fick supra* par 38). The court decision seemingly acquiesces with a notion of residency that goes beyond the physical presence of the deceased on the land in question. The concept of "residence" in this context becomes more nuanced and flexible.

#### 3 1 2 *Sandvliet Boerdery (Pty) Ltd v Maria Mampies*

In the *Sandvliet* case, the court considered a burial claim on land on which neither the deceased nor the family members seeking the burial lived (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 2–9). The contention here was that long-term, uninterrupted use of land for religious and cultural purposes establishes a limited real right akin to a private servitude, permitting burials according to their customs. The case examined whether the established custom of burials on the land could outweigh the landowner's rights despite the claimants not living on the land (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 10–12).

Prior to *Sandvliet*, it had been established that the burial privilege provided by these provisions is an extension of the occupier's right of residence under section 6(1) of ESTA (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 21). It is a registrable real right over the land held by the

occupier upon the death of a family member who resided there at the time of death (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 21).

The primary aim of the SCA judgment was to determine whether a person who regularly engages in enough activities on the land can be considered to be a resident of such land for purposes of section 6(2)(*dA*). In other words, does the practice of burying and visiting family members' graves pursuant to an established practice constitute sufficient activity on the land to establish residency? Interestingly, this contemplation represented a full-circle moment when put up against the decision in *Serole v Pienaar* (*supra*). In *Serole v Pienaar*, decided prior to the addition of section 6(2)(*dA*) of ESTA, the court held that the right to visit and maintain family graves did not extend to burying new family members on another's land (*Serole v Pienaar supra* 335B–G par 14–16).

The SCA in *Sandvliet Boerdery (Pty) Ltd v Maria Mampies* (*supra* par 24) held that denying burial rights to vulnerable occupiers would defeat the purpose of ESTA. The SCA determined that the landowner's inconvenience in allowing burials on their property was outweighed by the occupiers' critical need for burial rights (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 24–30). While this case supports the recognition of burial rights for non-occupiers/residents, its application is limited by the specific facts (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 22–23). The decision raises the possibility that an established connection to land, such as rite practices, could be used to establish residency and thereby support a claim to burial rights.

Both the *Sandvliet* and *Nhlabathi* decisions suggest the development of the concept of residency beyond physical occupation, potentially envisaging burial rights for individuals with historical or spiritual ties to land. While this protects vulnerable groups, it raises concerns about the potential for land becoming a cemetery (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 32). Balancing the rights of landowners and occupiers' remains crucial under ESTA (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 29). It remains crucial to consider whether the set of facts justifies any limitation (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 25). In the following section, consideration is given to whether such a right, if indeed established, is likely to pass the property-limitation clause.

## 4 Does this interpretation offend the constitutional protection of property?

### *4 1 The right to property*

According to section 25(1) of the Constitution, "no one may be deprived of property" until specific requirements are satisfied. The section goes on to introduce the terms "deprivation" and "expropriation" (see Mostert "The Distinction Between Deprivations and Expropriations and the Future of the 'Doctrine' of Constructive Expropriation in South Africa" 2003 19 *SAJHR* 567 592). In general, state intrusions on private property to control its usage are referred to as "deprivation" (Van der Walt "Compensation for Excessive

or Unfair Regulation: A Comparative Overview of Constitutional Practice Relating to Regulatory Takings" 1999 14 *SAPL* 273 331 273–279; see also Marais "When Does State Interference With Property (Now) Amount to Expropriation? An Analysis of the Agri SA Court's State Acquisition Requirement (Part I)" 2015 18 *PELJ* 2982 3031). The State may unilaterally terminate a property holder's rights for reasons of public interest or public purpose by "expropriation", as defined by section 25(2) (Van der Walt 1999 *SAPL* 273–279).

The primary question is whether the interest being sacrificed by the claimant (landowner) qualifies as "property" under section 25(1) (*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 46. See also Van der Walt *Constitutional Property Law* 3 ed (2011) 108–111). This involves two considerations: whether the burial rights exercised by non-occupiers, potentially in perpetuity, constitute "property"; and whether the rights that the landowner forgoes owing to the exercise of these burial rights qualify as "property" under section 25. The jurisprudence on these issues appears well settled (*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance supra* par 57–58. See Van der Walt *Constitutional* 203–204; see also Van der Walt 2004 *SALJ* 867). Collectively, jurisprudence establishes that deprivation of property under section 25(1) involves significant interference with the rights to use, enjoy or exploit private property (see *Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC); Bissett v Buffalo City Municipality 2005 1 SA 530 (CC) par 32; Transfer Rights Action Campaign v Member of Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC) par 32; *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) par 67; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) par 10; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) par 73–76; *Tshwane City v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) par 167). To the extent that the object of the rights to be gained or lost is land on which burial rights are to be exercised, both the land itself and the rights associated with its use qualify unequivocally as property for section 25.

The next consideration is whether the deprivation complies with section 25(1). Section 25(1) provides that "no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property" (s 25(1) of the Constitution). At this stage, two conditions must be satisfied. A law of general application must authorise the deprivation, and it must not be arbitrary. A law of general application can be summarised as being law that is valid, meaning it has been duly enacted and promulgated (Van der Walt *Property and Constitution* (2012) 28. See also Woolman and Botha "Limitation" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* vol 3 2ed (2013) 51–52). There is no doubt that ESTA, which embodies the discretion affecting the landowner's entitlement to use and enjoy their property (section 6(2)*(dA)*), meets this criterion. This leaves the question of arbitrariness, which can be

divided into procedural and substantive arbitrariness. However, these two components are essentially the same; a finding on one necessarily confirms the other.

The significance of the symbiotic relationship between the procedural and substantive components of arbitrariness is that procedural fairness, for purposes of section 25(1), may be evaluated on the same principles as the test for just administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act (3 of 2000) (PAJA) (*Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC)). This is simply because other suitable principles do not exist outside of administrative law (see Van der Walt "Procedurally Arbitrary Deprivation of Property" (2012) 23 *Stell LR* 88 94; Marais and Maree "At the Intersection Between Expropriation Law and Administrative Law: Two Critical Views on the Constitutional Court's Arun Judgment" 2016 19 *PELJ* 1 54; Roux "Property" in Woolman *et al Constitutional Law of South Africa* 37). The procedural test under PAJA seeks criteria similar to those needed for a substantive arbitrariness test, assessing what constitutes an unjustifiable detrimental effect on the property owner (see Hoexter *Administrative Law in South Africa* (2012) 177–178). Here, it should be noted that the burial right is not absolute and must be weighed against the property rights of the landowner or the person in charge of the land (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 26–31).

Zondo J explains this kind of balance in *Hattingh v Juta* (2013 (3) SA 275 (CC)):

> "In my view the part of s 6(2) that says: 'balanced with the rights of the owner or person in charge' calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the enquiry." (*Hattingh v Juta supra* par 32)

Therefore, an occupier may not willy-nilly invoke the right (*Sandvliet Boerdery (Pty) Ltd v Maria Mampies supra* par 29). Procedural challenges to the legality of an Act, such as ESTA, seemingly hinge on there also being an opportunity for the property holder's views to be heard (*Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government supra* par 40–47; see also *Tshwane City v Link Africa (Pty) Ltd supra* par 155). In addition, there is an emphasis on the need for court oversight (*National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) par 69; *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC)).

There is no doubt that the appropriation of a grave site by an occupier deprives the landowner of property. The law permitting the appropriation is a law of general application. It provides for a court-ordered process that weighs the circumstances of the landowner against those of the occupier and, therefore, is not arbitrary (*Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport supra*).

The central question is whether allowing additional burials on a property constitutes expropriation without just compensation, thus violating

section 25(2) of the Constitution (Hopkins and Hofmeyr "New Perspectives on Property" 2003 120 *SALJ* 48 62). This issue requires further examination.

Earlier court decisions have recognised the permanent impact of graves on property rights, potentially constituting expropriation (*Serole v Pienaar supra*; *Nkosi v Bührmann supra*). The addition of section 6(2)(*dA*) to ESTA introduced a further dimension to the debate. This provision grants occupiers the right to bury family members without compensating the landowner (*Nhlabathi v Fick supra* par 30–32). If the provision allows for expropriation without compensation, the provision may be declared unlawful, unless the absence of compensation has been excused by section 36 of the Constitution. (S 36 of the Constitution provides: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including– *(a)* the nature of the right; *(b)* the importance of the purpose of the limitation; *(c)* the nature and extent of the limitation; *(d)* the relation between the limitation and its purpose; and *(e)* less restrictive means to achieve the purpose.") The section 36 test determines if there is an adequate reason for the deprivation. This falls into the "arbitrariness vortex" (Roux "The 'Arbitrary Deprivation' Vortex: Constitutional Property Law After FNB" 2008 *Constitutional Conversations* 265 281). In essence, a non-arbitrary deprivation under section 25 means there is a proportional and sufficient reason, potentially justifying expropriation without compensation under the limitation clause (Roux "Property" in Woolman, Bishop and Brickhill (eds) *Constitutional Law of South Africa* 2 ed (2003) ch 46; Du Plessis *Compensation for Expropriation Under the Constitution* (doctoral thesis, Stellenbosch University) 2009 68–94).

## *4 2 Other rights*

### 4 2 1 The right to have one's dignity respected and protected

The Constitution upholds human dignity both as a right and a value (Dignity as a value is found in ss 7(1), 39 and 36 of the Constitution. See De Vos and Freedman "Equality, Human Dignity, and Privacy Rights" in De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 515). While it can be directly invoked, dignity often indirectly influences the interpretation of other rights (s 39(1)(*a*) of the Constitution; see also De Vos in De Vos *et al South African Constitutional Law in Context* 514). Its infringement often accompanies violations of other constitutional guarantees (*Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35).

In *Daniels v Scribante* (2017 (4) SA 341 (CC)), the Constitutional Court opposed a narrow interpretation of ESTA that might leave occupiers with hollow rights. The case involved the rights to security of tenure and human dignity. The court considered whether an occupier could make improvements to their dwelling to make it suitable for human habitation, a

right not expressly provided by ESTA. Madlanga J said in his seminal judgment:

> "This reading of s 6 is unduly narrow. Part of the context is s 5 of ESTA which the respondents' interpretation ignores. That section decrees that occupiers enjoy certain fundamental rights, including the right to human dignity. On the respondents' interpretation, occupiers have a right that could well be empty. They could live in conditions that infringe their right to dignity with no remedy available to them. That simply cannot be. How does the respondents' interpretation factor in the need for an occupier to live in conditions that conduce to human dignity? It does not. That immediately infringes an occupier's right under s 5." (*Daniels v Scribante supra* par 27–29)

What is clear from *Daniels v Scribante* is that the landowner's constitutional right does not exist in isolation. The constitutional framework balances various rights, including the right to have one's dignity respected and protected (s 10 of the Constitution). Dignity is closely linked with autonomy, meaning people should be free to live according to their own values (Liebenberg "The Value of Human Dignity in Interpreting Socioeconomic Rights" 2005 21 *SAJHR* 1–30 5; see also McCrudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 19 *The European Journal of International Law* 655 724 659–660 685–686). This includes the right to be buried among loved ones. According to Madlanga J, ESTA assumes that occupiers should engage in all activities reasonably associated with occupation. This ensures that they can live on the land with dignity – a core intention of the legislation. A narrow interpretation of the burial right in ESTA, excluding and segregating individuals even in death, overlooks the historical context of colonial and apartheid dispossession. This dispossession left many Black South Africans without land, and reliant on landowners' permission to remain connected with their kin. It left them without the dignity of maintaining a metaphysical connection to one's people.

In summary, the right to dignity ought to encompass the right to be buried among one's own. Any interpretation of ESTA that limits this right potentially fails to respect the inherent worth and autonomy of individuals. The Constitution's vision of a shared life must include recognition of the historical and ongoing impact of dispossession and ensure that dignity is upheld in both life and death (see *Sandvliet Boerdery (Pty) Ltd v Mampies supra*; *Daniels v Scribante supra* par 27–29).

### 4 2 2 The right to freedom of conscience, religion, thought, belief and opinion

The *Serole v Pienaar* case at the turn of the century offers a crucial historical perspective on the development of burial rights in ESTA (*Serole v Pienaar supra* 335B–G). The court interpreted ESTA's protection of occupiers' rights (prior to the addition of section 6(2)(*dA*)) as excluding the right to bury deceased family members on the land belonging to another (*Serole v Pienaar supra* 335B–G par 16). Arguments emphasising the cultural significance of burial and the potential constitutional implications of denying this practice laid the foundation for future legal developments. These submissions tied burial rights to fundamental human dignity and cultural life (*Serole v Pienaar supra* 335B–G par 14). While initially rejected, early

arguments linking burial rights to freedom of religion and conscience laid the groundwork for the subsequent inclusion of section 6(2)(*dA*) in ESTA. This historical context reinforces the ongoing importance of these constitutional principles in shaping our understanding of burial rights.

The constitutional right to freedom of religion, belief, and opinion, enshrined in section 15(1) of the Constitution, underpins the significance of burial rights. This fundamental right, De Vos asserts, is integral to human dignity and shapes our moral compass (De Vos and Freedman in De Vos *et al South African Constitutional Law in Context* ch 12 456–458). It fosters a society that respects diverse beliefs, including those concerning life, death and the afterlife (*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) par 89). Often, deeply held convictions about burial practices are central to these beliefs. Many cultures and religions prescribe specific burial rites and locations. A blanket prohibition on burial rights, particularly for those with a long-standing connection to the land, would unduly restrict the exercise of these constitutionally protected beliefs. While balancing the interests of landowners is crucial, as highlighted in *Hattingh*, a culturally sensitive interpretation of the Constitution necessitates a nuanced approach that respects the profound importance of burial rites in many communities. A restriction based on strict forms of residency, in some instances, could infringe on the right to practise one's religion freely and with dignity (see *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par 36; *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) par 92; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) par 38).

## 5 Conclusion

Undoubtedly, the historical physical dispossession and displacement of African communities have led also to a spiritual displacement, emphasising the need to reunify people with the land. The urgent need for this reunification is particularly envisaged in the context of burial rights, where the metaphysical bond between the living and the dead underscores the enduring significance of these sacred sites. Ultimately, recognising burial rights as separable from occupancy rights, once established, is a step towards healing historical wounds and fostering a more equitable and just society. By embracing a holistic understanding of property rights, as the courts have gradually done, it is apparent that the law can become a tool for preserving cultural identity, promoting reconciliation, and ensuring that the legacy of the past informs a more equitable future.

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