

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 1806/2019

Reportable	Yes
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In the matter between:

MKHUSELI MASHIYI

Applicant

and

NELISWA QHAYISO & OTHERS

Respondents

JUDGMENT

NOTYESI AJ

Introduction

[1] In *Daniels v Scribante & Another*¹ Madlanga J read into the judgment the words attributed to an old man, Mr Petros Nkosi. He later pronounced the

¹ *Daniels v Scribante & Another* 2017 (4) SA 341 (CC).

question of land as a fundamental link to dignity. These are the words as they appear from the judgment-

‘The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world.’

[2] Stripped in its essential features, the case is about the occupation of land rights

[3] The land is described as Allotment No [...], Mdeni Location, Ncise Administrative Area, Mthatha (the land in question)². The applicant, Dr Mashiyi, a medical practitioner of Mthatha, in essence, seeks an order declaring him to be the rightful holder of the right of access, use and occupation of the land in question. He is relying upon two documents that he alleges were issued to him by the Department of Rural Development and Agrarian Reform (the

² Allotment No [...], Mdeni Location, Ncise Administrative Area, Mthatha.

Department)³. The first document is titled Confirmation Letter for Site No: [...] Mdeni, Ncise A/A. The second document is a copy of a register in respect of allotted land.

[4] It is not necessary to detail the prayers sought by Dr Mashiyi. It suffices to say that they are for a relief that is dependent on or consequential to the grant of the declaratory of rights. Dr Mashiyi alleges that he was allotted the land by the traditional leader of the area in 1998. He did not take physical occupation of the land. In this regard, he believed that once land is allotted to a person, that allotment would constitute occupation in perpetuity.

[5] On or about May 2017, he discovered that the land allotted to him was occupied by the first respondent. According to him, he had never granted permission or consent for the first respondent to occupy the land. He decided to take steps against the first respondent. During the pleading stages, Dr Mashiyi discovered that the third respondent had taken possession of the land from the first respondent. The third respondent was building a residential dwelling. Dr Mashiyi alleged that he never granted consent or permission to the third respondent to build his home over the land. According to Dr Mashiyi, both the first and third respondents' claim of occupation over the land is unlawful. Dr

³ The Department of Rural Development and Agrarian Reform.

Mashiwi had contended that he is entitled to be declared as the only holder of rights over the subject land and that the first and third respondents should be interdicted from continuing with the erection or building of structures.

[6] The application is opposed by both the first and third respondents. The basis of opposition by the first respondent is that Dr Mashiwi has unreasonably delayed the institution of the proceedings. In this regard, the first respondent contended that, although Dr Mashiwi's alleged allotment of the land took place in 1998, he failed to take up possession for a period of 19 years and further delayed the institution of these proceedings for another period of approximately 2 years.

[7] The first respondent submitted that Dr Mashiwi ought to have taken up possession of the land within a period of 6 months from the date of the alleged allotment. He failed to do so. Secondly, Dr Mashiwi became aware of the first respondent's occupation of the land in 2017; and he only instituted the proceedings in 2019. On the merits, the first respondent disputed Dr Mashiwi's rights over the land. In this regard, she submitted that the land was allotted to her by the traditional leader of the area on or about 2013. The land was vacant when it was allotted to her. She took occupation of the land after lawful

allotment. On these bases, the first respondent contended that she is the lawful holder of rights over the land and not Dr Mashiyi nor the third respondent.

[8] The third respondent predicated his opposition to the application on the basis that he is the lawful holder of occupational rights over the land. According to the third respondent, he purchased the land from the family of the late Mthobeli Ndamase. Mthobeli Ndamase had been lawfully allotted the land by Chief Gwebelinyaniso Makaula. He alleged that on purchasing the land from the family, he was furnished with proof of the deceased's occupational rights. The proof consists of a document issued by the Department. The third respondent, further alleged that the transfer of land rights to him was confirmed by Chief Makaula. Relying on the documents from the Department and proof from the Chief, the third respondent contended that both Dr Mashiyi and the first respondent had no rights over the land and that he is the rightful holder of the occupational rights in respect of the subject land.

[9] On 3 March 2022, Dr Mashiyi instituted an application for condonation in respect of the late institution and prosecution of his main application. In the condonation application, he had contended that he was not aware of the occupation of the land by the first or third respondents. He only became aware

about the occupation of the land on 17 May 2017. Upon being aware of the occupation of his land, he immediately took steps by approaching the head of the traditional council and engaging the services of attorneys. According to Dr Mashiyi, he first launched legal proceedings on 18 March 2018, although that case was later withdrawn.

The issues for determination

[10] The following issues must be determined by this Court, the first - is whether the applicant unreasonably delayed the institution of the proceedings and whether such delay should be condoned; the second is whether the applicant has made out a case for the grant of the declaratory; and finally, costs for the application.

Common cause facts

[11] Each of the contesting parties to these proceedings claims exclusive holding rights of occupation in respect of the land in question. All the parties allege that the land in question was allotted to each of them by the chief of the area. Both Dr Mashiyi and the third respondent are in possession of confirmation documents from the Department. In respect of Dr Mashiyi, his confirmation was issued on 22 March 2017. For the third respondent, a similar

document had already been issued on 11 January 2017. These facts I find perplexing.

First respondent's case

[12] The case of the first respondent is simple and straightforward. First, she raised the defence of unreasonable delay. In this regard, the first respondent alleged that Dr Mashiyi was allegedly allotted the land in 1998. From the time of the alleged allotment, Dr Mashiyi never developed the land nor did he take occupation or even fenced in the land. According to the first respondent, Dr Mashiyi was required, according to the custom and practice of the area, to take possession of the land within a period of six months, failing which, the land could be reallocated to other interested parties. According to the first respondent, she was allotted the land by the Chief of the area in 2013.

[13] The first respondent contended that Dr Mashiyi has unreasonably delayed the launch of the proceedings and challenged the decision of the Chief to allot the land to her. The first respondent urged the Court to refuse the declaratory on the basis of unacceptable and unreasonable delay. The first respondent maintained that the land was lawfully allotted to her. The first respondent alleged that she applied for the land in question through the correct procedures.

Initially, she approached the sub-headman of the area by the name of Mr S Nkebe. Mr Nkebe was satisfied with the first respondent's application for the land in question. Mr Nkebe recommended the name of the first respondent to Chief Gobizizwe. Upon receipt of the recommendation from the sub-headman, Chief Gobizizwe approved the application. The first respondent was allotted the vacant land.

The third respondent's case

[14] The third respondent alleged that he was allotted the land by Chief Gwebelinyaniso Makaula in 2020. He was issued confirmation of allotment by the Chief on 6 June 2020. In this regard, the third respondent relies on a document issued by Chief Makaula. According to the third respondent, the land was sold to him by the family of one Mthobeli Ndamase. Mthobeli Ndamase is deceased. When purchasing the land, the family presented the third respondent with proof of ownership issued by the Department in favour of the late Mthobeli Ndamase. The document is attached to the third respondent's answering affidavit. According to the date stamp, the document was issued on 11 January 2017 in favour of Mr Ndamase.

[15] The third respondent alleges that he took possession of the vacant land once the transaction was concluded and approved by the Chief of the area. The third respondent further alleged that he has been in occupation of the land from the date of sale. The third respondent averred that his occupation of the land was public knowledge and it was transparent. The third respondent further alleged that he had built dwellings and developed the land for his residential use. The third respondent denied that Dr Mashiyi or the first respondent had any right over the land. He further pointed out that his permission to occupy was the most recent and that it was improbable for Dr Mashiyi, who was allegedly allotted the land in 1998, to only obtain his permission to occupy on 22 March 2017. The third respondent further pointed out that the register of the land, attached by Dr Mashiyi, is for the Kambi Administrative Area and not the Ncise Administrative Area. On this basis alone, the third respondent urged the court to dismiss the application.

Legal principles

[16] When a declaratory order is sought, the applicant should state clearly what rights, to which he claims to be entitled, have been infringed by the respondents. The applicant is expected to set out those rights to which he wishes the court to declare him to be entitled. To succeed with the relief sought for a declaratory order, the applicant must prove –

‘(a) an actual, existing or future right or obligation with regard to property; (b) an existing and real dispute about that right or obligation; and (c) a convincing reason why the Court should exercise its discretion in the circumstances to settle the dispute by granting a declaratory order that sets out the parties’ respective rights and obligations.’

[17] This Court has wide discretion to decide whether or not to grant declaratory relief. In this regard the Court in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁴ confirmed a two-stage approach in considering whether or not to grant declaratory relief; (i) the first is that the Court has to be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; (ii) once the Court is satisfied of the existence of such a condition, it will exercise a discretion either to refuse or grant the order sought taking into account all the relevant facts.

[18] The first respondent has raised the defence of undue delay. The contention by the first respondent is that Dr Mashiyi was allegedly allotted the land in 1998. He took no steps that would have confirmed possession of the land. Dr Mashiyi appears to have only acted in 2017. The first respondent

⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA); [2006] 1 All SA 103 at para 18.

contended that she had acquired the land in 2013 and therefore, Dr Mashiya has unduly delayed the challenge to his possession of the land. The first respondent urged this Court to refuse to entertain the application. Whether the application should be dismissed on this ground, is a question that has to be considered.

[19] There is a longstanding rule of our common law that proceedings for judicial review of the decisions of public bodies must be instituted without undue delay. If there has been an unreasonable delay, a court may in the exercise of its inherent power to regulate its own proceedings, refuse to determine the matter. In this manner, an invalid decision may, in a sense, be validated. The reasons for the rule are said to be two-fold.

[20] First, it is desirable and important that finality should be reached within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long time has elapsed.

[21] The second reason is the inherent potential for prejudice involved in failure to bring a review within a reasonable time, not only to a party affected by the decision but also to the effective functioning of the public body in

question and to third parties who may have arranged their affairs in accordance with the decision. For this reason, proof of actual prejudice to the respondents is not a precondition for refusing to entertain review proceedings by reason of undue delay. The extent of the prejudice is, however, a relevant consideration and may be decisive when the delay has been relatively slight.

[22] The application of the rule requires answering of two questions, namely – (a) was there an unreasonable delay; and (b) If so, should the unreasonable delay be condoned.

[23] Although the first question implies a value judgment, it entails factual enquiry. The second question involves the exercise of judicial discretion. Both questions must of course be answered in light of the facts and circumstances of the particular case. (See *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*⁵; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en n Ander*⁶; *Associated Institutions Pension Fund and Others v Van Zyl and Others*⁷; *Gqwetha v Transkei Development Corporation Limited*⁸).

⁵ *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 38H-42D.

⁶ *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en n Ander* 1986 (2) SA 57 (A) at 86A-G.

⁷ *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at paras 46 – 48.

⁸ *Gqwetha v Transkei Development Corporation Limited* [2006] 3 All SA (245) at paras 22 – 24.

[24] Whether there has been an unreasonable delay depends largely on the extent of the delay and the acceptability of the explanation tendered, if any. In this regard, it may sometimes not be sufficient to simply claim ignorance of the decision. In *Associated Institutions Pension Fund*, Brand JA said the following at para [51] –

‘In my view, there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both s 7(1) of PAJA and in the provisions of s 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case. (Compare *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA).)’

[26] The factors relevant to the exercise of the discretion to nevertheless overlook an unreasonable delay, include the extent of the delay, the explanation therefor, any prejudice to the respondents and/or third parties and the nature of the impugned decision.

[27] In *Khumalo and Another v MEC for Education, KwaZulu-Natal*⁹, the following was said on behalf of the majority:

‘An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.’

[28] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*¹⁰ section 7(1) of PAJA provides –

‘(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date–

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.’

[29] Further, in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*,¹¹ the court referred to the two-stage enquiry at common law and proceeded to explain –

⁹ *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 57.

¹⁰ *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) at paras 23 – 26.

¹¹ *supra* note 10 at para 26.

‘Up to a point, I think s 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature’s determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period, the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters.’

[30] As Dr Mashiyi is also seeking for condonation, it is trite that a party seeking condonation is asking for an indulgence of the court. In such circumstances, it has become trite that the court must exercise discretion judicially on consideration of the facts of each case and subject to the requirement that the applicant shows good cause for the default. In *United Plant Hire (Pty) Ltd v Hill*¹² the Supreme Court of Appeal found that in essence, it is a question of fairness to both sides.

[31] In *Pieter Westerman Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills Cape*¹³ Jones AJA held –

¹² *United Plant Hire (Pty) Ltd v Hill*, 1976 (1) SA 717 (A) at 720 E-G.

¹³ *Pieter Westerman Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills Cape*, 2003 (6) SA 1 (SCA)

‘The authorities that it is unwise to give a precise meaning of the term good cause. As Smallberger J put it in *HDS Construction (Pty) Ltd v Wait*¹⁴ -

When dealing with words such as “good cause” and “sufficient cause” in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns’ Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352-3*). The Court’s discretion must be exercised after a proper consideration of all the relevant circumstances.’

[32] In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*¹⁵, the Constitutional Court held that an applicant for condonation must give a full explanation for the delay which must not only cover the entire period of the delay, but must also be reasonable. The factors enumerated in the case are not individually decisive, but are interrelated and must be weighed one against the other, thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.

¹⁴ *HDS Construction (Pty) Ltd v Wait*, 1979 (2) SA 298 (C)

¹⁵ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*, 2008 (2) SA 472 (CC) at 477E

[33] The Supreme Court has warned against penalising a blameless litigant on account of his attorneys' negligence. However, in *Saloojee and Another NNO v Minister of Community Development*,¹⁶ it was held –

‘To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity... The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.’

[33] Insofar as the parties have adduced evidence regarding their competing rights to the subject land, there was no application for referral of the matter for hearing of oral evidence. In such circumstances, if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts, as stated by the respondents, together with the facts alleged by the applicant that are admitted by the respondents, justify such an order.¹⁷

[34] On these principles, I consider the parties' submissions.

¹⁶ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E

¹⁷ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634

Submissions by the parties

[35] Dr Mashiyi had submitted that once the subject land was allotted to him in 1998, irrespective of whether or not he had assumed physical possession, his possession of the land became protected under the Interim Protection of Informal Land Rights Act, 31 of 1996 (IPILRA).¹⁸ Section 2(1) of the Act provides that subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

[36] Dr Mashiyi had contended that Chief Gobizizwe and the first respondent had no right to appropriate the subject land and allocate same to the first respondent without consulting him and accordingly, their conduct was unlawful. He contended that IPILRA was adopted to protect those who held insecure tenure because of the failure to recognise customary title. In this regard, Mr *Jozana* had submitted that the purpose of the IPILRA is to provide temporary protection ‘of certain rights to and interest in land which are not otherwise adequately protected by law; and to provide for matters connected therewith.’ In advancing his contentions, Mr *Jozana* relied on the cases of *Maledu and Others*

¹⁸ Interim Protection of Informal Land Rights Act, 31 of 1996

*v Itereleng Bakgatla Mineral Resources (Pty) Ltd*¹⁹ and *Baleni and Others v Minister of Mineral Resources and Others*²⁰.

[37] Insofar as Dr Mashiyi's case against the third respondent, Mr *Jozana* had submitted that the allotment of the land to the third respondent by Chief Gwebelinyaniso and the Ndamase family was unlawful. In this regard, Mr *Jozana* contended that Dr Mashiyi was already protected by the provisions of the IPILRA which had kicked in upon the allotment of the land to him in 1998. The upshot of the contention is that once the land was allotted to Dr Mashiyi, whether he had assumed possession or not, is immaterial. Dr Mashiyi's case, stripped to its essentials, was that his rights in terms of IPILRA were infringed by the first and third respondents by their conduct of occupying the subject land irrespective of whether they were granted occupational rights by the relevant community. On that basis, Dr Mashiyi had submitted that he was entitled to a declaratory that he is seeking and that an interdict should be issued against the respondents. He disputed that there was a delay in the institution of the proceedings and that, in the event it being found that there is a delay, he is seeking condonation to the extent of that delay.

[38] On the contrary, the first respondent had contended that Dr Mashiyi had unreasonably delayed the institution of the proceedings. Mr *Dotwana*, who

¹⁹ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC)

²⁰ *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP)

appeared for the first respondent, submitted that Dr Mashiyi had never acquired any rights over the subject land which could be protected under IPILRA. The contention in this regard was that Dr Mashiyi never took occupation of the subject land. The essence of the first respondent's contention in this regard is that the act of allotment, on its own, was not sufficient for the purposes of IPILRA. It was submitted that Dr Mashiyi ought to have taken possession of the subject land or at least must have taken steps to show that he was occupying the subject land. Mr *Dotwana* relied on the custom of the community which, according to the first respondent, is that a person who has been allotted the land must take possession within a period of 6 months, failing which, the land that has been allotted, would revert to the traditional authority for a new allotment.

[39] The first respondent submitted that in Dr Mashiyi's own version, the land was allotted to him in 1998. He never took possession of the site nor even fenced the land to mark it as his own. The first respondent submitted that Dr Mashiyi waited for a period of 19 years before he could show any interest in the subject land.

[40] The third respondent submitted that Dr Mashiyi had no rights over the land and that the IPILRA does not apply to the case brought by Dr Mashiyi. Mr *Tiya*, counsel for the third respondent, further submitted that the third

respondent was the lawful occupier of the land. Mr *Tiya*, in this regard, relied on the documents issued in favour of the third respondent by the Chief of the traditional community.

[41] Mr *Tiya* also relied on the documents that were issued in favour of the late Mr Ndamase. The document relied upon by the third respondent was issued by the Department, according to the date stamp, on 11 January 2017, which is three months earlier than the documents relied upon by Dr Mashiyi. Mr *Tiya* contended that upon careful consideration of the land register relied upon by Dr Mashiyi, it is unquestionable that he was allotted land at the Kambi Administrative Area, not the Ncise Administrative Area. On this basis alone, Mr *Tiya* had urged this Court to dismiss the application.

[42] Finally, Mr *Tiya* submitted that Dr Mashiyi has failed to refer the matter on oral evidence insofar as the disputed facts. In this regard, Mr *Tiya* pointed out that the third respondent is the holder of permission to occupy; that the Chief of the area had confirmed that the third respondent was lawfully allotted the vacant land; and that despite the existence of the dispute, Dr Mashiyi has not sought for the referral of the matter for oral evidence.

[43] Mr *Tiya* urged the Court to apply the *Plascon Evans* principle. The counsel for the third respondent had also urged the Court to have regard to the provisions of the IPILRA which recognises the custom and tradition of the community. The third respondent contended that on the basis of the traditional community, Dr Mashiwi lost any rights that he could have had once the 6 months period lapsed without taking possession of the allotted land or showing any further interest in developing the land.

Evaluation and analysis

[44] The first respondent had raised the question of undue delay. This is a long-standing rule of common law. The underlining principle of the rule is that proceeding for judicial review must be instituted without undue delay. Whether there has been an unreasonable delay, depends largely on the delay and acceptability of the explanation tendered, if any. In this regard, it may sometimes not be sufficient to simply claim ignorance of the decision.

[45] Dr Mashiwi had alleged that he was allotted the land in 1998. He confirmed that he did not take physical possession of the allotted land. It does not appear to this Court that he assumed some form of any possession in the sense that he would fence the land or place any of his identifying markings. Dr

Mashiwi has not filed any affidavit by the Chief of the area to confirm that the land was allotted to him. The Chief who allegedly allotted the land to Dr Mashiwi is deceased.

[46] In explaining his indifferent attitude regarding taking of possession of the land, Dr Mashiwi stated that he held a view that the allotment, once effected, it becomes in perpetuity. At this stage, I propose to quote the necessary averment from his affidavit–

‘....I did not act on the allotment in terms of developing it because I held the view that the allotment, once effected, is in perpetuity. I may also indicate that I am of the view that application for condonation for inaction regarding the period 1998 to 2016 is unnecessary because there was no interference with my rights on the allotment until May 2017. The alleged re-allocation of this allotment in 2013 to Mthobeli Ndamase came to my attention only when the third respondent filed his answering affidavit in the main application on 20 October 2021. I was unaware of it, hence my inaction.’

[49] In *Associated Institutions Pension Fund* Brand J held –

‘In my view there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both s 7(1) of PAJA and in the provisions of s 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have

taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case. (Company Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200(SCA).)’

[50] In my view, it should not be enough for a litigant to rely on ignorance of a decision in circumstances where the existence of the decision would have become known by the taking of reasonable steps in the circumstances. The Court should determine whether the existence of a decision would have been uncovered by the taking of reasonable steps in the particular circumstances and the period of delay should be reckoned from that date, event or period.²¹ The factors relevant to the exercise of the discretion to overlook an unreasonable delay, include the extent of the delay, the explanation therefor, any prejudice to the respondent or third parties and the nature of the impugned decision.

[51] It is undisputed that the third respondent had purchased the land from the family of Mthobeli Ndamase. Mr Ndamase is now late. The third respondent was furnished with proof of entitlement by the late Mr Ndamase to the land. The document attached by the third respondent was issued by the Department of Agriculture on 11 January 2017. The Chief of the area, Gwebelinyaniso Makaula, confirmed to the third respondent that indeed, the late Mr Ndamase

²¹ *Mandela v The Executors of Estate Late Nelson Rolihlahla Mandela and Others* [2016] 2 All SA 833 at para 17

was the occupant of the land that he was purchasing. It was confirmed by the Chief that the land had been allotted to the late Mr Ndamase in 2013. The third respondent has built residential dwellings over the land. The third respondent is the occupier of the land.

[52] On the other hand, Dr Mashiyi, who was allegedly allotted the land in 1998, had adopted a supine attitude for a period of 19 years. In his own version, he never took possession of the land for the purpose of developing it. He never identified the land with his own markings or any other form of identification. Dr Mashiyi, in my view, had lost interest in the subject land and his interest was only revived when he, by chance, saw certain persons working over the land during 2017. That is when his interest was revived. Unquestionably, this is a delay of approximately 19 years, many times more than the period of 180 days.

[53] The actions of Dr Mashiyi must be viewed against the customs or traditions of the area. The first respondent has alleged that the custom of the area is that a person who has been allotted land at Ncise Administrative Area, such person must take up possession of the land within a period of six months, failing which the land must be reallocated to the next person. In this regard, I quote from the first respondent's answering affidavit –

‘...In this particular matter, the applicant claims in paragraph 9 of his founding affidavit, to have been allocated a land during or around 1998. The applicant then failed to take up possession of the land until a period of six months elapsed since he was allocated the land with the result that the land reverted to the traditional authority to deal with it as it considered appropriate.’

[54] Dr Mashiyi did not dispute in his replying affidavit the allegations that once a person failed to take up possession of the allotted land within a period of six months, the land will revert to the traditional authority for reallocation. In these proceedings, there is no attack regarding the legality of the practice. I do accept, on the principles of *Plascon Evans*, that the land had reverted to the traditional authority after the period of six months when Dr Mashiyi had failed to take any steps of occupying the land. In my view, this is a sound policy for the community in managing their land affairs.

[55] In terms of s 2(1) of the IPILRA, no person may be deprived of any informal right to land without his or her consent. An informal right to land is defined as the ‘use of, occupation of, or access to land in terms of (i) any tribal, customary, or indigenous law or practice of a tribe; (ii) the custom, usage or administrative practice in a particular area or community, where the land in

question at any time vested in – the Government of the former Republic of Transkei, Bophuthatswana, Venda and Ciskei.’

[56] In *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* at paras 95 and 96, the court held –

‘As is manifest from its preamble, IPILRA seeks to provide for the protection of certain rights to and interest in land that were previously not otherwise protected by law. To provide such protection, IPILRA ensures that communities have a right to decide what should happen to land in which they have an interest. It offers communities legal protection to assume control over and deal with their land according to customary law and usages practiced by them.

Most significantly, IPILRA provides that no person may be deprived of any informal right to land without his or her consent.²² Where land is held on a communal basis, a person may be deprived of such land or right in land in accordance with the custom or usage of the community concerned, except where the land in question is expropriated.’

[57] Dr Mashiyi was not deprived by the respondents of any of his occupational rights over the land. The respondents were allotted the land by the traditional authority of the community. The third respondent has produced enough evidence of his allotment of the land. The question of deprivation was

²² Section 2(1)

considered by the Court in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, where it was held –

‘A somewhat curious feature of IPILRA is that whilst it provides that no person may be deprived of any informal right to land without consent, it does not itself spell out what constitutes a deprivation. The Concise Oxford English Dictionary defines the verb “deprive” as meaning: “Prevent (a person or place) from having or using something”.²³ The noun “deprivation” is defined as: “The damaging lack of basic material benefits; lack or denial of something considered essential”. This, to my mind, is the definition that should be adopted for purposes of section 2 of IPILRA.

Whether there has been a deprivation in any given case, said Yacoob J in *Mkontwana*, depends—

“on the extent of the interference with or limitation of use, enjoyment or exploitation....at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”²⁴

Before *Mkontwana*, this Court had earlier, in the context of section 25(1) of the Constitution, said that:

²³ Fowler & Fowler (eds.) *The Concise Oxford Dictionary* 12 ed (Oxford University Press, 18 August 2011) at 468

²⁴ *Mkontwana* above n 58 at para 32

“In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.”

[58] It is common cause that Dr Mashiyi has never occupied the land in question for a period of at least 19 years. He has never fenced nor developed the land. In my view, Dr Mashiyi knew or ought to have known the customs and traditions of the community regarding the occupation of the allotted land. The common cause facts are that once a person is allotted land, he must take possession within a period of six months. Dr Mashiyi did not do so and therefore he must accept the consequences.

[59] The explanation proffered by Dr Mashiyi for his indifference is so poor and I find that unacceptable. Dr Mashiyi, although advised that the land was allotted to the first and third respondents in 2013, simply gives no explanation for the period before 2017. In his amended notice of motion, he failed to challenge the decision of the Chief to reallocate the land. In my view, that decision remains valid until it is set aside. On the existence of the decision to allot the land, the relief sought can simply not be granted, even if the delay was overlooked.

[60] It must follow from what I have said in the previous paragraphs that there is no acceptable explanation for the delay and accordingly, there has been unreasonable delay in launching this application.

[61] I proceed to deal with the question of whether the delay should be condoned. The period of the delay for 19 years is excessively long and there was no satisfactory explanation. The prejudice to the third respondent is manifest. The third respondent has constructed his residential dwellings. This Court must also make this remark, the third respondent purchased the land from the Ndamase family on the strength of objective evidence in the form of permission to occupy and the confirmation by the Chief of the area. He proceeded to arrange his life on the basis that the land was lawfully allotted to the deceased, the late Mr Ndamase, during 2013. Had Dr Mashiyi acted timely, the third respondent would not have purchased the property in 2020. To overturn the present position, would be grossly prejudicial to the third respondent.

[62] This Court accepts that if Dr Mashiyi had taken possession of the allotted land during 1998, he would have enjoyed the protection under section 2(1) of the IPILRA. In the absence of evidence that the deprivation was in accordance

with the customs and traditions of the community, the conduct of allotment of the land to the first or third respondents would have been unlawful. In such a case, the decision would have been contrary to section 33 of the Constitution and section 2(1) of IPILRA. Only in that context, the prospects of showing the existence of the alleged rights of Dr Mashiyi must be considered.

[63] Dr Mashiyi has attached, in his founding papers, documents upon which he relies for proving his alleged right of possession, that which would entitle him to a declaratory order that he is the rightful holder of the right of access, use and occupation of the land in accordance with the provisions of IPILRA.

[64] The immediate difficulty with his evidence is that although he alleges that the land was allotted in 1998, the permission to occupy it he relies upon was only issued on 22 March 2017. This is a period of two months after the land had already been allotted to Mr Ndamase. The other striking feature is that the land register that Dr Mashiyi relies upon contains contradictory material. In the first page of the document, it is suggested that the land in question is under Kambi Administrative Area. Dr Mashiyi's case is in relation to land in the Ncise Administrative Area. There was no evidence to link up these two different administrative areas. Mr *Jozana*, counsel for Dr Mashiyi, conceded that the land

register is not in support of his case. The Chief who allegedly allotted the land to Dr Mashiyi is deceased. This Court had no evidence upon which it could find in favour of Dr Mashiyi. I agree with the submissions by Mr *Tiya* that Dr Mashiyi has failed to make out a case regarding the occupational rights of the disputed land.

[65] The court has wide discretion to decide whether or not to grant declaratory relief. In this regard the court in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*²⁵ confirmed a two-stage approach in considering whether or not to grant declaratory relief: (i) the first is that the court has to be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; (ii) once the court is satisfied of the existence of such a condition, it will exercise a discretion either to refuse or grant the order sought.²⁶ Declaratory orders are discretionary²⁷ and flexible as the Court pointed out in *Rail Commuters Action Group and Others v Transnet Ltd TIA Metrorail and Others-*

‘[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a *flexible* remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection

²⁵ 2005 (6) SA 205 (SCA).

²⁶ *Cordiant*: “[18].”

²⁷ *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at 525A.

and enforcement of our Constitution and *its* values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory *relief* in *addition* to the declarator, a court will consider all the relevant circumstances."²⁸

[66] Having regard to the context of the present dispute, I am of the view that the declaratory relief should be declined. When regard is given to the various factors, there is no live dispute between the parties. The application ought not to have been launched by way of motion proceedings. There is a huge dispute of facts on Dr Mashiyi's own version. The first and third respondents were allotted the land by the Chief. It is not a question of land grabbing. Dr Mashiyi was made aware of these disputes, or at the very least, ought to have foreseen the existence of the dispute, nonetheless, he proceeded by way of motion proceedings. He has failed to prove any right to the land in view of the fact that he has never taken possession of the land. He relied on documents that did not support his case. Dr Mashiyi's alleged right to occupy the land was prescribed six months after his allotment, of which he failed to take possession.

Costs

[67] I cannot think of any good reason, and none has been suggested, as to why the costs should not follow the results. The general rule is that costs should

²⁸ 2005 (2) SA 359 (CC).

follow the event and I will follow that rule. The first and third respondents have successfully opposed the application and are entitled to their costs, including all costs previously reserved.

Order

[68] In the result, I make the following order –

- (1) The application is dismissed.
- (2) The applicant is ordered to pay the costs of the first and third respondents.

M NOTYESI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant : *Mr Jozana*

Instructed by : B Makada Incorporated

Mthatha

Counsel for the First Respondent : *Mr Dotwana*

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Counsel for the Third Respondent : *Mr Tiya*

Instructed by : Zincedile Monde Tiya Inc
Mthatha

Heard on : 28 March 2024

Judgment Delivered on : 18 June 2024