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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 031023/2014

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 07/06/2023

In the application between

MARTIN BOIKANYO PITSIE NO

First Applicant

MAFATSE ALICE PITSIE

Second Applicant

And

PAUL SEPOPI DITSHEGO

Respondent

In re the main application between

PAUL SEPOPI DITSHEGO

Applicant

And

MARTIN BOIKANYO PITSIE NO

First Respondent

MAFATSE ALICE PITSIE

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third Respondent

**DEPARTMENT OF HOUSING FOR
GAUTENG PROVINCIAL GOVERNMENT**

Fourth Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Fifth Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

Sixth Respondent

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. This interlocutory application has its roots in a main application, initiated almost a decade ago, which concerns property-related disputes between the parties that are only alluded to in the papers before this court. It is not in dispute in this application that there has been considerable delay in the conduct of that application. The thrust of the interlocutory application is that the delay is sufficiently inordinate, inexcusable and prejudicial as to merit the dismissal of the main application, such that the property-related disputes would not be determined by a court. A finding to that effect would have an obvious and significant impact on the constitutional right of access to court and should thus not readily be reached.
2. For reasons set out in this judgment, I consider that, whilst there has been inordinate delay that is inadequately explained and/or justified on the papers, the

circumstances of this case are such that the delay has not occasioned prejudice of a serious nature or extent. In the result, the dismissal application must fail.

THE PROCEEDINGS

3. The applicant in the main application and the respondent in this dismissal application is Paul Sepopi Ditshego.
4. The first and second respondents in the main application and the first and second applicants in this dismissal application are Martin Boikanyo Pitsie NO and Mafatse Alice Pitsie.

The main application

5. The main application was initiated by Mr Ditshego against Mr and Ms Pitsie and four other respondents on 22 August 2014. The papers in the main application do not appear to have been uploaded on CaseLines and so this court is offered only glimpses, in other documents such as those referred to in paragraphs 18 and 20 below, of the property-related disputes that form the subject matter of that application.
6. Mr and Ms Pitsie delivered an answering affidavit in the main application on 06 November 2014.

7. On or about 11 February 2015 Mr Ditshego delivered a replying affidavit in the main application.
8. Heads of argument in the main application were:
 - 8.1. demanded of Mr Ditshego by 06 March 2015 but not delivered on his behalf until 01 December 2022 (see paragraph 20 below); and
 - 8.2. delivered on behalf of Mr and Ms Pitsie on 13 August 2015.

This dismissal application

9. Mr Ditshego also did not enrol the main application for hearing by the court.
10. On 27 February 2020, some five years after the exchange of affidavits, Mr and Ms Pitsie launched this dismissal application in which they seek an order that the main application be dismissed with costs. In support of that relief, the Pitsies deposed to founding and confirmatory affidavits on 10 February 2020. The averments in the founding affidavit include that:
 - 10.1. since delivery of the replying affidavit referred to in paragraph 7 above, Mr Ditshego has taken no further step to advance the main application; and

- 10.2. his inordinate and inexcusable delay has caused Mr and Ms Pitsie prejudice and constitutes an abuse of process that should not be countenanced by this court.
11. This dismissal application was set down to be heard on 12 August 2020 but, by agreement between the parties, was removed from the roll by the court (per Millar AJ), with costs reserved, to enable Mr Ditshego to deliver an answering affidavit by 08 September 2020.
12. On 08 September 2020 Mr Ditshego delivered an answering affidavit in this dismissal application. Although he concedes that there had been delay in the conduct of the main application amounting to non-compliance with the rules of court, Mr Ditshego alludes to convenience in having this matter dealt with and determined together with another matter. The thrust of his opposition to the application is said to be his intention *“to make an application in terms of Rule 27(3) of the Uniform Rules of Court for the condonation of my non-compliance as I believe that I have a good cause in the light of the decision in the case of Rahube/Rahube 2018(1) SA 638 (GP) which judgment was confirmed by the Constitutional Court on the 30th October 2018.”* In addition, Mr Ditshego submits in opposition to the application that:

“our argument for the relief sought is fully supported by the abovementioned case and therefore our prospects of success in the application are very good. It is my submission that the Applicants will not suffer any prejudice if condonation

is granted in my favour. My non-compliance was not done with the intention to delay the finalisation of the matter.”

13. Replying and confirmatory affidavits in this dismissal application were delivered by Mr and Ms Pitsie on or about 18 May 2021. The replying affidavit contends that Mr Ditshego “*concedes that as a result of the inordinate delay in the prosecution of the main application, by the dominus litis party, the Respondent, amounts to non-compliance with the Rules of this above Honourable Court, rendering the continuation of the application and abusive process warranting the dismissal of the main application.*” In support of this contention, Mr Pitsie asserts that, “*after filing the replying affidavit on 11 February 2015 in the main application, the Respondent took no further steps to continue with the litigation.*” The further contentions in the replying affidavit include that:

- 13.1. “*the Respondent non-compliance and inordinate delay in the prosecution of the main application was done with the intention of delay the finalisation of the main application*” and constitutes an abuse of process; and
- 13.2. the Pitsies “*have suffered prejudice and continue to be seriously prejudiced as a result of the Respondent inordinate, unreasonable and inexcusable delay in the prosecution of the main application*”.

14. On 08 October 2021 heads of argument and a practice note in this dismissal application were delivered on behalf of Mr and Ms Pitsie. On the questions of abuse of process and prejudice, it is submitted in the heads of argument that:

14.1. *“it would be inherently unfair for the Applicants’ to proceed due to inordinate, unreasonable and inexcusable delay of the Respondent in bringing the matter to finality as well as the prejudice suffered by the Applicants”;*

14.2. *“[t]he dominus litis party, the Respondent has to date failed to file a practice note and heads of argument in the main application and failed to take any further steps to continue with the litigation, rendering the continuation of the application unreasonable and inexcusable delay and abusive process in bringing the main application to finality”;*

14.3. *“[t]he dismissal of the Respondent’s main application is sought on the ground that it has been dormant approximately for 5 years’ and that to permit its revival would give rise to irremediable prejudice amounting to an abuse of the process of this Honourable Court”;* and

14.4. *“where there is long delay, the Court can nevertheless dismiss the Respondent main application as it is clear that the Respondent has lost interest in pursuing the main application and its presence on the Court roll is prejudicial to the due administration of justice.”*

15. On 03 March 2022 Mr Ditshego delivered a notice of intention to oppose this dismissal application.
16. By email dated 07 March 2022, the attorneys for Mr and Ms Pitsie advised the attorneys for Mr Ditshego of their instructions to proceed with an interlocutory application to compel him to deliver heads of argument in this dismissal application.
17. It appears that the interlocutory application was set down to be heard on 10 March 2022. The interlocutory application was thereafter set down for hearing on 03 November 2022.
18. Meanwhile, a practice note in the main application – not this dismissal application – was delivered on behalf of Mr Ditshego on 01 November 2022. It describes the application as being “*for cancellation of the registration of properties situated at 1[...]8 and 1[...]0 Tsakane township in the names of Mafatse Alice Pitsie and Michael Pitsie since same were fraudulently and/or irregularly registered in their names*” and the disputed issues as including “*whether the 3rd Respondent has complied with the provisions of Section 2 of Act 112 of 1991 prior to registering the properties in the names of the deceased and the Second Respondent.*”
19. On 03 November 2022 the court (per Dlamini J) ordered Mr Ditshego to deliver heads of argument in this dismissal application within three days of service of the order and to pay the costs of the interlocutory application.

20. On 01 December 2022 heads of argument, a list of authorities and a practice note in the main application – not this dismissal application – were delivered on behalf of Mr Ditshego. The heads of argument describe the purpose of the main application as being “*to set aside the decision of the Director General of the 3rd Respondent declaring the Second Respondent and the late Michael Pitsie owners of the Erven 1[...]8 and 1[...]0 Tsakane township. Applicant further seeks an order to set aside any deed of sale entered into between the 3rd Respondent and the late Mr Michael Pitsie and the 2nd Respondent in respect of Erven 1[...]8 and 1[...]0 Tsakane township.*” The concluding submissions for Mr Ditshego are that:

20.1. “[t]he two properties were purchased by the Applicant from the auction and that Edward Boitumelo Pitsie, the former First Respondent, fraudulently transferred same into his parents’ names”; and

20.2. “[t]he 3rd Respondent transferred the properties irregularly into the names of the 2nd Respondent and Michael Pitsie”.

21. On 24 March 2023 Mr and Ms Pitsie delivered a chronology of events and list of authorities in this dismissal application.

22. In response to a directive issued by this court on 22 May 2023, counsel for Mr and Ms Pitsie delivered a proposed joint practice note in this dismissal application recording common-cause facts, including that “[i]t is approximately 9

years later and the [main] application has not been enrolled” and that “[t]he delay has been conceded, which amounts to non-compliance.”

GENERAL PRINCIPLES

23. An unreasonable delay in the conduct of an action or application may constitute an abuse of process that may justify dismissal of a matter. The court’s discretion to grant such an order is however to be exercised with reference to the particular facts and circumstances of each case, including the extent of the delay, any explanation or justification therefor and any serious prejudice to the defendant or respondent occasioned thereby.¹

24. Thus the issues for determination by this court are whether:

24.1. there has been inordinate delay in the conduct of the main application;

24.2. any such delay is inexcusable in the circumstances of the case; and

24.3. Mr and Ms Pitsie have been prejudiced by such delay.

¹ *Verkouteren v Savage* 1918 AD 143 144; *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) [10]-[13]

THE ISSUES

Whether the delay is inordinate

25. Advocate Kloek, who appeared at the hearing for Mr and Ms Pitsie, submitted that it is common cause on the papers that there has been a substantial delay in the conduct of the main application.
26. Although not responsible for preparing any papers in the matter, Advocate Tungo appeared at the hearing for Mr Ditshego. He did not seek to suggest that the delay in conducting the main application was anything other than substantial.
27. I have no difficulty accepting, in the context of motion proceedings, that a period of inactivity on the part of an applicant in the order of five years constitutes an inordinate delay. It is in the interests of litigants and justice itself that litigation not be protracted by unnecessary delay.
28. This first issue is therefore determined in favour of Mr and Ms Pitsie.

Whether the delay is inexcusable

29. Mr Kloek submitted on their behalf that the delay in the conduct of the main application was not explained let alone justified on the papers. Whether the delay is inexcusable is not pertinently addressed – and thus tacitly conceded – by Mr

Ditshego. His disinterest in the main application is evident from his inactivity in progressing the matter. In the submission of Mr Kloek, it is unnecessary for the success of this dismissal application for the delay to constitute an abuse of process and I did not understand him to press for a finding of an abuse on the facts of this case.

30. It was fairly conceded by Mr Tungo for Mr Ditshego that an inadequate explanation or justification for the delay was made out on the papers. He did however submit that the delay could properly be explained and justified with reference to the judgments in the *Rahube* litigation,² which may have an impact on property transfers such as those at issue in the main application. Since it was and remains uncertain what bearing those judgments and any resultant legislative amendments may have on this matter, it was submitted that Mr Ditshego had not been unreasonable in awaiting clarification before proceeding with the main application. At the very least, in his submission, even an

² *Rahube v Rahube and others* 2018 (1) SA 638 (GP); *Rahube v Rahube and others* 2019 (1) BCLR 125 (CC). Subject to a measure of variation, the latter judgment confirmed the former judgment's declaration of constitutional invalidity in respect of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991. As varied, the order declared the section constitutionally invalid "insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas ... into holders [of] rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution." The order was made retrospective to 27 April 1994 but "shall not invalidate the transfer of ownership of any property which title was upgraded in terms of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised estates; and upgrade to ownership of a land tenure right prior to the date of this order by a woman acting in good faith." The order was suspended for a period of 18 months to allow Parliament an opportunity "to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional invalidity of the provisions of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991." Pending compliance by Parliament with that portion of the order, the respondent in *Rahube* was interdicted from passing ownership in or encumbering a specified property.

inadequate explanation or justification for the delay did not warrant a finding of an abuse of process in this matter.

31. I accept that the *Rahube* point, if properly addressed on the papers, may have provided a proper explanation and justification for the delay. I am however not persuaded that it is adequately articulated as a ground of opposition to this dismissal application. This court may fairly expect of a respondent in such proceedings to be clearer and more deliberate in accounting for its conduct throughout a period of delay. Mr Ditshego falls short of this standard.

32. This second issue is also determined in favour of Mr and Ms Pitsie.

Whether the delay is seriously prejudicial

33. Mr Kloek submitted that the ‘tyranny of litigation’ is such that it is inherently prejudicial to be subjected to lengthy legal proceedings. He did, however, fairly acknowledge a distinction between action and motion proceedings, the former of which being more readily susceptible to prejudice in the form of impaired memories, discarded records and the like. Ultimately, Mr Kloek was constrained to accept that serious prejudice is unlikely to arise in motion proceedings in circumstances where affidavits were exchanged at an early stage of the proceedings. Although he accepted that it had been within his clients’ power to take steps to bring about a hearing of the main application, he submitted that

respondents should not be expected to do so when there is delay on the part of an applicant.

34. Mr Tungo submitted that there is no substance to the contention that the delay on the part of Mr Ditshego was or is prejudicial to Mr and Ms Pitsie.

35. I am not persuaded that a case for serious prejudice is made out on the papers. Besides conclusory assertions of prejudice – quoted in paragraphs 13.2, 14.1, 14.3 and 14.4 above – there is little if any elaboration on or substantiation of the form or extent of any such prejudice. It is not suggested, for example, that the delay will deprive Mr and Ms Pitsie of any rights or interests in the properties that form the subject matter of the main application. Nor is it contended that the Pitsies will be disadvantaged in the conduct of that litigation. As has been the case since about August 2015, it is open to either side to take steps to bring about a hearing of the main application on the papers delivered at that time, as supplemented by Mr Ditshego's submissions of 01 December 2022 (see paragraph 20 above).

36. Hence this third issue falls to be determined in favour of Mr Ditshego.

The outcome and order

37. I am satisfied that there has been inordinate and inadequately explained and/or justified delay in the conduct of the main application. Individually and even

collectively, however, they are not decisive on the particular facts and circumstances of this case.

38. In the absence of serious prejudice on account of the delay, I consider that this dismissal application must fail.

39. As regards costs:

39.1. Whilst acknowledging that the *Rahube* point had not been pertinently addressed until the hearing itself, Mr Tungo submitted that Mr and Ms Pitsie could have set down the main application for hearing, need not have initiated or pursued this dismissal application and should thus be liable for the costs of its failure. The submission is not without force but, to my mind, underplays Mr Ditshego's role in precipitating the application.

39.2. Mr Kloek submitted that, if this dismissal application were to fail, the parties should bear their own costs since it was not unreasonable for Mr and Ms Pitsie to have pursued the application in the circumstances of the case. On balance, I am persuaded by the submission.

40. In the circumstances, I grant the following order:

40.1. The interlocutory application initiated on 27 February 2020 by Martin Boikanyo Pitsie NO and Mafatse Alice Pitsie against Paul Sepopi

Ditshego (the dismissal application), in which an order is sought dismissing the main application initiated on 22 August 2014 under case number 031023/2014, is dismissed.

40.2. The parties are to bear their own costs of the dismissal application.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. As a courtesy, it will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is 07 June 2023.

Counsel for First and Second Applicants: Advocate JW Kloek

Instructed By: Kitching Attorneys

Counsel for Respondent: Advocate Tungo

Instructed By: AK Manthe Attorneys

Date of Hearing: 29 May 2023

Date of Judgment: 07 June 2023