



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **CA&R 39/2021 &
1013/2023**
Heard: **14/11/2023**
Date available: **12/04/2024**

In the matter between:

DEON HARMSE
CORNELIS HARMSE
HELENA ALBERTA CORNELIA HARMSE
OCKERT JORDAAN
ANDREAS JS PENTELBURY
ELSABE PENTELBURY
ANITA ECK

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant

and

KAMIESBERG LOCAL MUNICIPALITY
THE MINISTER OF TRADE AND INDUSTRY

First Respondent
Second Respondent

JUDGMENT

Mamosebo J et L Lever J

- [1] This application was brought by seven of the initial 24 litigants. It comprises the following: First, an application for condonation for their failure to comply with paragraph 2 of the order dated 21 February 2022; secondly, a review in terms of s 7(1) of the Promotion of Administrative Justice Act, 3 of 2000, (PAJA) and

thirdly, the constitutionality of s 21 of the National Building Regulations and Building Standard Act, 103 of 1977 (the NBSA).

- [2] The fourth applicant, Mr Ockert Jordaan, died of natural causes on 06 September 2023 as recorded in the death certificate issued on 07 September 2023. Six applicants remain, namely, Mr Deon Harmse, Mr Cornelis Harmse, Ms Helena Alberta Cornelia Harmse, Mr Andreas JS Pentelbury, Ms Elsabé Pentelbury and Ms Anita Eck; all residing at Eureka Settlement, Farm Dikdoorn, Garies, Northern Cape Province. For convenience they will be referred to as the applicants. The first respondent is the Kamiesberg Local Municipality (the Municipality) and the second is the Minister of Trade, Industry and Competition (the Minister).
- [3] This matter came before us on appeal under Case Number CA&R 39/2021 on 21 February 2022 with the Municipality as the appellant and 24 respondents, including Mr Pieter Albertus Schreuder, the owner of the farm which is the subject matter of this application, cited as the first respondent. The current applicants were the 3rd, 5th, 6th, 9th, 13th 14th and 16th respondents. The other respondents have abandoned this litigation and some are said to have vacated the premises and will no longer be referred to.
- [4] The following order was made by agreement between the Municipality and the third to the twenty-fourth respondents on 21 February 2022:
- "1. *The appeal is postponed sine die.*
 2. *The third to the twenty-fourth respondents will launch an application pertaining to the constitutionality and/or the correct constitutional interpretation of section 21 of the National Building Regulations and Building Standard Act, 103 of 1977, on or before 30 April 2022. That application may include further relief.*

3. *The third to the twenty-fourth respondents undertake not to participate in any unlawful building work on the farm known as Dikdoorn within the jurisdictional area of the appellant, while the contemplated further legal action and this appeal remain pending.*

AND THE COURT DIRECTS THAT:

4. *This appeal be set down as soon as the proceedings in paragraph 2 above have been finally determined.*
5. *The Kamiesberg Municipality file the report on the alternative emergency accommodation before the appeal is set down for hearing.*
6. *A copy of this order be served on the first and second respondents pending the appeal hearing.*
7. *The office of the registrar of this Court is directed to furnish a copy of the appeal record to the Director of Public Prosecutions, Northern Cape, to determine if there is any criminal conduct on the part of the first and second respondents and any of the other respondents.*
8. *The costs of this appeal are reserved.*

THE CONDONATION APPLICATION

[5] It is the failure by the aforementioned third to twenty-fourth respondents, now the six applicants, to comply with the second order of the Court in para 4 above that led to the condonation application. The Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*¹ succinctly explained the requirements as follows:

"[22] *An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more the explanation must be reasonable.*"

¹ 2008 (2) SA 472 (CC) at para 22

It is settled that condonation cannot be had for the mere asking. Moseneke ACJ in *Ferris and Another v Firstrand Bank Ltd*² reiterated that lateness is not the only consideration when the court considers whether condonation may be granted. The test for condonation is whether it is in the interests of justice to grant it.

- [6] The applicants did not bring their application on or before 30 April 2022 as ordered by the Court but brought it 13 months later with significant unexplained gaps. Their explanation for the delay is the following as deposed to by Harmse in the founding affidavit:

6.1 Immediately after the granting of the court order on 21 February 2022 *'it was agreed that the legal representative of the 19th to 24th respondents [would] draft this application. Such draft was circulated to our legal representative on 29 April 2022, however, the legal representatives did not finalise the court papers due to a disagreement in respect of Mr Nieuwoudt.*

The founding affidavit is silent regarding, when, where and by whom the purported arrangement was agreed to.

6.2 Van Rensburg Attorneys who initially represented the 19th to the 24th respondents as attorneys of record withdrew from the matter during or about August 2022 leading to a need to obtain new legal representation. WN Attorneys were instructed during or about September 2022.

² 2014 (3) SA 39 (CC) at para 10

- 6.3 Advocate van Staden was briefed in October 2022 to settle the application which was received from him on 21 November 2022.
- 6.4 The 7th and 8th respondents (Potgieter), 17th and 18th (Kühn), became ill and left the settlement. The following also left around the same time: 10th and 11th respondents (Locke), 12th respondent (Gothan) as well as the 15th respondent (Gouws). The 19th to 24th respondents (Van Rensburg's clients) also left the settlement. The residences are currently occupied by new individuals.
- [7] The explanation furnished does not account for the entire period. The email communication marked annexure "AC1" attached to the applicants' founding affidavit shows that the legal representatives of the nineteenth to the twenty-fourth respondents forwarded the application to the current applicants' attorney, Mr Niedinger, on 29 April 2022. This was literally on the eve of the 30th April 2022, the date on which the applicants were to have filed the constitutional challenge, if so advised. No explanation was furnished for the delay between 21 February 2022 and 29 April 2022.
- [8] Niedinger's response dated 03 June 2022 to Dr Van Rensburg, the non-participating parties' attorney, adds to the silence regarding the period of delay between 29 April 2022 and 03 June 2022. Whereas Van Rensburg responded to Niedinger on 08 June 2022 there is no explanation for the further delay between 08 June 2022 and the unspecified date in October 2022 when their counsel, Mr van Staden, was allegedly briefed. A further unexplained gap appears between the period 21 November 2022 and 31 May 2023 when the application was filed.

- [9] Whereas counsel for the applicants submitted that there was a clash of interest between Van Rensburg and Niedinger, as attorneys representing the two groups of occupiers, they distanced themselves from Nieuwoudt without providing any detail save to say the applicants have 'touched' on this matter in their application. No specific details surrounding Nieuwoudt are furnished in the founding affidavit. The contents of the draft that was circulated between the legal representatives and their clients on 29 April 2022, the eve (30 April 2022) of the deadline, is also not explained.
- [10] The aforementioned explanation given by the applicants is superficial and unconvincing. It falls far short of the requirements to be met in condonation applications. We are not satisfied that the applicants are entitled to condonation in respect of their failure to launch their application timeously. There is an important principle that a litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to administer their affairs and get on with their lives. In the judicial exercise of our discretion we are not disposed to grant condonation in view of the inordinate delay and the absence of a reasonable explanation. In addition, as will become evident, the application is without merit.

THE REVIEW APPLICATION

- [11] The applicants brought the review application in terms of s 7(1) read with 9(1)(b) of the Promotion of Administrative Justice Act³ (PAJA) seeking an extension of the 180-day period within which to bring the review application. In it, they base their challenge on the assumption that the Municipality has failed to comply with the National Building Regulation A25(9) and A25(10) by failing to take a decision as contemplated in s 6(2)(g) of PAJA.

³ 3 of 2000

- [12] A brief background to this review application is to this effect. The applicants are among the many others who joined the Eureka Movement formed by Mr Adriaan Nieuwoudt in 2016. Members of this movement erected houses on a farm known as Dikdoorn which was and still is owned by Mr Pieter Albertus Schreuder after payment was made to the Eureka Movement. These houses were erected without approved building plans. The Municipality became aware of this development in November 2017 and addressed a letter under signature of the Municipal Manager, Mr JG Cloete, to Nieuwoudt (DH3) which reads:

"INSAKE: BEWEERDE DORPSTIGTING

Dit het onder ons aandag gekom dat daar na bewering 'n tipe van dorpsontwikkeling op u plaas beoog word met die naam van Eureka.

Indien daar waarheid steek in die bogenoemde bewering, word u hiermee versoek om die ontwikkeling te stop en te sorg dat die wetlike prosesse eers afgehandel word, voordat enige verdere ontwikkeling kan geskied. Die munisipaliteit het geen rekord van enige aansoek wat ingedien is in hierdie verband.

Verder vereis die Ruimtelike Beplanning en Grondgebruiks Bestuurswet, 2013, Wet 16 van 2013 dat alle aansoeke om grondgebruiksverandering in 'n Munisipale gebied, moet dien voor 'n Munisipale Beplanningstribunaal vir goedkeuring en in u geval waar landbougrond betrokke is, ook 'n goedkeuringsbrief van die Departement van Landbou.

U samewerking in hierdie verband word waardeer."⁴

⁴ Loosely translated: RE: TOWN DEVELOPMENT

It has come to our attention that there is allegedly a type of town development planned on your farm with the name of Eureka. If there is any truth in the above assertion, you are hereby requested to stop the development and ensure that the legal processes are completed before any further development can take place. The municipality has no record of any application submitted in this regard. Furthermore, the Spatial Planning and Land Use Management Act, 2013, Act 16 of 2013 requires that all applications for land use change in a Municipal area must be submitted to a Municipal Planning Tribunal for approval; and in your case where agricultural land is involved, also an approval letter from the Department of Agriculture. Your cooperation in this regard is appreciated.

- [13] Nieuwoudt responded to the Municipal Manager on 27 November 2017 under the Letter Head "Eureka Beweging" which reads:

INSAKE: BLANKE KULTUURGROEP

Geagte meneer Cloete

Ek antwoord op u pos van 13 November 2017 en verwys na die skrywe van 25 September 2017 per geregistreerde pos aan u kantoor, wat ek hierby aanheg.

*Soos in aangehegte skrywe vermeld, **is ek die sameroeper van die EUREKA Beweging en is gemagtig om namens die beweging te reageer** op sake wat die beweging aangaan.*

Ek respekteer u belangstelling en bevestig graag hiermee as volg.

- 1. Daar sal geen poging aangewend word om die grond ter spake sonder 'n behoorlike aansoek te onderverdeel nie.*
- 2. Lede wat by die intensiewe boerdery metodes betrokke wil raak sal egter op die gesamentlike regte vir hul wonings kan oprig om hier tydelik of permanent te woon en te werk.*
- 3. Daar is geen begeerte anders as om net hier ons taal en kultuur tussen ons eie mense uit te leef soos wat ander kultuurgroepe vir jare reeds doen nie.*

Alhoewel ons begeer om onself hier te handhaaf bly ons steeds daartoe verbind om waar moontlik tot die ontwikkeling van die hele omgewing ons bydrae te maak.

Ons beplan om in die loop van 2018 ons eerste groente tonnells op te rig. Ons beplan voedsel verbouing met gevorderde moderne tegnologie. Ons moet egter eers behuising vir ons mense hê voordat ons daarby kan uitkom.

Wees verseker van ons heelhartige samewerking in die toekoms en dat ons enige bepaling van die reg sal volg. Daar is geen begeerte om die regte van enige ander landsburgers ooit te skaad nie.

Vriendelike Groete.⁵

⁵ Loosely translated: RE: WHITE CULTURAL GROUP

Dear Mr. Cloete

I reply to your mail of 13 November 2017 and refer to the letter of 25 September 2017 by registered post to your office, which I am attaching hereto.

As stated in the attached letter, I am the convener of the EUREKA Movement and authorized to respond on behalf of the movement to matters concerning it.

I respect your interest and hereby confirm as follows.

1. No attempt will be made to subdivide the land without a proper application.

- [14] On 26 March 2018 Mr Carlo Viljoen, referring to himself as the legal executive officer for Eureka, wrote an email to the Municipality (DH6) recording Eureka's intention to establish a township on the farm Dikdoorn. He, among others, mentioned that the farm was bought by Eureka Pty Ltd, that the sale was concluded and that the transfer was pending. Viljoen requested to be put in contact with the Chief Town Planner and any other relevant person who would assist them with the application. On 05 October 2018 the Municipality launched an application against Schreuder in the Garies Magistrates Court. The applicants applied to be joined in the application. The Magistrate dismissed the application by the Municipality. This resulted in an appeal which was postponed *sine die* to afford the applicants an opportunity to challenge the constitutionality of s 21 of the NBSA.
- [15] Essentially, the application boils down to a move by the applicants to prevent the Municipality from demolishing their homes which they concede were erected on Dikdoorn Farm without first obtaining approved building plans by the municipality as required by s 4(1) of the National Building Regulations and Building Standards Act⁶.
- [16] It is the applicants' case that the Municipality failed to serve them with notices as contemplated in Regulations A25(9) and A25(10) of the NBSA which stipulate:

2. Members who want to get involved in intensive farming methods will, however, rely on the joint rights to erect their homes to live and work here temporarily or permanently.

3. There is no desire other than to promote our language and culture here among our own people as other cultural groups have been doing for years.

Although we wish to maintain ourselves, we remain committed to making our contribution to the development of the entire region wherever possible.

We plan to establish our first vegetable tunnels in the course of 2018. We plan food cultivation with advanced modern technology. We must first have housing for our people before reaching that stage.

Be assured of our wholehearted cooperation in future and that we will follow any provision of the law. There is no desire to vitiate the rights of any citizen ever.

Kind regards."

⁶ 103 of 1977

- "(9) *Where any building is being or has been erected and any contravention of these regulations other than those relating to matters referred to in sub-regulation (4) or (5) has been committed, **the local authority shall serve a notice on the owner of such building** and in such notice shall specify a date by which such owner shall have complied with the regulations, cite the regulations contravened and specify the steps to be taken in order to comply with such regulations.*
- (10) *Where any building, excluding a temporary building, is being or has been erected without the prior approval contemplated in section 4(1) of the Act, the local authority shall serve a notice on the owner of such building, calling upon him to obtain the approval, in writing, as required by the Act, by a date specified in such notice."*

[17] Section 4 of the NBSA, which is couched in peremptory terms, deals with the approval by local authorities of applications in respect of erection of buildings by providing the following:

- "(1) **No person shall without the prior approval in writing** of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.
- (2) *Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question.*
- (3) *Any application referred to in subsection (2) shall-*
- (a) *contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land;*
 - (b) *be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act.*
- (4) **Any person** erecting any building in contravention of the provisions of subsection (1) **shall** be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building."

[18] Section 7(1) provides for the procedure for judicial review as follows:

"(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."

[19] Section 9(1)(b) makes provision for the variation of time by stating that (1) the period of-

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

The municipality has not consented to the period being extended and has opposed the application for the extension.

[20] The contention by the applicants that the Municipality has failed to serve them with the required notice as stipulated by the National Building Regulation A25(9) and A25(10) is without merit. "Owner" is defined in section 1 of the NBSA as: 'owner', in relation to a building or land, means the person in whose name the land on which such building was or is erected or such land, as the case may be, is registered in the deeds office in question. According to the deeds search (DH2) Schreuder is the registered owner of Dikdoorn Farm. He was rightfully served and even cited as the respondent for the

transgression. Consequently, there was no need for the Municipality to have served the applicants with such notices. What exacerbates the applicants' case is that despite Nieuwoudt, as the purported coordinator, undertaking to comply with the cited law after communication by Cloete that Eureka refrain from further construction activities, the number of homes erected continued to increase.

- [21] Harmse made this startling admission in his founding affidavit which this Court must have regard to:

"Dikdoorn farm and the houses which form the basis of this application are out of sight, not an environmental or health hazard and should be out of mind. These houses bother nobody except the first respondent."

- [22] In the circumstances, it is our view that the Municipality has not, as alleged by the applicants, failed to serve the required notice as contemplated in the National Building Regulation A25(9) and A25(10).

- [23] The applicants have also not explained the relevance of invoking s 6(2)(g) of PAJA. The clause is intended to compel the administrator to take a particular administrative decision. The relief sought by the applicants by invoking s 6(2)(g) of PAJA is to oblige the Municipality to issue the Regulation A25(9) and A25(10) notice to them. Not only does this type of relief amount to a *mandamus* whose requirements have not been met, but, as stated earlier, we are not persuaded that they were entitled to be served with such notices.

- [24] It is unclear how extending the period of lateness will assist the applicants with the review application when a notice was served on the owner of the land. This, notwithstanding the fact that the delay

was inordinate and without adequate explanation. The Constitutional Court settled this aspect regarding the delay that is longer than 180 days in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*⁷ by affirming that the court must consider whether it is in the interests of justice for the time period to be extended. In *Camps Bay Ratepayers and Residents Association and Another v Harrison*⁸ Maya JA, then, writing for a unanimous court made the following salutary remarks pertaining to determining whether it is in the interests of justice to extend the 180 days:

"And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."

[25] The following information is significant.

25.1 The land on which the applicants have erected their houses is zoned for agricultural purposes only. The applicants have to date not submitted any application with the Municipality to develop a town or township on Dikdoorn farm.

25.2 The Municipality must implement the Spatial Planning Land Use Management Act, 16 of 2013 (SPLUMA). According to s 26(2)(a) of SPLUMA land may be used only for the purposes permitted by a land use scheme. Clause 2 of Schedule 2 to SPLUMA defines agricultural purposes as "*purposes normally or otherwise reasonably associated with the use of land for agricultural activities, including the use of land for structures,*

⁷ 2019 (4) SA 331 (CC) at para 47

⁸ [2010] 2 All SA 519 (SCA) at para 54

building and dwelling units reasonably necessary for or associated to the use of the land for agricultural activities.”

In this instance there has been no legalisation of town planning by the applicants or their representatives.

25.3 Section 26(3) of SPLUMA provides that where no town planning or land use scheme applied to a piece of land before a land use scheme is approved in terms of SPLUMA, such land may be used only for the purposes listed in Schedule 2 to SPLUMA and for which such land was lawfully used or could lawfully have been used immediately before the commencement of SPLUMA.

25.4 The applicants' residences were erected contrary to the provisions of SPLUMA, which conduct amounts to an offence punishable in terms of s 58(1)(b) of SPLUMA to a term of imprisonment for a period not exceeding 20 years or to a fine calculated according to the ratio determined for such imprisonment in terms of the Adjustment of Fines Act, 1991.

[26] Regard being had to the aforesaid and mindful of the purpose of the NBSA being: To provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities; for the prescribing of building standards; and for matters connected therewith, the provisions of the NBSA apply to the Kamiesberg Municipality too. Nothing exempts this Municipality from the application of the NBSA. To date no application was filed with the Municipality in an endeavour to regularise the situation.

[27] The applicants have not only failed to make out a case for the extension of the 180-day period within which to bring the review but also failed to furnish any explanation for such failure. They have

further failed to furnish reasons why it would be in the interests of justice to extend the period. It follows, therefore, that the application stands to be dismissed. **It therefore follows that their application to have the impugned failure reviewed and set aside must also fail because the interests of justice requirement has not been satisfied.**

- [28] It must be pointed out that counsel for the applicants raised a new ground of review challenging the administrative action by the Municipality to have them evicted and because of that they have a right to be informed. This ground is not in the papers. Counsel conceded that this new ground is not contained in the founding affidavit nor belatedly in the replying affidavit. He was further unable to refer the Court to any specific section in the Constitution to support his submission and sensibly abandoned the argument.

THE CONSTITUTIONALITY OF SECTION 21 OF THE NBSA

- [29] The relief sought by the applicants under this head is a declarator in respect of the constitutionality of s 21 of the National Building Regulations and Building Standards Act (the NBSA), that s 21 is unconstitutional. In the alternative, that the phrase in s 21 which reads: *"....or authorising such local authority to demolish such building...."* be declared in breach of the Constitution and therefore unconstitutional as contemplated in s 172(2)(a) of the Constitution. This, they argue, is based on the fact that the section gives a Magistrate, acting in terms of s 21, a wide and equitable discretion to order demolition, whereas a Magistrate is a creature of statute.

Section 21 of the NBSA deals with the erection and demolition of buildings and provides:

"Notwithstanding anything to the contrary contained in any law relating to magistrates' courts, a magistrate shall have jurisdiction,

on the application of any local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorizing such local authority to demolish such building if such magistrate is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorization granted thereunder."

- [30] Mr van Staden, for the applicants, submitted that in *BSB International Link CC v Readam South Africa (Pty) Ltd and Another*⁹ the SCA expressed a critical view that in its interpretation of s 21 the Court in *Lester v Ndlambe Municipality*¹⁰ may not have taken certain factors pertaining to s 21 into consideration. Counsel submitted that the applicants are vulnerable people and since they do not own any other property elsewhere the demolition of their houses may result in their eviction. The applicants contend that s 21 may not be justifiable in terms of s 36 of the Constitution and further does not accord with Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹¹(PIE) and Extension of Security of Tenure Act¹² (ESTA). The applicants contend that in *Lester* the judgment does not take into consideration s 10 of the Constitution which affords everyone the right to dignity as well as s 26(1) of the Constitution which affords everyone the right to have access to adequate housing.

- [31] The correct approach when interpreting documents, including legislation, has become settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹³ Wallis JA said:

"[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the

⁹ 2016 (4) SA 83 (SCA)

¹⁰ 2015 (6) SA 283 (SCA)

¹¹ 19 of 1998

¹² 62 of 1997

¹³ 2012 (4) SA 593 (SCA)

circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[32] Section 172 of the Constitution¹⁴ deals with powers of courts in constitutional matters and provides:

- "(1) When deciding a constitutional matter within its power, a court-
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

¹⁴ Act 108 of 1996

- [33] Mr Knoetze SC, for the Municipality, invoked *Miya v Matleko - Seifert*¹⁵ in countering the submission by Mr Van Staden that s 21 does not give a Magistrate any discretion to take the circumstances of the people involved into account. Counsel maintained that the Court found in *Miya* that eviction and demolition are constitutional issues which enjoins a Magistrate to consider s 172 of the Constitution before making an order. The Court in *Miya*¹⁶ remarked:

"[77] In any event, s 172(1)(b) of the Constitution empowers a court to make any order that is just and equitable when deciding a constitutional matter within its power. The granting of an eviction order in terms of PIE is a constitutional matter, in that it implicates the appellant's right to have access to adequate housing in terms of s 26(1) of the Constitution, and her right in terms of s 26(3) of the Constitution not to be evicted from her home without an order of court made after considering all the relevant circumstances. At the same time, the respondent's right to property in s 25 of the Constitution is implicated. An order can be made in terms of s 172 of the Constitution, that is just and equitable without first necessarily declaring any law or conduct invalid as being inconsistent with the Constitution."

- [34] Ackermann J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powel NO and Others*¹⁷ stated that the test for invalidity of a statutory provision is objective; and that the subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any competent Court, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law, the Court stated. Whereas Mr Van Staden has emphasised the age of the applicants for consideration by this Court, that should not be the only

¹⁵ 2023 (1) SA 208 (GJ)

¹⁶ Ibid at para 77

¹⁷ 1996 (1) SA 984 (CC)

consideration to tilt the decision in their favour. Doing so would, in our view, afford litigants unequal protection of the law.

[35] Ms Moroka SC, for the Minister, submitted that despite s 21 being assailed by the applicants, the Minister maintains the stance that it is constitutional. The applicants refer in emotive terms that the section was legislated during the apartheid era but the law must be read through the prism of the Constitution. The attack on the constitutional validity is misconceived, regard being had to the provisions of s 39(2) of the Constitution. The interpretation of s 21 must be done through the prism of the Bill of Rights, counsel contended.

[36] The interpretation of s 21 is crucial because all the parties referred to the three judgments by the Supreme Court of Appeal (SCA) namely, *Lester*, *BSB International Link CC v Readam SA*¹⁸ (Readam) and *Serengeti Rise Industries v Aboobaker*¹⁹ (Serengeti). In *Readam*²⁰, the court of first instance granted an order in favour of Readam for a partial demolition in a case involving an encroachment on Readam's land. BSB international noted an appeal. Notwithstanding that the Municipality was cited as respondent, it did not participate in the proceedings. Ponnan et Swain JJA stated:

"[23] ...However, it is clear that only a local authority or the Minister has locus standi to bring an application in terms of s 21 before a magistrate. The statutory right to seek the remedies provided for in s 21 is clearly intended to enable local authorities and the Minister to ensure compliance with the provisions of the NBSA in relation to town-planning schemes. Consequently an individual with standing to bring an application to review and set aside the unlawful approval of building plans by a local authority would not have locus standi to pursue the remedies provided for in s 21. Such an

¹⁸ 2016 (4) SA 83 (SCA)

¹⁹ 2017 (6) SA 581 (SCA).

²⁰ Ibid at para 23

individual would be restricted to seeking a mandamus in appropriate circumstances to compel the municipality or the Minister to act in terms of s 21 of the NBSA, should the municipality or Minister have failed so to act."

The distinction between *Lester* and *Readam* is that in *Lester* the Municipality was a party to the proceedings and invoked s 21 as required unlike in *Readam*. The criticism levelled against *Lester* appears in paras 27 and 28 of Readam's judgment. Emphasis is that because of the draconian nature of s 21 there must be judicial oversight. *Readam* did not seek a public law remedy under s 21 nor rely on any of the provisions of the NBSA. We are of the view that *Readam* is distinguishable on the facts.

- [37] In *Serengeti* the appeal court considered the validity of a demolition order granted by the KwaZulu-Natal Division of the High Court. The SCA stated that *Lester* must now be read in the light of *BSB International (Pty) Ltd v Readam South Africa*, which is the later judgment. The facts in *Serengeti* are also distinguishable from the facts in *Lester*.

- [38] The case of *Lester* involved the unlawful erection of a primary residence without approved building plans as required by s 4(1) of the NBSA. The Court in *Lester* found that the protection afforded in s 26(3) must therefore always, without exception, be read against the backdrop of the right to have access to adequate housing, enshrined in s 26(1). Thus, where a person facing a demolition order does not adduce any evidence that he or she would not, in the event of his or her dwelling being demolished by order of a court, be able to afford alternative housing, s 26(1) is of no avail to him or her. The applicants *in casu*, apart from emphasising their age and vulnerability, the calamitous financial implications, that the residences are out of sight and do not bother anyone, were also adamant that they are developing Eureka as a town to promote their

culture and language. They did not aver anywhere in the papers that they would be rendered homeless and destitute by the demolition.

- [39] The Courts have already pronounced in several matters that what constitutes '*adequate housing*' is a factual enquiry. The question that remains to be answered is whether the right of access to adequate housing would be compromised by the demolition of the erected unlawful structures. We do not think so. The primary issue is not that they cannot occupy the farm and any lawful structures but the unlawfully erected structures without approved plans.
- [40] As pointed out by Majiedt JA, then, in *Lester*, s 21 must be read with ss 4(1) and 4(4) of the NBSA. Sec 21 authorises a Magistrate on application of a local authority or the Minister to order demolition of a building erected without any approval under the Act. The applicants have conceded that the residences have been erected unlawfully and without building plans. It follows that the law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so, Majiet JA found, would be to subvert the doctrine of legality and to undermine the rule of law.
- [41] In any event, the applicants had been aware since November 2017 that the town development was embarked upon in contravention of the law and without building plans. Nothing prevented Schreuder as the owner of the property and Nieuwoudt as the coordinator or their experts or even legal advisors from accessing the relevant documentation from the Municipality and following the required processes. The reaction by the applicants at this stage is nothing short of arrogant indifference.

[42] We are mindful of the financial implications, the inconvenience and some degree of disruption in the lives of the applicants that may ensue in consequence of an adverse decision. Sight cannot be lost of the fact that the houses that form the subject of this application are detrimental to the environment and are a health hazard as highlighted in the report dated 07 October 2019 compiled by the Department of Water and Sanitation. Should this court incline to find s 21 unconstitutional, the effect thereof would lead to unlawful land invasions.

[43] Dambuza JA in *Serengeti* held that sections 38 and 172 enjoin Courts to order case-appropriate remedies. This means that when a party seeks a relief in terms of s 21 the court is not compelled to order demolition but is enjoined to order a case-appropriate order promoting the spirit, purport and objects of the Constitution and the Bill of Rights. We are not persuaded that s 21 is in conflict with the provisions of the Constitution, in fact, that it is unconstitutional. There is also nothing wrong with the phrase in s 21 that reads "or authorising such local authority to demolish such building", as was contended for by the applicants.

[44] Section 172(1)(b) of the Constitution empowers a Court to make any order that is just and equitable when deciding a constitutional matter within its power. In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*²¹ Moseneke DCJ made the following salutary remarks:

"[97] *It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order*

²¹ 2010 (2) SA 415 (CC) para 97

may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution."

- [45] The applicants have, in our view, failed to make out a case for the declaration of s 21 of the NBSA unconstitutional. There is also no merit in finding that the Magistrate, in ordering the demolition of a building or some buildings, lacks discretionary powers. We are of the view that whereas the Magistrate is not obliged to issue the order once the jurisdictional fact is established, he or she may issue the order if justified. The applicants' reliance on sections 25 and 26 of the Constitution was misplaced.

It follows that the application to declare s21 unconstitutional stands to fail.

- [46] On the question of costs. Awarding of costs remains a discretion of the Court which must be exercised judicially. The applicants have been truant in their handling of this matter leading to unnecessary delays in litigation coupled with spurious court processes. Their conduct is not completely innocent. However, this case does implicate constitutional issues such as the applicants' rights under the Bill of Rights. Hence senior counsel was involved. It would accordingly be fair and equitable to invoke *Biowatch Trust v*

*Registrar Genetic Resources and Others*²² and order that each party must bear its own costs.

[47] In the result, the following order is made:

1. The application for condonation is denied.
2. The whole of the application is dismissed.
3. It is ordered that each party bears its own costs.


MC MAMOSEBO
JUDGE OF THE HIGH COURT
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²² (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)