IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

Case No: 2938/2014

In the matter between:-

NOMZAMO WINIFRED ZANYIWE MADIKIZELA MANDELA	Applicant

and

THE EXECUTORS ESTATE LATE NELSON ROLIHLAHLA MANDELA	1st Respondent
THE REGISTRAR OF DEEDS, MTHATHA	2nd Respondent
MINISTER OF LAND AFFAIRS FOR THE REPUBLIC OF SOUTH AFRICA	3rd Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	4th Respondent
THE NELSON MANDELA FAMILY TRUST	5th Respondent
THE MASTER FOR THE HIGH COURT, SOUTH GAUTENG	6th Respondent
GRACA MACHEL	7th Respondent
EBOTWE TRIBAL AUTHORITY	8th Respondent
ZWELIDUMILE MBANDE	9th Respondent

CORAM: MAKGOBA, JP *et* VAN DER MERWE *et* TEFFO, JJ

JUDGMENT BY: THE COURT

HEARD ON: 29 FEBRUARY 2016 and 1 MARCH 2016

DELIVERED ON: 07 APRIL 2016

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[1] This application concerns the rights to the land described in Deed of Grant G7307/1999 as:

> "Lot KWA MADIBA (portion of A. A. No. 20 called QUNU) situate in the Administrative District of Umtata Province of the Eastern Cape
> In EXTENT NINE SIX COMMA EIGHT NINE FIVE NINE (96,8959) HECTARE" (the property).

The property is situated at Qunu, the birthplace of the late former President of the Republic of South Africa, Mr Nelson Rolihlahla Mandela. On 16 November 1997 the third respondent, the Minister of Land Affairs for the RSA (the Minister) took a decision to donate the property to Mr Mandela (the Minister's decision). The Minister acted on recommendation of the Director-General of the Department of Land Affairs and in terms of the State Land Disposal Act 48 of 1961. As a result, the second respondent, the Registrar of Deeds, Mthatha, registered the property in the name of Mr Mandela in terms of Deed of Grant G7307/1999.

[2] The applicant, Mrs Nomzamo Winifred Zanyiwe Madikizela Mandela, in essence seeks an order reviewing and setting aside the Minister's decision. It is not necessary to detail the further prayers contained in the amended notice of motion. It suffices to say that they are for a relief that are depended on or consequential to the review and setting aside of the Minister's decision.

[3] The application is opposed by the first respondent, the executors of the estate of Mr Mandela (the executors). The executors are Justice Dikgang Moseneke, Judge President Themba Sangoni and Advocate George Bizos SC. The application is also opposed by the Minister. The eighth respondent, the Ebotwe Tribal Authority,

and the ninth respondent, Mr Zwelidumile Mbande, were represented before us, but did not oppose the application. None of the other respondents filed papers or participated in the hearing of the matter.

[4] It is firstly necessary to determine the boundaries of the evidence on which the application must be determined. Two matters must be considered. First, the executors asked that certain documents constituting hearsay evidence be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. Secondly, on 1 February 2016, the Minister filed an application for the admission of yet a further set of affidavits. As we will indicate, the case for Mrs Mandela entails consideration of events that took place during the period from 1989 to 1997. The admissibility of the evidence must be determined against this background.

[5] Only two documents that the executors asked to be admitted in terms of Act 45 of 1988, need to be considered. They are an unsigned affidavit of Mr Mandela and a press statement regarding events that took place in Qunu during December 1955.

[6] Advocate Bizos, who deposed to the answering affidavit on behalf of the executors, had attended the hearing of the divorce proceedings between Mr and Mrs Mandela. He stated that the affidavit of Mr Mandela had been filed on 15 March 1996, in opposition to an application by Mrs Mandela for postponement of the divorce proceedings. He said that although the signed version of Mr Mandela's affidavit could not be located, he was able to

confirm the authenticity thereof, as well as that Mrs Mandela filed a replying affidavit thereto. Mrs Mandela's bare denial hereof did not create a real or genuine dispute of facts. We accept the evidence regarding the circumstances and authenticity of Mr Mandela's affidavit. The relevance of the affidavit lies in its description of the state of the marital relationship between Mr and Mrs Mandela and the issues in their divorce proceedings.

[7] The press statement read:

> "**PRESIDENT MANDELA DONATES R150.000.00 TO THE QUNU COMMUNITY**
>
> During December 1995, while President NELSON MANDELA was holidaying at his home at Qunu Village just outside UMTATA in the Eastern Cape, local residents and the E-BHOTWE Tribal Authority, all led by King BUYELEKHAYA ZWELIBANZI DALINDYEBO and local chiefs, decided to extend the extent of the President's rural allotment in the village. The decision was reached as a token of expressing the Thembu tribe's appreciation for the President's service to the people of South Africa, the liberation struggle and personal sacrifice and suffering. It was felt that he should have learned sufficient to enable him to consider spending his retirement days at his rural home and be able to practice farming.
>
> In accepting the offer President MANDELA responded by donating a sum of R150 000,00 to the residents of QUNU to be utilised for a community project. He further nominated Messrs BANTU HOLOMISA, DUMISA NTSEBEZA and TEMBA SANGONI to set up a committee incorporating the chieftains of the area and a representative of King DALINDYEBO to

> monitor the use of the funds. The residents themselves, however, will decide on the project or projects to be undertaken."

Although the source of the press statement is unknown, it is not disputed that it was a publically announced contemporary statement in respect of events that were uncontentious at the time. Thus there appears to have been no motive or reason for the making of a false statement. And an unbiased contemporary press statement will generally be more reliable than human recollection after the expiry of a period of some 20 years.

[8] Taking into account the factors set out in section 3(1)(c)(i)-(vi) of Act 45 of 1998, we are of the opinion that the affidavit and press statement should be admitted in the interest of justice.

[9] The factors relevant to the admission of further affidavits in motion proceedings are the reasons for the late tendering of the affidavits, the relevance and materiality of the contents thereof and the question of prejudice to the other party or parties. As to the reasons for the late tendering of the affidavits, the Minister pointed to the difficulties in finding witnesses in respect of matters that happened many years before. The contents of the additional affidavits are relevant and may be material. Although not abandoning her objection to the admission of the affidavits, Mrs Mandela proactively filed answering affidavits to the additional affidavits. The admission of these affidavits can cause no real prejudice to Mrs Mandela. In the circumstances they are admitted.

[10] The relevant factual background of the matter can now be set out. During 1958 Mr and Mrs Mandela were married in terms of customary law. Lobola of 10 cattle was paid. Thereafter, on 14 June 1958, they entered into a civil marriage. It is common cause that that marriage was out of community of property. During 1964 Mr Mandela was sentenced to life imprisonment. He was eventually released from prison during 1990. Upon his release he rejoined his wife. He also visited Qunu and decided to build his home there. He resolved to build a replica of the house in which he stayed during the latter part of his incarceration at Victor Verster prison.

[11] However, the marriage relationship between Mr and Mrs Mandela deteriorated. During April 1992 Mr Mandela finally decided to put an end to their marriage. This was publicly announced at a press conference held on 13 April 1992. Thereafter no marital relationship or co-habitation existed between them. Mrs Mandela defended the divorce action instituted by her husband. She also filed a counterclaim for the transfer of half of the estate of Mr Mandela in terms of the provisions of section 7 of the Divorce Act 70 of 1979. The marriage was ended by decree of divorce made on 19 March 1996. The counterclaim was dismissed.

[12] In meantime, during the period from 1993 to 1995, the house was built on a site measuring approximately 9 hectares that now forms part of the property (the original site). On 5 March 1995 official permission to occupy the original site as from 2 January 1995, was issued to Mr Mandela by the former government of the Republic of

Transkei. On 5 January 1996 Chief Mtirara wrote to the magistrate of Mthatha stating that the extension of the original site of Mr Mandela from approximately 9 hectares to approximately 101,5 hectares, carried the approval of the relevant tribal authority. There can be no doubt that at all times during and after the building of the house, Mr Mandela regarded it as his home. In due course Mr Mandela married Ms Graca Machel, the seventh respondent. Mr Mandela passed away on 5 December 2013. In paragraph 4.5.3 of his will he bequeathed the property to the NRM Family Trust in the following terms:

> "I bequeath the Qunu Property and the movable assets of my estate in or on it at the time of my death, to THE NRM FAMILY TRUST. It is my wish that the trustees of THE NRM FAMILY TRUST administer the Qunu Property for the benefit of the MANDELA family and my third wife and her two children, MALENGANE MACHEL and JOSINA MACHEL. The Qunu Property should be used by my family in perpetuity in order to preserve the unity of the MANDELA family."

[13] It is not disputed that the property was State land as defined in the State Land Disposal Act. Proclamation 67 in *Government Gazette No. 16511 of 7 July 1995* declared the State Land Disposal Act applicable to *inter alia* the former territory of Transkei. This proclamation also amended the Act in so far as it was made applicable to the former territory of Transkei by defining "Minister" as the Minister of Land Affairs in the national government. Section 2(1) of the State Land Disposal Act provides that subject to the provisions of subsection (2) and (3), the President may, on such terms and conditions as he may deem fit, sell, exchange, donate or

lease any State land on behalf of the State. In terms of section 6 the President may assign this power to the Minister. Mrs Mandela did not aver that the power in terms of Section 2(1) had not as a fact been assigned to the Minister and did not dispute the evidence of the Minister that it had been so assigned.

[14] Mrs Mandela's case on the merits as developed in argument before us, stripped to its essentials, was that the Minister's decision was unlawful as it had been taken in disregard of her rights to the property. Her case was that she obtained an informal right of occupation and use of the original site, the subsequently extended site and the property, because the original site had been allocated to her during 1989 by the King and chiefs of the AbaThembu and the community of Qunu. In any event, so it was averred, she retained the right of occupation and use of the property under customary law, because of the continued existence of the customary marriage, despite the civil marriage and the dissolution thereof. According to Mrs Mandela her customary marriage to Mr Mandela was never ended and continued to exist until his death. Finally, her case was that the consent of the community of Qunu to the donation of the property to Mr Mandela was a statutory requirement and that no such consent had been given.

[15] As we have said, the impugned decision was taken on 16 November 1997. Mrs Mandela deposed to the founding affidavit herein nearly 17 years after the Minister's decision. The executors and the Minister argued that there had been an unreasonable delay and that for that reason, we should refuse to entertain the

application. Whether the application should be dismissed on this ground, is the question that we now turn to.

[16] 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 twofold. 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. 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 respondent 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. The application of the rule requires answering of two questions, namely:

(a) Was there an unreasonable delay?

(b) If so, should the unreasonable delay be condoned?

Although the first question implies a value judgment, it entails a factual enquiry. The second question involves the exercise of a judicial discretion. Both questions must of course be answered in light of the facts and circumstances of the particular case. (See **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978 (1) SA 13 (A) at 38H – 42D; **Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander** 1986 (2) SA 57 (A) at 86A-G; **Associated Institutions Pension Fund and Others v Van Zyl and Others** 2005 (2) SA 302 (SCA) paras [46] – [48]; **Gqwetha v Transkei Development Corporation Limited** [2006] 3 All SA (245) paras [22] – [24].)

[17] 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).)"

In our view the same considerations are applicable to the question of knowledge of the decision. It should be legally insufficient 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 for reasonable steps in the circumstances. The court should therefore 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.

[18] 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 respondent and/or third parties and the nature of the impugned decision.

[19] In **Wolgroeiers** the appellant applied for subdivision of an erf. The application was granted by the Administrator of the Cape Province, *inter alia* subject to the condition that the appellant pay an amount equal to 5% of the sale price of the subdivided erven to the municipality of Cape Town. The appellant paid the amount to the municipality. Approximately 3½ years after the decision of the Administrator, the appellant launched an application for the review and setting aside of the said condition only and for repayment of the said amount by the municipality.

[20] The court found that the appellant had unreasonably delayed the institution of the review. The court also refused to exercise its

discretion to overlook the unreasonable delay, even though it found that the review would have succeeded. In determining this issue, Miller JA said (at 43H) that it was relevant to consider the consequences of setting aside the decision to impose the condition. He said that if the imposition of the condition were to be said aside, the matter would presumably be referred back to the Administrator for reconsideration. He stated that the possibility that the same condition could be re-imposed, could not be excluded. Miller JA also said that even if the condition were to be set aside, it was as a matter of law by no means clear that the claim for repayment against the municipality would succeed.

[21] **Wolgroeiers** therefore provides clear authority that the prospect of anything meaningful being achieved by the applicant in the event of the review application succeeding, is a relevant consideration in the exercise of the discretion to condone the unreasonable delay of review proceedings.

[22] In **Gqwetha** there was a divergence of opinion on the question whether, apart from the consideration mentioned in **Wolgroeiers**, the prospect of success in the review application itself was a relevant consideration. Mpati DP, with whom Farlam JA concurred, held at paras [18] and [19] that it clearly was. Nugent JA, with whom Navsa JA and Van Heerden JA concurred, was of the opinion at paras [34] and [35] that the prospect of the challenged decision being set aside is not a material consideration in the absence of an evaluation of what the consequences of setting the decision aside are likely to be. However, the issue has since been

settled by the Constitutional Court. In **Khumalo and Another v MEC for Education, KwaZulu-Natal** 2014 (5) SA 579 (CC) the following was said on behalf of the majority at para [57]:

> "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."

(See also **Beweging vir Christelik–Volkseie Onderwys and Others v Minister of Education and Others** [2012] 2 All SA 462 (SCA) at para [47])

[23] Where the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is applicable, the common law delay rule find its basis in PAJA. (See **Opposition to Urban Tolling Alliance v South African National Roads Agency Limited** [2013] 4 All SA 639 (SCA) paras [23] – [26]; **Beweging vir Christelik-Volkseie Onderwys and Others** para [46]). 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."

Section 9(1) provides that the period of 180 days referred to in section 7 may be extended for a fixed period by agreement between the parties or by a court on application by the person concerned. In terms of section 9(2) the court may grant an application in terms of section 9(1) where the interests of justice so require. In **Opposition to Urban Tolling Alliance** at para [26] the court referred to the two-stage enquiry at common law and proceeded to explain:

> "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 s 9. 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."

[24] On Mrs Mandela's case, the Minister's decision falls within the definition of "administrative action" in PAJA. On this basis it was a decision by a person when performing a public function in terms of an empowering provision which adversely affected the rights of a person or persons and which had direct, external legal effect. The Minister's decision was taken after the advent of the final

Constitution but before the commencement of PAJA. For this reason the right to review the Minister's decision stemmed from section 33 of the Constitution (See **Associated Institutions Pension Fund** at para [36]). But in our view PAJA is a applicable to proceedings for review of administrative action as defined therein, launched after its commencement. It should be added that in this matter it makes little or no difference whether the question of unreasonable delay is decided in terms of the common law or PAJA.

[25] The first question is whether as a fact, Mrs Mandela unreasonably delayed the launch of these proceedings. Mrs Mandela stated that she only became aware of the registration of the property in the name of Mr Mandela and therefore of the Minister's decision, after the death of Mr Mandela, when she became aware of the contents of his will. This was not denied by the executors or the Minister. But, as we have said, that is not the end of the enquiry. The question is when a reasonable person in shoes of Mrs Mandela would have acquired knowledge of the Minister's decision.

[26] It is undisputed that during April 1992 Mr Mandela had finally decided to put an end to the marital relationship with Mrs Mandela. It is also undisputed that by April 1992 the marital relationship between Mr and Mrs Mandela had irretrievably broken down. It is common cause that the house on the property was built during the period from 1993 to 1995. Mrs Mandela's statement that "I spend (sic) a lot of energy in the acquisition, construction and building of the Traditional home at Qunu" and that "I contributed immensely to

the building of our homestead at Qunu", are disingenuous. The house was built for Mr Mandela according to his wishes and the property was thereafter used by him as his home to the exclusion of any right of Mrs Mandela. This denial of her rights would have been clear to any reasonable person in the shoes of Mrs Mandela. The reasonable person in the position of Mrs Mandela would have regarded recognition of her rights to the property as a critical issue in the divorce proceedings. Such reasonable person would have asserted her rights to the property during the divorce proceedings. Mrs Mandela rightly did not complain of lack of resources or of professional assistance. Assertion of the right to the property during the divorce proceedings would no doubt have uncovered the steps taken to donate the land to Mr Mandela. A reasonable person would have continued to follow up on the information indicating a disregard of her rights. It follows that the reasonable person would have been aware of the Minister's decision virtually as soon as it was taken. As the property was donated, the reason for the decision is not material.

[27] In our judgment the delay must be calculated from the end of 1997. This is a delay of nearly 17 years, many times more than the period of 180 days. Although each case must be decided on its own facts, the finding in **Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another** 2011 (4) SA 42 (CC) at para [54] that a delay of approximately 3 years was clearly inordinate, places the present delay in perspective. It follows from what we have said in the previous paragraph, that

there is no acceptable explanation for the delay. We find that there has been an unreasonable delay in launching this application.

[28] Should the delay be condoned? The period of the delay was excessive and was not satisfactorily explained. The prejudice to the executors and the beneficiaries of the will is manifest. Because of the delay they were unable to present the evidence of a material witness, namely Mr Mandela. At no time during the lifetime of Mr Mandela did Mrs Mandela lay claim to the property. He arranged his affairs and made the dispositions in his will on the acceptance that he had unencumbered ownership of the property. The property constituted a major financial and emotional asset in his estate. To overturn this position would be grossly prejudicial.

[29] We accept that the Minister's decision would have been unlawful if it was taken in disregard of the rights of Mrs Mandela. In such a case the decision would have been contrary to section 33 of the Constitution and section 2(1) of the Interim Protection of Informal Land Rights Act 31 of 1996, which provides that no person may be deprived of any informal right to land without his or her consent. In the present context the prospects of showing the existence of the alleged rights of Mrs Mandela must now be considered.

[30] Mrs Mandela said that at a meeting held during 1989, the original site was allocated to her by the King of the AbaThembu, Buyelekhaya Dalindyebo and several chiefs, subject to the approval of the community of Qunu. She said that some days later a community meeting took place during which the original site was

allocated to her. This is supported by the affidavits of several persons, including King Buyelekhaya Dalindyebo. Most of these affidavits are however in rather vague terms. On the other hand there is evidence that King Buyelekhaya Dalindyebo was in exile until 1990 and that he in fact presided over the allocation of the extended site to Mr Mandela during 1995. This is stated by General Bantubonke Holomisa and Chief Mtirara and supported by the press statement. The latter evidence cannot be described as farfetched or clearly untenable. It goes without saying that Mrs Mandela would have to show that the original site and the extended site were allocated to her in personal capacity and not in her capacity as representative or wife of Mr Mandela. Whether an allocation of land to a married woman in her personal capacity was possible in under customary law, is open to question. Taking into account that the merits of the application will have to be decided on the version of the respondents, it would appear that the prospects of showing that the original site and the extended site were allocated to Mrs Mandela in her personal capacity, are not strong.

[31] The alternative averment that the customary continued to exist, is based on the proposition that even if there was a complete parting of ways, a customary marriage is not terminated until the return of the lobola is made or negotiated. On this question there was a difference of opinion between the experts Prof D. S. Koyana and Prof R B Mqeke. Prof Mqeke supported this proposition whereas Prof Koyana said that the customary marriage is ended if in such a case the husband elects not to claim a refund of the lobola. But this issue would be irrelevant if the customary marriage did not

survived the civil marriage and divorce. When parties who had been married in terms of customary law, thereafter entered into a civil marriage before 2 December 1988, the civil marriage prevailed. It superseded ad extinguished the customary marriage. (See J C Bekker **Seymour's Customary Law in South Africa,** fifth edition, p 269 – 270; T W Bennett, **Customary Law in South Africa**, p 236 – 240.) In any event, parties married in terms of customary law might enter into a civil marriage with the intent to relinquish the customary marriage and the consequences thereof. That this was the case when Mr and Mrs Mandela entered into their civil marriage, appears to be supported by the conduct of both Mr and Mrs Mandela. Mr Mandela was clearly of the opinion that the divorce order brought about a final end to all legal relationships with Mrs Mandela. She, in turn, did not at any time after the divorce order and during the lifetime of Mr Mandela rely on the continued existence of the customary marriage nor did she attempt to assert any right flowing therefrom. The prospects of showing that the customary marriage remained in existence thus appear to be tenuous.

[32] Regarding the consent of the community of Qunu we were referred to the Upgrading of Land Tenure Rights Act 112 of 1991. Section 3 (1) thereof, read with Schedule 2, deals with conversion of land tenure rights into ownership. It *inter alia* provides that where the State is the owner of a piece of land situated outside a formalised township which piece of land is lawfully occupied by a tribe or community, a deed of transfer in respect of that land shall not be submitted unless the consent of the tribe or community has been

obtained. Irrespective of whether the community of Qunu was a tribe or community as defined in this Act, the consent had to be given by decision taken by a majority of the members of the tribe or community over the age 18 years present or represented at a meeting convened for the purpose of considering the disposal of a right in land lawfully occupied by or allocated for the use of such tribe or community, of which they have been given sufficient notice, and in which they had a reasonable opportunity to participate.

[33] We are prepared to accept, without deciding, that such a formal resolution by the community of Qunu was not obtained in respect of the donation to Mr Mandela. But it is important to note that this requirement would be relevant only if Mrs Mandela did not have the right of occupation and use of the property. If she had obtained the right of occupation and use of the property from the community as she claimed, no rights of the community would be implicated. For the same reason the community of Qunu would not have been deprived of an informal right to land in terms section (2)1 of Act 34 of 1996 if the informal right vested in Mrs Mandela. In the absence of a right to the property, Mrs Mandela may not achieve anything meaningful by the review and setting aside of the Minister's decision on this ground. If the Minister's decision is reviewed and set aside on this ground, the matter would probably be referred back to the Minister for reconsideration. In such a case the result may very well be that after a proper resolution of the community of Qunu, the property remains at the disposal of the executors.

[34] In our view, the nature of the application, the strength of the merits of the application and the prospects of the Mrs Mandela achieving anything meaningful also do not favour overlooking the delay. In the exercise of our discretion we conclude that the delay should not be condoned. In the result, in the words of Brand JA in **Opposition to Urban Tolling Alliance** at para [41], we are prevented by the provisions of section 7(1) PAJA from embarking upon the merits of review application.

[35] The executors and the Minister asked that Mrs Mandela be ordered to pay their costs of the application. Relying on **Biowatch Trust v Registrar, Genetic Resources and Others** 2009 (6) SA 232 (CC), counsel for Mrs Mandela submitted that in the event of dismissal of the application, there should be no order as to costs. However, no Constitutional rights were considered, because of Mrs Mandela's unreasonable delay. Costs should follow the result, save in respect of the eighth and ninth respondents. They should bear their own costs.

[36] The following order is issued:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the first respondent and the third respondent, in each case with the inclusion of the costs of two counsel.

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E.M. MAKGOBA, JP

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C. H. G. VAN DER MERWE, J

_____
M. J. TEFFO, J

On behalf of the applicant:	P. Mtshaulana SC with K. Pillay SC and Z. Madlanga
On behalf of the first respondent:	V. Maleka SC with T. Ngcukaitobi
On behalf of the third respondent:	V. S. Notshe SC with Ms Pango
On behalf of the eighth and ninth respondents:	S. M. Luzipo with S. Malunga

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