

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

CASE NO:

In the matter between:

ANGELINA MATSHEKE	First Applicant
ZAMILE DYONASE	Second Applicant
ALBERT DYONASE	Third Applicant
ESTHER NOZILE DYONASE	Fourth Applicant
TANDIWE DYONASE	Fifth Applicant
MICHAEL DYONASE	Sixth Applicant
NOMASE KOBOKA	Seventh Applicant
NCEDO KOTI	Eighth Applicant
SIDABE MXINZELELI	Nineth Applicant
LUMKA SIKADE	Tenth Applicant
NOWALAKAZI ELISE DYEKE	Eleventh Applicant
NOWINSETHI BAMANA	Twelfth Applicant
NONKISE KETSE	Thirteenth Applicant
ZOLILE MFUNDISI	Fourteenth Applicant
THANDIMATEYISE	Fifteenth Applicant

and

THE MINISTER OF  
LAND REFORM AND RURAL DEVELOPMENT

First Respondent

DIRECTOR GENERAL OF THE DEPARTMENT  
OF AGRICULTURE, LAND REFORM AND  
RURAL DEVELOPMENT

Second Respondent

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CHRIS HANI DISTRICT MUNICIPALITY

Third Respondent

ENOCH MGIJIMA LOCAL MUNICIPALITY

Fourth Respondent

AMATSHATSHU TRADITIONAL COUNCIL

Fifth Respondent

LWAZI/MNINAWA ZICINA

Sixth Respondent

THE REGISTRAR OF DEEDS, MTHATHA

Seventh Respondent

MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS

Eighth Respondent

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FOUNDING AFFIDAVIT

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I, the undersigned,

**SIPESIHLE MGUGA**

do hereby make oath and say that:

1. I am an adult female attorney based at the Legal Resources Centre with offices at 116 High Street Makhanda, Eastern Cape. I am the attorney of record of the Applicants.
2. The facts contained in this affidavit fall within my own personal knowledge and belief, save where the contrary appears from the context. They are, to the best of my knowledge and belief, both true and correct.

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## I INTRODUCTION

3. The applicants in this matter have informal rights to land as defined in the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The applicants' rights are in respect of portions of two farms, called Maties and Forest Range. These two farms form part of a block of 33 farms, collectively referred to as Gwatyu. The state owns all the farms in Gwatyu.
4. The applicants have lived and farmed on Maties and Forest Range undisturbed and as if they are the owners for at least thirty years—many for their entire lives.
5. However, some of the respondents, in particular the Department of Land Reform and Rural Development (**Department**) and the AmaTshaTshu Traditional Council, have refused to acknowledge the applicants' rights. The Department and Traditional Council have on several occasions over the last decade, taken various decisions, and made numerous statements, inconsistent with the applicants' rights. The Department, the Traditional Council, and various state officials, *dispute* the existence of the applicants' rights.
6. The applicants approach this Court for declaratory relief. The applicants seek an order declaring that they hold informal rights to land under IPILRA. This declaration, if granted, will resolve a decades-long dispute between the applicants and various organs of state. The declaration, moreover, will affirm the applicants' constitutionally guaranteed security of tenure and obviate threats to that security of tenure.

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7. The circumstances of this case warrant a declaration of the content of the applicants' informal land rights. The applicants seek an order declaring that their informal land rights, *in this case*, entitle them to enjoy certain land as if they were owners. The applicants' informal rights to land, enforceable against the whole world, include the "ownership" rights to possess, use, and (to an extent) alienate the land.
8. The applicants also seek an order directing the registration of their informal rights to land on the relevant land's title deed. The applicants' informal rights to land are real rights. These rights can and should be registered—like any other real right.
9. This application therefore turns on three straightforward issues.
  - 9.1. First, do the applicants bear informal rights to land as defined in IPILRA?
  - 9.2. Second, if so, what is the content of those informal rights to land in this case?
  - 9.3. Third, are those informal rights to land real rights capable of registration on the relevant land's title deed?
10. In this affidavit, the **main affidavit**, I deal with these three core issues directly.
11. While this case turns on these three simple issues, the facts of this matter are complex.
12. There are two intricate strands to the facts of this matter.

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- 12.1. First, the land's history. Gwatyu has a relevant history of over 200 years. The history involves violent dispossessions, colonialism, apartheid land policies, and a revolving door of owners or lessees.
- 12.2. Second, the applicants' communications with the state. The state, through various organs, has interacted with Gwatyu's occupants since 1995. These interactions reveal how organs of state have consistently either ignored or disputed the applicants' informal land rights.
13. To avoid repetition and prolixity, the applicants have divided these two strands between two further affidavits.
- 13.1. Dr Rosalie Kingwill, has deposed to a separate affidavit in which she deals with Gwatyu's history in detail based on her own work there and the key historic texts. This affidavit is the **history affidavit**.
- 13.2. Thembakazi Matsheke, has deposed to a separate affidavit in which she deals with the state's interactions with Gwatyu in detail. This affidavit is the **interactions affidavit**.
14. Throughout the main affidavit I will refer to pertinent paragraphs in the history and interactions affidavits. I link Gwatyu's history and state interactions to the applicants' cause of action.
15. In addition to the main, history, and interactions affidavits, the applicants have filed **supporting affidavits**. Each of these supporting affidavits address the

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respective applicant's personal history and circumstances in more detail. I refer to the relevant supporting affidavits throughout this main affidavit.

16. I address the following in this affidavit:

- 16.1. PART II: The land and the parties.
- 16.2. PART III: The applicants' informal rights to land.
- 16.3. PART IV: The content of informal rights to land.
- 16.4. PART V: Real rights and registration.
- 16.5. PART VI: Remedy.

## II THE LAND AND THE PARTIES

### (a) The land

17. Gwatyu is a block of 33 farms, all owned by the state. Gwatyu has been surveyed and registered as state agricultural land. Gwatyu is an area of approximately 30 000 hectares. The farms in Gwatyu have been formally and informally subdivided. A map of Gwatyu is attached marked **AM1**.
18. Gwatyu falls under the jurisdiction of the Chris Hani District Municipality and the Enoch Mgijima Local Municipality.

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19. Gwatyu is southeast of Queenstown and west of Cofimvaba. It is situated at the interstices of the Black Kei River to the south, the White Kei River to the east and the Bolotwa River to the north. Gwatyu is bounded by the rural settlements of the former Transkei to the north and east and commercial farmland to the south and west.
20. This application concerns portions of two farms in Gwatyu.
21. First, Maties. Maties is farm number 255 in Gwatyu. Maties comprises 1079.0947 hectares. A map of Maties is attached marked **AM2** and the title deed marked **AM3**. The title deed records that the "South African Bantu Trust" became the owner of Maties on 1 June 1978. Maties is formally divided into two portions, as appears from the map. This application concerns portion 1 of Maties only, highlighted on **AM2**. (The other portion is colloquially known as 'Sono Farm' or 'New Haven'.)
22. Second, Forest Range. Forest Range is farm number 254. It comprises portions 0, 1 and 2. These three portions are commonly known as Emaxandeni, Ntabutsolo and Exesane respectively. The three portions amount to 1027.0833 hectares. A map of Forest Range with the three portions separately highlighted are attached marked **AM3**, **AM4** and **AM5**. The title deeds for portions 1 and 2 are attached as **AM6** and **AM7** respectively. The title deeds reflect that the "South African Bantu Trust" became the owner of the three portions in 1978. Despite our best efforts, we were unable to locate a title deed for portion 0, but we have no reason to believe that it would not reflect the same owner.

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23. The South African Bantu Trust, later called the South African Development Trust, was established under the Development Trust and Land Act 18 of 1936. The Trust held property in the former Bantustans.
24. The Development Trust and Land Act was repealed by section 11 of the Abolition of Racially Based Land Measures Act 108 of 1991. Section 12 of the Abolition of Racially Based Land Measures Act empowers the President to transfer assets held by the Trust to a Minister or the State. Section 12 further required the registrar of deeds to "make the necessary entries and endorsements in respect of his registers and other documents, as well as in respect of any relevant documents produced to him, in order to give effect to such a transfer".
25. The title deeds of Maties and Forest Range reveal that the President never transferred the farms to a Minister or organ of state, or that the Registrar failed to record such a transfer. The deeds still reflect the Trust as the owner of the properties.
26. Nonetheless, today, the Department is the legal owner of Maties and Forest Range in lieu of the South African Bantu Trust.
27. The **history affidavit** focuses on the history of the two farms at paragraphs 44 - 72. The farms' history can be summarised in four phases.
28. *First, pre-1883*: From the mid-1820s, the Khoesan, the AmaTshaTshu, and the English fought over Gwatyu and its surrounding land. By 1883, through warfare

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and colonialism, the English had control over the land. The English colonial authorities forcibly removed all occupants from Gwatyu.

29. *Second, 1883 to 1978:* The English colonial authorities sub-divided the land in Gwatyu and sold the land to struggling white farmers. These farmers employed farmworkers from surrounding areas. The applicants are mostly descendants of workers employed by these white farmers (some of the older applicants were workers themselves). These workers did not belong to a single community or tribe but were a diverse group of people from around the then Cape Colony.
30. *Third, 1978 to 1995:* In 1978 the state expropriated the land in Gwatyu. The South African Bantu Trust became the registered owner of the farms. Kaiser Matanzima, the then Prime Minister of Transkei, leased many of the farms to his supporters and beneficiaries on favourable terms. These lessees farmed on Gwatyu with limited success but did not develop the land. Many of the lessees were nominal in nature, never even visiting the land. Some of the applicants (or their parents), worked for lessees during this time, but most did not. For the most part, the farm workers of the previous white farmers remained in Gwatyu, living off the land without any disturbances.
31. *Fourth, 1995 to present:* By the mid-1990s, Matanzima's lessees had mostly left Gwatyu. The Heath Commission (that became the Special Investigating Unit (SIU)) found that leases were illegally granted by Matanzima. The SIU evicted the remaining lessees and required them to pay arrear rent. The Gwatyu farm workers remained, and to this day remain, on the land, living off subsistence farming.

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(b) The Applicants

32. The First Applicant, Angelina Matsheke was born on Maties farm in 1970. She still lives in their family home on Maties farm on the same land today. In her supporting affidavit, she describes how she has never known another home. In fact, her father was born on the land in 1930, and his sister five years earlier. Her seven siblings were also all born at Maties and, while many of them went to work in the big cities as adults, Gwatyu remains their home to which they return as often as they can.
33. During her father's lifetime, he saw these farms first belonging to white farmers, then expropriated and incorporated into the Transkei, and then becoming part of the democratic South Africa and seemingly transferred to the Department. While he initially worked for some of the white farmers, since the Transkei times he lived and farmed the land as if it was his own even though he was never granted permission by the state to do so. Their family tree is attached marked **AM8**.
34. The Second Applicant is Zamile Dyonase, an adult male residing at Forest Range Farm Portion 2 on the Gwatyu Block of Farms in the Eastern Cape. While he was born on Maties farm, he moved to Forest Range Portion 2 in 1968 to work for a white farmer. He and his wife settled there and raised a family of 10 children. He was employed with successive owners and a lessee until 1982, when he resigned and dedicated himself to farming on Forest Range. He continues to farm the land today. He represents his family in this application. Their family tree is attached marked **AM9**.

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35. The Third Applicant is Albert Dyonase, an adult male residing in Cape Town, cite b Khayelitsha, and with a home on Forest Range, Portion 0 (commonly known as Emaxandeni). He was born on the farm in 1958 when his father worked for the farm owner at the time. In the early 1970s, when the land was expropriated, his father had already built a house for his family and started to raise animals. From that time, the family has been living and farming freely and openly on Forest Range. Mr Dyonase established his own separate homestead in the early 1980s. While he works in Cape Town, his sister looks after his home, and he returns there whenever possible. He represents his household in this application. Their family tree is attached marked **AM10**.
36. The Fourth, Fifth and Sixth Applicants are siblings. Michael Dyonase, an adult male residing in Forest Range Portion 0 (commonly known as Emaxandeni) on Gwatyu Block of Farms in the Eastern Cape is the Fourth Applicant. He was born on Maties farm but moved with his family to Forest Range in around 1974 when his father retired. His sisters, Esther Nozililo (Fifth Applicant) and Tandiwe Dyonase (Sixth Applicant), are adult females also residing at Forest Range where they have lived and farmed openly and freely since 1974. Their family tree is attached marked **AM11**.
37. The Seventh Applicant is Nomase Koboka, an adult female residing in Forest Range Portion 0 (Emaxandeni). She has lived at Forest Range since the late 1980s when she moved there with her husband to build a home, farm and raise a family. While her husband has passed away, she continues to live in their family home with her daughter and grandchildren. Her other children all

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established their own homes in Gwatyu. Their family tree is attached marked AM12.

38. The Eighth Applicant is Ncedo Koti, an adult male residing at Forest Range Portion 2 (commonly known as Exesane). Mr Koti was born on Forest Range in 1980 and has lived there all his life. He has established a home for his family there. Their family tree is attached marked AM13.
39. The Ninth Applicant is Sidabe Mxinzeleli, an adult male residing at Forest Range portion 0 (commonly known as Emaxandeni). He was born on a different part of Forest Range in 1967. In 1980, his family moved to portion 0 of Forest Range where they established a homestead and started farming. That is where he continues to live and work today. Both his parents are buried on the farm. His family tree is attached marked AM14.
40. The Tenth Applicant is Lumka Sikade, an adult female currently residing at Forest Range Farm portion1 (commonly known as Ntabutsolo). She built a home for herself and her family at Forest Range in 1999 and has lived and farmed on Forest Range for 24 years. Her family tree is attached marked AM15.
41. The Eleventh Applicant is Nowalakazi Elise Dyeke, an adult female residing at Forest Range Farm Portion 2 (commonly known as Exesane). Ms Dyeke was born on Forest Range, Portion 2 in 1939 and has lived there all her life. Their family tree is attached marked AM16.
42. The Twelfth Applicant is Nowinsethi Bamana, an adult female currently residing at Forest Range Farm Portion 2 (commonly known as Exesane). She moved

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onto Forest Range farm with her parents in 1985 and married an employee of a lessee on the farm. Her husband retired in 1991 and since then, she has lived and farmed on the land undisturbed. Their family tree is attached marked AM17.

43. The Thirteenth Applicant is Nonkise Ketse, an adult female residing at the northern part of Forest Range Farm, Portion 1 (Ntabutsolo). She and her husband moved to Forest Range in 1987 where her husband, initially, looked after cattle for Kaiser Matanzima. By 1990, they were no longer employed and since then have lived and farmed on the land as if they were the owners. His family tree is attached marked AM18.
44. The Fourteenth Applicant is Zolile Mfundisi, an adult male residing at Tylden in Komani in the Eastern Cape, under the Chris Hani District Municipality and Enoch Mgijima Local Municipality. He moved to Maties farm in 1986 where he built a homestead in 1987. His son, Onke, looks after the household today. Their family tree is attached marked AM19.
45. The Fifteenth Applicant is Thandi Mateyise, an adult female residing on Maties Farm where she has lived since 1985. Her family has built a house there, grazed their livestock and grown food ever since. Their family tree is attached marked AM20.
46. The applicants bring this application:

46.1. in their own interest,

46.2. in the interests of their respective families,

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- 46.3. in the interests of all other similarly situated persons on Gwatyu farms,
- 46.4. in the interest of all beneficial occupiers on state land, and
- 46.5. in the public interest.
47. They do so on the basis of sections 38(a), 38(b), 38(c) and 38(d) of the Constitution.

(c) The Respondents

48. The First Respondent is the Minister of Rural Development and Land Reform, at 600 Lilian Ngoyi Street, Pretoria c/o the State Attorney, 8th Floor, 167 Andries Street, Pretoria. The Minister is cited in his official capacity as the representative of the State as owner of the land and as the person responsible for the implementation and oversight of IPILRA. I shall refer to the First Respondent as "Minister".
49. The Second Respondent is the Director-General of the Department of Agriculture, Rural Development and Land Reform, with offices at the Department's head office at 600 Lilian Ngoyi Street, Pretoria, 0001, cited in his official capacity as the person overseeing the development and co-ordination of policies and programmes in support of the implementation of land reform and tenure security.
50. The Third Respondent is the Chris Hani District Municipality with offices at 15 Bells Road, Central, Komani, Eastern Cape. The Fourth Respondent is the Enoch Mgijima Local Municipality with offices at 70 Cathcart Road, Komani,

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Eastern Cape. The applicants cite the municipalities for any interest they may have in this matter. No relief is sought against them.

51. The Fifth Respondent is Amatshatshu Traditional Council with offices at Fordyce Farm, Gwatyu, Komani cited as a party with interest in the outcome of this Application. No relief is sought against this respondent.
52. The Sixth Respondent is Lwazi Zicina cited as a party with interest in the outcome of this Application. Despite having been ordered to vacate Forest Range Portion 2 in 1999, he still has livestock on the farm being looked after by one of the Thirteenth Applicant's sons. No relief is sought against this Respondent.
53. The Seventh Respondent is the Registrar of Deeds, Mthatha. The Registrar's office is responsible for the title deed and registration of rights in the Farms. The applicants seek an order requiring the Registrar to register certain rights on the Farms' title deeds.
54. The Eighth Respondent is the Minister of Cooperative Governance and Traditional Affairs (COGTA) at 87 Hamilton Street, Arcadia, Pretoria, c/o the State Attorney, 8th Floor, 167 Andries Street, Pretoria. The applicants do not seek any relief against COGTA. COGTA has however participated in various inquiries relating to Gwatyu; so, COGTA is cited for any interest it may have in this application.

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### III THE APPLICANTS' INFORMAL RIGHTS TO LAND

55. In this part of the affidavit, I first set out the legal requirements for informal rights to land. I then address how, on the facts of this case, each applicant enjoys informal land rights.

#### (a) The relevant principles

56. Section 25(6) of the Constitution provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory law or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

57. Section 25(9) in turn mandates Parliament to enact the legislation referred to in subsection (6). These two provisions compel the legislature to enact tenure security legislation to remedy the effects of past racial discrimination.

58. It is thirty years since the advent of South Africa's constitutional dispensation and Parliament has not enacted permanent tenure security legislation to protect the thousands of people who are beneficial occupiers of state land.

59. In 1996, IPILRA was enacted. The Act intended to "provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law". IPILRA's purpose is to provide for the protection of informal rights to and interests in land that were not adequately protected by the law because of racially discriminatory laws of the past.

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60. The provisions of IPILRA must be interpreted benevolently in order to afford holders of informal rights to land the fullest possible protection.

61. Section 2(1) of IPILRA provides:

*"Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent."*

62. Section 3 of IPILRA provides that "[s]ubject to the provisions of section 2, any sale or other disposition of any land shall be subject to any existing informal rights to that land".

63. IPILRA defines an "informal right to land":

*"informal right to land' means—*

*(a) the use of, occupation of, or access to land in terms of—*

- (i) any tribal, customary or indigenous law or practice of a tribe;*
- (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in—*
  - (aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936);*
  - (bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act 21 of 1971); or*
  - (cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;*

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- (b) *the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;*
- (c) *beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or*
- (d) *The use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question,*

*but does not include—*

- (e) *any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and*
- (f) *any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.”*

64. The most important aspect of this definition is paragraph (c). An informal right to land accrues to persons who have had *beneficial occupation* of land for a continuous period of not less than five years prior to 31 December 1997.
65. IPLIRA defines “beneficial occupation” as “*the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner.*”
66. A beneficial occupant under IPLIRA should be distinguished from an “occupier” for the purposes of the Extension of Security of Tenure Act 62 of 1997 (ESTA).
- 66.1. Section 1 of ESTA defines occupiers as those persons who, *inter alia*, have an owner’s consent to reside on land.

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66.2. The applicants are not "occupiers" for purposes of ESTA. Some of the applicants (or their parents) once worked for owners or lessees of the farms. However, since around 1992, none of the applicants were employed by any remaining lessees. Moreover, given the state's conduct towards the applicants, the applicants do not have the state's consent or permission to reside on the land. I return to the state's conduct below.

67. The applicants, accordingly, are not occupiers under ESTA. The applicants in this case invoke their beneficial occupation of their land to establish their informal rights to land.

68. Alternatively, even if the applicants are occupiers under ESTA, the applicants in this case invoke their beneficial occupation of their land to establish their informal rights to land *under IPILRA*. There is no reason why these rights cannot exist concurrently and independently.

(b) The applicants' beneficial occupation

69. The applicants' respective supporting affidavits set out how each applicant occupies land as if he or she is the owner, without force, and openly, and did so for at least five years prior to 31 December 1997.

70. All the applicants have a residence, often which they built themselves, on their portions of land. They possess, to the exclusion of others, areas on the farms over which they intentionally exercise control for their own benefit. The applicants use their land for subsistence farming, mainly of crops and livestock.

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They access the water near or on their land. The applicants live with their families, exercising rights to allow their families to live with them. The applicants intend to alienate their properties to their families once they die.

71. In some cases, the applicants have exercised rights to exclude or include others accessing the land according to communal consent and customs. For example:

71.1. Angelina Matsheke, the first applicant, describes in her affidavit how the occupants resisted invasions by third parties, who purported to have—but did not have—permission to occupy Maties.

71.2. Nonkise Ketse, the fourteenth respondent, describes in her supporting affidavit how the applicants refused access to Forest Range to an aspirant occupier for stealing livestock.

71.3. The affidavit by Thembakazi Matsheke refers to how the occupiers have repeatedly resisted land invasions.

71.4. Lumka Sikade, the tenth applicant, describes how occupants collectively decided to allocate her a portion of Forest Range.

72. The applicants live openly and freely—as if owners of the land.

73. I tabulate below the date on which each applicant began occupying their respective portions of the farms. The table includes the primary land uses for each applicant.

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Farm	Applicant	Date of occupation	Land uses
Maties	Angelina Matsheke	1970 (since birth)	Primary residence, subsistence farming, 41 cattle, 25 sheep, 30 goats.
	Zolile Mfundisi	1986	Primary residence
	Thandi Mateyise	1985	Primary residence, subsistence farming, 7 cows, 4 goats and chickens.
Forest Range Portion 0	Albert Dyonase	Before 1986	Residence, subsistence farming, livestock.
	Esther Dyonase	1974/1975	Primary residence, lives with her two sons and four grandchildren.
	Tandiwe Dyonase	1975	Primary residence, lives with her six grandchildren, subsistence farming, two cows and 11 chickens.
	Nomase Koboka	1988/1989	Primary residence, subsistence farming.
	Michael Dyonase	1974/1975	Primary residence, subsistence farming.
	Nowalakazi Dyeke	1939 (since birth)	Primary residence, subsistence farming, ten cows and 11 goats.
Forest Range Portion 1	Lumka Sikade	1981 (on Maties) and 1999 (on Forest Range)	Primary residence, lives with son,

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			subsistence farming.
	Nonkise Ketse	1987	Primary residence, lives with grandson, subsistence farming, 70 cows, 12 goats, 13 sheep.
Forest Range Portion 2	Zamile Dyonase	1968	Primary residence, subsistence farming, garden, six cows, 17 goats.
	Ncedo Kofi	1984 (since birth)	Primary residence.
	Sidabe Mxinzeleli	1980	Primary residence, lived with two children and five grandchildren, subsistence farming, 20 goats and two cows.
	Nowinsethi Bamana	1985	Primary residence, subsistence farming.

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74. The table, read with the supporting affidavits, demonstrates how each applicant meets the requirements for informal rights to land under IPILRA.
- 74.1. Each applicant occupies their land as if the owner, without force and openly.
- 74.2. The state has not given the applicants any kind of permission to occupy the land.
- 74.3. The applicants occupied the relevant land for more than five years prior to 31 December 1997.
75. The applicants' rights are *confirmed* by two land rights enquiries commissioned by the Department.
- 75.1. First, in March 2000, the Department received a report on Gwatyu that concluded that farm dwellers like the applicants "*enjoy overlapping legal protection in terms of ESTA and IPILRA*".
- 75.2. Second, in a report dated 25 February 2022, commissioned by the Department, the Department was advised that the applicants have "occupational rights". This report echoes a document produced by the Department, dated 28 August 2019, which similarly accepts that the applicants have "occupational rights".
- 75.3. The applicants refer to these reports as the **first and second land reports** respectively. They are addressed in detail in the **interaction's affidavit** at paras 77 and 192.

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76. In addition to the two reports, the Portfolio Committee on Agriculture, Land Reform and Rural Development presented a report to the Department on 7 April 2022.

76.1. The Portfolio Committee presented its report after conducting an oversight visit at Gwatyu.

76.2. The Portfolio Committee, in its report, concluded that the applicants “have accumulated beneficial occupation/informal land rights that are recognised in law”.

76.3. A committee of Parliament has thus found that the applicants enjoy informal land rights.

76.4. The **interaction’s affidavit** addresses the Portfolio Committee’s report at paragraphs 208.

77. The Applicants submit that these three investigations – two by the Executive and one by the Legislature – are correct: The applicants have informal rights to land under IPILRA.

#### IV THE CONTENT OF INFORMAL RIGHTS TO LAND

78. IPILRA provides that deprivations of informal rights to land cannot occur without the rightsholder’s consent, and that sales of land are subject to informal rights to that land.

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79. IPILRA does not expressly provide for the contents of informal rights to land. But those rights must have content for them to exist at all. They are not limited to the specific entitlements in IPILRA to prevent deprivation. They also have positive content that can be asserted beyond merely resisting deprivation. They are informal only because they were not recognized at the time, and are not traditional common-law rights, not because they have no substantive content.
80. The content of informal rights to land is a matter for legal argument. The rights must be interpreted generously and to ensure the fullest protection for the applicants.
81. The applicants will submit that the content of informal rights to land may depend on the circumstances of each case. While there are hundreds of people in the applicants' position on farms across Gwatyu, the applicants do not ask the Court to consider the facts of all the Gwatyu farms. We are only concerned here with the applicants and their households who occupy Maties and Forest Range farms.
82. In the circumstances of this case, the applicants' informal rights to land include:
- 82.1. First, the right to possess the land, which includes the right of physical control of the land for one's own benefit, and the right to resist any unlawful invasion.
- 82.2. Secondly, the right to use and to enjoy the land, including the right to use the land for any ordinary and natural purpose, and to enjoy the property and its fruits. The ordinary and natural use of land includes planting and

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sowing on the land, building on the land, and using and enjoying water on and beneath the surface of the land.

82.3. Third, the right to transfer the rights to the property to, at least, one's descendants or family upon death. This right is however subject to the consent and customs of other occupiers.

82.4. Fourth, the right to form a communal association – including a Communal Property Association – of some or all persons with informal rights to land living on Gwatyu.

83. In other words, the applicants will submit that in the context of this case, their informal rights to land incorporate the primary features of common law ownership. They will do so for the following reasons.

84. First, the significant length of time of the applicants' occupation. Almost all the applicants have occupied land for over 40 years.

85. Second, the undisturbed, absolute nature of the applicants' occupation. The applicants have not had anyone, let alone the state, prescribe conditions for their occupation, or otherwise limit how they use their land. The applicants have truly acted as owners, with no encumbrances.

86. Third, the communal consensus around the applicants' occupation. The applicants have not disagreed between themselves as to their respective occupations. They live in harmony. The **history affidavit** describes how, according to the first report, the applicants and other occupants have

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established a strong community in Gwatyu. There are no recorded major disputes between the occupants about land use:

*"Ties of family and community are also stronger than ethnic affiliations. While some individuals recognised some form of affiliation to the amaTshatshu ethnic group, this did not appear to be an important source of identity in the area as a whole, and was only revealed when prompted by the question. In general people referred to their historical identity as former farm workers and their ties to the land as their main point of reference in defining themselves as a 'group' or 'community'.*

[. . .]

*"[T]he farmdwellers have well-established relationships with each other. This occurs on both the social and organisational level. Intra-sports meetings such as soccer games and weddings and funerals form the basis of weekend socialising, in spite of the bad roads and inaccessibility of some of the farms."*

87. Fourth, the applicants rely on the land. Almost all the applicants have nowhere else to live. Almost all the applicants need the land to ensure that they have sufficient food or income to survive. Without their respective portions of land, the applicants would have nowhere to live and no source of food or income. The same is true of the applicants' families and dependents.
88. Fifth, the nominal owner of the land is the state, who holds the land in trust, not in its own right. There is no private party who will be prejudiced by the recognition of these informal rights for these applicants.
89. A recognition that these are the rights that these occupiers hold does not mean that every holder of informal rights under IPILRA will have the same entitlements. It will depend on the nature of the rights, the nature of their use of

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the land, the owner of the property and so on. It is a fact specific inquiry. On these facts, this is the appropriate content of the rights.

90. Therefore, the applicants' informal rights to land include rights to possess, use, and alienate the land, at least to their descendants, and subject to communal customs and consent.

#### V REAL RIGHTS AND REGISTRATION

91. The Deed Registries Act 47 of 1937 (DRA) determines the rights that the Registrar of Deeds may register on title deeds.
92. The DRA, in section 3, provides that the Registrar shall register any real right. There is no closed list of real rights.
93. Informal rights to land, as defined in IPILRA, are real rights.
94. Informal rights to land subtract from the *dominium* of land. The rights impose a duty on an owner to refrain from exercising entitlements inherent in their right of ownership. The rights confer on the rightsholder entitlements inherent in ownership. For example, in this case, the state must refrain from depriving the applicants of their informal rights to the land without their consent, while the applicants enjoy rights to use and possess the land.
95. The informal right is "*to land*". The right and its correlative duty attach to the property, not to a particular owner or the performance of a duty by a particular

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owner. The informal right creates a relationship between the occupier and the land—not the person who happens to be owner of the land.

96. A change in ownership does not result in the termination of informal rights to land. Section 3 of IPILRA makes this plain: all sales of land are subject to informal rights to that land. Successors in title would be bound by the applicants' rights.

97. Informal rights to land are rights that may be defended against the whole world.

98. Parliament, when it enacted IPILRA and created informal rights to land, patently intended for the rights to be real rights, binding on successors in title.

98.1. The rights are expressly described as informal rights "*to land*".

98.2. Section 3, which subjects sales to informal rights to land, reveals a clear intention to render informal rights to land as real rights, and binding on successors in title.

98.3. The purpose behind IPILRA, to provide for the protection of informal rights to land previously undermined by racist laws, can only be advanced by affording occupiers real rights. Otherwise, occupiers' rights would dissipate if the person who happened to be owner at the time of IPILRA's commencement died or sold the land. A mere personal right would afford almost no security of tenure or protection of an informal right to land.

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99. Accordingly, informal rights to land under IPILRA can and *must* be registered on the title deed of the relevant land.

## VI REMEDY

100. The applicants have informal rights to land. These rights are real rights.

101. Accordingly, the applicants seek declaratory relief regarding their rights, and an order directing the registration of their informal rights to land.

### (a) The declaratory relief

102. The applicants meet the requirements for declaratory relief. The applicants have an interest in an existing right, viz. their respective informal rights to land.

103. The **interactions affidavit** reveals the decades-long dispute between the applicants, the Department, and the amaTshatshu Traditional Council. It is this dispute that necessitates the declaratory relief the applicants seek. The dispute can be summarised around four key events.

104. *First, attempts to lease the land.* On two occasions, of which the applicants are aware, the Department attempted to lease swathes of Gwatyu to third parties without the applicants' consent.

104.1. In 2013, the Department announced to the applicants that it had decided to lease numerous farms in Gwatyu to a group called Imijelo. The applicants were never even given prior notice of the Department's

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intention to lease the farms. In response, the applicants protested and urged the Department against proceeding with the leases. It appears that the Department backtracked from its decision, although the Department never explained the reasons for its decision or why it walked back from the leases. The **interactions affidavit** addresses the Imijelo fiasco at paragraphs 15 - 30.

104.2. In October 2020, the Minister announced that the Department intended to allocate 700 000 hectares of state land for redistribution. A list of applicable farms was published and is attached marked **AM22**. The applicants were shocked to discover Gwatyu on that list. The land was being advertised for anyone to come and lease it—without the consultation and consent of the applicants. After numerous meetings and correspondence, on 19 January 2021, Mr Mngwengwe, Chief Director: Property Management and Advisory Services in the Department, confirmed that “the Gwatyu farms will not be allocated in accordance with the advertisement”. The **interactions affidavit** addresses the redistribution advertisement at paragraphs 96.

105. *Second, the mischaracterisation of the applicants’ rights.* The Department’s officials have repeatedly mischaracterised and refused to recognise the applicants’ rights. The **interactions affidavit** sets out numerous statements to this effect by the Department. Examples include:

105.1. On 25 May 2015, an official at the Queenstown office of the Department, Malerato Molokoane, posted a message on Facebook alleging that the

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applicants had no rights in the land, that they should relocate to Thembani, and that the applicants seek “mischievous goals” (*interactions affidavit* at para 40).

105.1. On 8 December 2020, in an interview on *Special Assignment*, Ms Peliwe Mntukatandwa an official from of the Department stated that the Minister wanted agricultural land to be used productively, whether by the occupier or by “someone from the outside”. The Minister suggested that the rights of the Gwatyu beneficial occupiers would be deprived from them if they are not deemed to be “productive”. Ms Mntukatandwa went on to allege that IPILRA does not apply to the applicants, because IPILRA “does not work on farms” and only on communal land (*interactions affidavit* at para 109).

105.2. On 4 February 2021, the Department wrote a letter to the applicants’ attorneys advising that “currently, there is no single stakeholder that has authority over the Gwatyu Farms. Authority over these farms lies with the State as the landowner”. The letter failed to acknowledge the applicants’ IPILRA rights (*interactions affidavit* at para 118).

105.3. On 9 February 2021, the Minister reported to the Portfolio Committee. During her presentation, she failed to recognise the applicants’ rights. She described the applicants only as “farm dwellers” who have applied to file a Communal Property Association (CPA). She blamed these “CPA farm dwellers” for the state’s inability to regularise the rights in respect of Gwatyu (*interactions affidavit* at para 119).

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105.4. On 12 February 2021, one of the applicant's attorneys, Wilhelmina Wicomb, attended a meeting with the Department, COGTA, the Traditional Council on behalf of the applicants. At this meeting, the Department presented a questionnaire it used for establishing the applicant's rights to land in Gwatyu. This questionnaire cannot provide a basis for understanding or capturing informal rights to land under IPILRA (*interactions affidavit* at para 126). A confirmatory affidavit of Ms Wicomb is included in this affidavit.

105.5. On 7 December 2021, the Department presented a report on Gwatyu to the Portfolio Committee. In this report, the Department characterised Gwatyu as a conflict involving land claims and leases. This is incorrect. There is no land claim over Gwatyu (two previous land claims by the amaTshatshu were dismissed, I return to this below). There have been no leases over Gwatyu since the early 1990s. The report, glaringly, does not consider Gwatyu as involving IPILRA rights. The report blames Gwatyu's occupants for the Department's inability to audit the rights over Gwatyu (*interactions affidavit* at para 167)

105.6. On 30 August 2022, before the Portfolio Committee, the Department's Director-General revealed that the Department intended to give the land to the amaTshatshu Traditional Council (*interactions affidavit* at para 208).

106. *Third, arrest of occupiers for exercising their rights.* In September 2020, five occupiers were arrested for resisting a land invasion by Mr Skhwenkwe

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Mzothana (who was brought to Gwatyu by Mncedisi Gungubele). This followed months of pleas by the occupiers to the Department to assist in resisting the land invasions (interactions affidavit at paras 84-95) In 2008, a similar arrest occurred (**first applicant's affidavit** at para 38). The first applicant, Angelina Matsheke, describes in her affidavit how the occupiers cannot assert their rights against invaders for fear of arrest (**the first applicant's affidavit** at paras 44 to 45).

107. *Fourth, the inexplicable role of the amaTshatshu Traditional Council.*

107.1. The Traditional Council has no rights over Gwatyu. The Traditional Council submitted land claims over Gwatyu. But its two claims were rejected. The Traditional Council could not claim rights over Gwatyu because the amaTshatshu community had been removed from Gwatyu before 1913—the cut-off date for land restitution claims. The Land Claims Commissioner's decisions to reject these claims are addressed in the **interactions' affidavit** at para 203.

107.2. Nonetheless, the Department and Portfolio Committee have repeatedly consulted with the Traditional Council. There have been several incorrect allegations that the Traditional Council has some kind of authority over the applicants or Gwatyu. It does not.

107.3. The applicants have objected to the Traditional Council's involvement on several occasions. For example, in an email dated 18 February 2021, the applicants' attorney enquired on behalf of the applicants after the legal basis for the Traditional Council's role in the process of auditing

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land rights in Gwatyu. A copy of the letter is annexed marked AM24. Ms Wicomb sent this email to the Department after a Department official, in a meeting on 12 February 2021, said:

*"In the process the Department received an application from Tshatshu Traditional Council claiming the Gwatyu farms however as per the Restitution criteria their claim was dismissed. The department now is trying to reach an amicable solution and is communicating equally with all Gwatyu Stakeholders."*

The Department never clarified the legal basis for the Traditional Council's involvement in auditing the land rights over Gwatyu.

107.4. Despite the applicants' objections, and the patent irrelevance of the Traditional Council to determining the applicants' rights, the Department insists on consulting with the Traditional Council. The ineluctable impression created by the Department's conduct, and several statements, is that the Department intends to somehow grant the Traditional Council rights over Gwatyu—in plain violation of the applicants' rights. The statements suggesting the Department's and Traditional Council's intentions are in the **interaction's affidavit** at paras 173 – 185.

108. Against this background, declaratory relief will have significant utility. It will settle the question of whether the applicants have informal rights to land—an issue between the parties. The declaratory relief, if granted, will offer the applicants a tangible and justifiable advantage—their tenure will be secured,

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clear, and recognised. The declaration will vitiate threats to their rights to their farms, including from the Department and the Traditional Council.

109. Public policy, as grounded in the Constitution, requires a declaration of rights. The applicants are vulnerable occupiers, deprived of rights to land because of racially discriminatory laws. They face threats to their occupation from all fronts: the Department, the Traditional Council, commercial entities, and criminals. The occupiers are constitutionally entitled to secure tenure.
110. Practically, the declaratory relief will assist the Department's never-ending attempts to characterise the land rights in Gwatyu. For the past thirty years, the Department has sought to determine the applicants' rights; but it has failed to do so. The declaratory relief will put an end to the recurring process of "land audits", consultations, and reports. The declaratory relief will ensure that the Department is aware of the applicants' informal land rights, including their contents, which will enable the Department to proceed to deal with the land in a constitutionally appropriate manner.
111. The applicants have no alternative remedy. They have tried to engage with the Department over the last 20 years—to no avail. The applicants are no better off than where they were at the end of apartheid. They require declaratory relief to recognise and affirm their security of tenure.
112. The relief is justified both under the common law and under s 38 of the Constitution, to vindicate the applicants' right to security of tenure that is threatened by the conduct of the Department and the Traditional Council.

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(b) Registration of rights

113. The applicants' rights are real rights. The Registrar of Deeds is therefore obliged to register the rights. The applicants seek an order directing the registration of their rights on the relevant title deeds. A per the table attached to the notice of motion as AM24.

(c) Conclusion on remedy

114. Accordingly, the applicants seek the following order:

1. *It is declared that the applicants have informal rights to land as defined in the Interim Protection of Informal Land Rights Act 31 of 1996 in respect of the land which they occupy.*
2. *It is declared that the applicants' informal rights to land include the following rights:*
  - 2.1. *the right to possess the land, which includes the right of physical control of the land for one's own benefit, and the right to resist any unlawful invasion.*
  - 2.2. *the right to use and to enjoy the land, including the right to use the land for any ordinary and natural purpose, and to enjoy the property and its fruits.*
  - 2.3. *Third, the right to alienate the rights to the property, including to one's descendants or family upon death, subject to communal rules.*
  - 2.4. *Fourth, the right to form a communal association of some or all persons with informal rights to land living on Gwatyu.*
3. *The Registrar of Deeds (Mthatha) is directed to register the applicants' rights in terms of section 3 of the Deeds Registries Act 47 of 1937*

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4. *The First and Second Respondents are to pay the costs of this application, including the costs of two counsel."*

115. In all the circumstances, I submit that this Court should grant the relief sought in the Notice of Motion which this affidavit is attached.




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SIPESIHLE MGUGA

I certify that on the <sup>14</sup>18<sup>th</sup> day of October<sup>1984</sup> and at Matieland the above deponent appeared before me and that she acknowledged to me that she knows and understands the contents of the above Affidavit, which Affidavit was signed and sworn to in my presence in accordance with the requirements of Regulation No. R1428 dated 16 November 1984, as amended, which have been fulfilled.




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COMMISSIONER OF OATHS

**COMMISSIONER OF OATHS  
MFUNDO NKOSANA NTSHWAXA  
118A HIGH STREET  
GRAHAMSTOWN  
PRACTISING ATTORNEY,  
REPUBLIC OF SOUTH AFRICA**