**REPUBLIC OF SOUTH AFRICA**

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**
**(REPUBLIC OF SOUTH AFRICA)**

**CASE NO: 2001/17748**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... .....

In the matter between:

| | |
|---|---|
| **SHAH JAYESH HASMUKH** | Plaintiff |
| And | |
| **INTERNATIONAL BANK OF SOUTHERN AFRICA** | First Defendant |
| **SIMON, NORMAN N.O.** | Second Defendant |
| **MOTALA, ENVER N.O.** | Third Defendant |
| **GAINSFORD, GAVIN N.O.** | Fourth Defendant |
| **MASOANGANYE, RICHARD N.O.** | Fifth Defendant |

In the application between:

| | |
|---|---|
| **INTERNATIONAL BANK OF SOUTHERN AFRICA** | First Applicant |
| **MOTALA, ENVER N.O.** | Second Applicant |
| **GAINSFORD, GAVIN N.O.** | Third Applicant |
| **MASOANGANYE, RICHARD N.O.** | Fourth Applicant |

And

**SHAH JAYESH HASMUKH** Respondent

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# JUDGMENT

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**VAN DER LINDE, AJ:**

**Introduction**

1 This matter was called on the trial roll of 15 October 2014 and allocated to me. It stood down to 16 October 2014 when argument commenced, and continued until 17 October 2014. The parties were agreed that the trial could not proceed. They were not agreed, at least not wholly, on why that was so.

2 But they were agreed that the defendants would argue their application that the plaintiff's action should be dismissed for want of prosecution on the allocated trial date.

3 The plaintiff in turn applied to set aside the defendants' application as an irregular proceeding, because it was brought on the short form and not the long form of notice of motion. I heard the submissions on both applications and reserved judgment.

4 The dismissal application was not strictly ripe for hearing when the argument commenced because the answering affidavit had not been filed. I ruled that an unsigned copy, which had already been prepared, could be received without prejudice to the plaintiff's rights and that a signed copy could be

handed up in the course of the hearing. The defendants would be afforded an opportunity to put up a replying affidavit if so advised. After tea on the first day of argument the signed answering affidavit was handed up and the replying affidavit was received on the morning of the second day.

5 What was also placed before me were seven volumes, referred to as books, comprising the affidavits in a previous dismissal application brought by the defendants, as well as the pleadings and notices in the pending action.

**The procedural history**

6 I commence by setting out the main milestones in the procedural history of the matter, then the test which I propose applying to the two applications, and thereafter the reasoning for the conclusions to which I have come.

7 The matter commenced more than 13 years ago when the plaintiff sued the defendants on 13 August 2001 for the return of 116 vehicles. His claim was based on ownership. He alleged that the defendants were in possession of the vehicles. At that time the first defendant was a bank known as the International Bank of Southern Africa Ltd, and it conducted banking business. It no longer does that, and its name is now Boundary Financing Ltd.

8 Its role in the events is that it had provided financing to a company known as Afinta Motor Corporation (Pty) Ltd ("AMC"), which was provisionally liquidated on 22 March 2001, and finally on 11 December 2001. The second, third and fourth defendants are its liquidators.

9 The vehicles came into AMC's possession, according to the plaintiff's founding affidavit in his application for the liquidation of AMC dated 22 March

2001, because the plaintiff and AMC had established a joint venture in June 1988. His contribution to the JV was to source the vehicles and to pay for them, and the JV would then import them into South Africa and distribute them here and to some extent in neighbouring countries. Ownership would remain reserved for the plaintiff until he will have been paid for them. He never was.

10 The financier's possession of the vehicles came about because on 5 March 2001 it perfected its general notarial bond over the vehicles pursuant to a court order. The financier subsequently handed the vehicles over to the liquidators of AMC, who sold them on 6 February 2002 on a public auction for R2 439 570.

11 On 28 September 2001 the financier pleaded, and AMC followed suit on 28 November 2001. Thereafter, for nearly five years until 25 April 2006, nothing happened. On that date the plaintiff gave notice of his intention to amend his particulars of claim to insert an alternative claim for damages of R35 974 824.25, being the alleged fair market value of the motor vehicles on 5 March 2001, arising from *"the conduct of the defendants in allowing or causing the plaintiff's motor vehicles to be sold."* The manner of calculation of the value was said to be contained in a schedule "A", but no one was able to produce that schedule during the course of the hearing or afterwards.

12 The financier objected to the intended amendment and a substantive application was heard on the 11th and 12th of June 2007. The amendment was ultimately granted.

13 On 30 October 2007 the plaintiff's attorneys set the matter down for trial on 29 August 2008. The defendants requested further particulars for trial and

amended their pleas. The plaintiff filed a response to the defendants' request for trial particulars on 9 July 2008 and on 24 July 2008 the defendants served a list of pre-trial requests in terms of Rule 37(4) on the plaintiff.

14 On that day Van Huyssteen Inc. withdrew as the plaintiff's attorneys of record. A pre-trial conference was held at which the plaintiff personally attended. He gave a number of undertakings. One which is relevant for present purposes is recorded in paragraph 8 of the pre-trial minute and concerns the trial bundle. It was recorded that the plaintiff agreed to the defendants' offer to prepare a bundle of documents to be used at the trial. The plaintiff agreed that he would provide a list of documents that he specifically required the defendants to include in the trial bundle, within two months of the date of the pre-trial conference. The plaintiff would be entitled to supplement this list until five days before the date of the trial.

15 Another undertaking which assumes relevance in this matter is recorded in paragraph 7.22 of the pre-trial minute. The plaintiff undertook to respond within six weeks of receipt of the pre-trial minutes to paragraphs 5 and 6 of the defendants' pre-trial request. The relevant request is contained in paragraph 5 of that pre-trial request and records that the defendants were not satisfied with the plaintiff's responses to, amongst other things, paragraph 7.44, and paragraphs 8.1 to 8.5, 8.8, 8.9, 8.16, 8.17 and 8.18, of the defendants' request for trial particulars. Of particular significance later on in the exchanges between the parties, are the requests contained in paragraphs 8.2 to 8.5 of the defendants' request for trial particulars.

16 The request in paragraph 7.44 of the defendants' request for further particulars for trial was directed at establishing the efforts that the plaintiff had made to obtain the information referred to in paragraphs 10.1 to 10.4 of the plaintiff's particulars of claim. In turn, that refers to the dates on which the vehicles were sold, the circumstances in which they were sold, the terms or prices on or at which they were sold, and the identity of the purchasers of the vehicles concerned.

17 On 31 March 2009 the plaintiff's current attorneys filed a notice of their appointment. On 15 May 2009 the plaintiff delivered his reply in terms of Rule 35(3), which he had undertaken in paragraph 7.24 of the minutes of the pre-trial conference of 24 July 2008, to have responded to within six weeks after receipt of the minutes.

18 As noted above, the first trial date in this matter had been 29 August 2008. The matter did not proceed on that day for reasons set out in paragraphs 1.1 to 1.5 of the agreed minutes of the pre-trial conference of 24 July 2008. They were that no pre-trial conference had been held more than six weeks before the trial date as required by practice; the plaintiff had responded to the request for further particulars for trial late and inadequately; the plaintiff's discovery was in adequate; the plaintiff's attorney had withdrawn without providing an address for service of any future process; and the withdrawal of the plaintiff's attorney made it difficult adequately to prepare the pre-trial preliminaries. In the result the trial was postponed and the costs were reserved.

19 The second trial date was allocated, and the plaintiff's attorneys served a notice of set down on 10 March 2010, for a trial date of 7 February 2011. On

19 January 2011 the plaintiff served a notice of removal of the trial from the roll of 7 February 2011. No explanation was given as to why this had happened.

20 The third trial date was then allocated for 25 May 2012 and the plaintiff's attorneys served a notice of set down for that date on 6 October 2011. On 22 March 2012 the defendants' attorneys wrote to the plaintiff's attorneys requesting a further pre-trial conference, suggesting 3 April 2012. The response to this letter was a letter by the plaintiff's attorneys dated 26 March 2012, which said:

> *"We advise that we have removed this matter from the trial roll as we are having difficulty getting hold of our client."*

The notice of removal accompanied the letter.

21 This conduct led to an application by the defendants on 26 June 2012 for dismissal of the plaintiff's action for non-prosecution of the claim. An answering affidavit on behalf of the plaintiff was filed on about 22 August 2012 and the attorney for the defendants filed a replying affidavit.

22 The matter then came to be argued before Mathopo, J during the week commencing 1 October 2012. After hearing argument, and upon coaxing by the Learned Judge, the parties agreed to an order in terms of which the application for dismissal was postponed *sine die,* but the defendants were granted leave to reinstate the dismissal application on the same papers duly supplemented, if the plaintiff were to fail to comply with the provisions of the said order ("the order").

23 Of relevance for the present matter are three paragraphs from the order which the defendants contend were not complied with. They provide as follows:

> *"3. The plaintiff is required to provide the following within three weeks from the date of this Order:*
>
> *3.1 …*
>
> *3.5 The plaintiff's list of documents to be included in the trial bundle in accordance with paragraph 14.2 of the Questionnaire.*
>
> *3.6 Supplementary responses to the following requests contained in the defendant's request for further particulars for trial dated 29 November 2007: 7.42, 7.43, 7.44, 8.1 to 8.1, 8.8, 8.9, 8.16, 8.17 and 8.18."*

24 The reference in paragraph 3.5 of the order to *"paragraph 14.2 of the Questionnaire",* was a reference to paragraph 14.2 of the defendants' list of pre-trial requests under Rule 37(4), which reads as follows:

> *"14.2 The plaintiff will notify the defendants in writing not less than five days before trial of the identity of any documents that the plaintiff specifically requires the defendants to include in the trial bundle. Provided that those documents have been discovered, the defendants will include those documents in the trial bundle."*

25 It will be recalled that at the pre-trial conference held on 24 July 2008, the timing of that obligation was changed, and the plaintiff agreed to provide the list of documents within two months of the date of the pre-trial conference. The order also provided that the matter would be placed under case management before him.

26 Next, on 31 October 2012 the plaintiff filed a supplementary response to the defendants' request for further particulars for trial dated 29 November 2007 as well as a response to the defendants' list of pre-trial requests under Rule 37(4) dated 24 July 2008. Dissatisfied with these responses, the defendants' attorneys wrote to the plaintiff's attorneys on 13 November 2012. In the letter they pointed out that the plaintiff had responded only to paragraph 8.1 of the defendants' request for trial particulars dated 29 November 2007; and although the order referred to *"8.1 to 8.1"*, that was clearly an error. The defendants' attorneys went on to afford the plaintiff a further three weeks to provide supplementary responses to paragraphs 8.2 to 8.5 of the defendants' request for trial particulars.

27 On 13 November 2012 the defendants' attorneys wrote to Judge Mathopo updating him on the developments and reporting that the plaintiff's attorneys had advised that they had applied for a new trial date. On 29 November 2012 the defendants' attorneys wrote to the plaintiff's attorneys requesting them to comply with the various requests arising from the order. On 6 December 2012 this was followed up by a letter in which the defendants' attorneys recorded that the plaintiff's attorneys had failed to comply with the order and advising that the Judge would be approached.

28 Next, by the end of March 2013 the plaintiff had not received any formal notification from the Registrar of the South Gauteng High Court with regard to the allocation of a trial date. The attorneys for the plaintiff accordingly instructed their messenger to attend at court to enquire with regard to the allocation of a trial date. On 4 April 2013 they received a handwritten note

from their messenger advising that a trial date had been allocated for 22 October 2013. On the same day, 4 April 2013, the defendants' attorneys wrote to the plaintiff's attorneys confirming receipt of a pre-trial notice and proposing arrangements between Counsel. They also requested that the plaintiff's attorneys urgently deal with the outstanding issues and addressed the following enquiry:

> *"We further enquire whether you have to date received a trial date as to when the matter is to be heard."*

29 There was no response to this letter and on 16 April 2013 the defendants' attorneys wrote to Judge Mathopo requesting that a pre-trial conference be held before him during the week commencing 20 May 2013.

30 It would appear that such a conference was not held, because on 28 August 2013 the plaintiff's attorneys wrote to the defendants' attorneys advising that they had applied for a trial date, and recording that as far as they were concerned the plaintiff had adequately responded to the defendants' requirements. They did not in this letter advise that according to the handwritten note of their messenger, a trial date for 22 October 2013 had been allocated by the Registrar.

31 On 13 September 2013 there was a telephonic discussion between the plaintiff's attorney and the defendants' attorney. During that conversation the plaintiff's attorney told the defendants' attorney that the Registrar had allocated 22 October 2013 for the hearing, back in April 2013 already, but that the plaintiff's Counsel was not available for the trial during the week of 22

October 2013. The defendants' attorney advised in a letter of 13 September 2013 addressed to the plaintiff's attorneys, as follows:

> *"3. It is abundantly clear that the matter cannot proceed on the scheduled date and we accordingly await your confirmation that the matter has not been set down by the Registrar notwithstanding no notice having been filed."*

32 In a letter of 8 October 2013 the plaintiff's attorneys wrote that after the letter of 13 September 2013 by the defendant's attorneys, they had on various occasions attended at the offices of the Registrar in order to enquire whether the matter had been enrolled for 22 October 2013. The response was apparently that the court file had been misplaced and the trial date could not formally be allocated. When one of the plaintiff's candidate attorneys located the court file on 26 September 2013, and handed it to the clerk dealing with civil trials, the Registrar on 27 September 2013 formally enrolled the matter for 22 October 2013.

33 In the letter of 8 October 2013, the plaintiff's attorneys advised:

> *"We are in agreement with your advices that the matter cannot proceed on the scheduled date and as a result we will attend to the delivery of a notice of removal from the trial roll in due course."*

34 A new trial date was then applied for. On 14 April 2014 the plaintiff's attorneys wrote advising that the Registrar had allocated 15 October 2014 as the trial date. This letter also indicated that the plaintiff's attorneys were desirous of scheduling a meeting with Judge Mathopo in order to obtain clarification as to whether the plaintiff's supplementary response to the defendants' request for further particulars for trial, as well as the plaintiff's

response to the defendants' list of pre-trial requests under Rule 37(4), had been satisfactorily answered.

35 On 15 April 2014 the plaintiff served a request for further particulars for trial. On 23 May 2014 the plaintiff's attorneys wrote to Judge Mathopo advising him of the trial date and requesting that the Judge provide dates on which he would be able to conduct a pre-trial conference.

36 On 29 May 2014 the defendants' attorneys responded to the plaintiff's attorneys and also to Judge Mathopo, and enquiring as to his availability in view of the fact that he was then acting in the Supreme Court of Appeal. On 10 July 2014 the attorneys for the plaintiff wrote to the Judge President raising the question of Judge Mathopo's unavailability and requesting the appointment of a substituted case manager.

37 The Acting Deputy Judge President, Judge Masipa wrote on 17 July 2014, allocating the matter to Judge Sutherland. On 25 September 2014 the plaintiff's attorneys wrote to Judge Sutherland advising that a trial date had been allocated for 15 October 2014 and requesting that he facilitates a pre-trial conference between the parties. On the next day, 26 September 2014, the defendants filed the renewed notice of motion and a supplementary affidavit in support of their renewed application for dismissal.

38 On 3 October 2014 the plaintiff's attorneys gave notice in terms of Rule 30(2)(b), read with Rule 30A, which was a notice affording the defendants an opportunity to remove causes of complaint. As stated, the complaint was that the defendants' dismissal application ought to have complied with Rule 6(5)(a) of the Uniform Rules of Court, meaning the long form notice of motion, instead

of the short form, which was compliant with form 2(a) of the first schedule. Indeed, the defendants' amended notice of motion dated 26 September 2014 is in the short form and apart from costs and alternative relief, asks for dismissal of the application. In the notice, the plaintiff is afforded until 6 October 2014 to file his answering affidavit. This meant that the defendant was affording the plaintiff five court days, and two weekends, to prepare his answering affidavit.

39 On 9 October 2014 the defendants' attorneys wrote to the Deputy Judge President, Judge Mojapelo, reporting that a judicially supervised pre-trial conference had been held before Judge Sutherland on that day, Thursday, 9 October 2014. The letter reported that at the pre-trial conference before Judge Sutherland the parties had agreed that the matter was not ready for trial. Since the defendant had already by then launched its application to dismiss, the parties agreed that instead of the matter proceeding on trial on 15 October 2014, the defendant would then argue its application to dismiss.

40 The matter was then allocated to me on 15 October 2014. I was hearing another matter and the parties agreed that if I finished early on that day with the other matter, I ought to be given the papers to read in advance of them arguing the application to dismiss the next day, 16 October 2014.

41 This followed. On 16 October 2014 plaintiff's counsel advised me that they had an unsigned answering affidavit in the dismissal application, and that it was expected that the affidavit would be signed in the course of the morning. I received the unsigned copy and the argument commenced. By teatime the signed answering affidavit was available. A replying affidavit by the defendant

was handed up at the commencement of the argument on Friday, 17 October 2014.

42 I propose dealing first with the plaintiff's application to dismiss the defendants' application as having been an irregular step. In view of the conclusion to which I have come on that issue, I then proceed to deal with the merits of the defendants' application. In that context, it is necessary to examine whether the provisions of the order had been complied with, and the judgment will thereafter examine that issue.

**The irregular step application**

43 Turning then to the plaintiff's application, the essence of the argument is that since the defendants seek substantive and final relief, they ought to have used the long form notice of motion. The submission is that even although the original application to dismiss was also on a short form notice of motion and was by definition interlocutory in nature, the fact that the plaintiff did not then object to that form of procedure, did not mean that the plaintiff cannot now object to the form of procedure which the defendants have again adopted.

44 In his submissions for the plaintiff, Mr Belger stressed that the defendants were clearly in a position to resuscitate their dismissal application in good time, and that it was not necessary to have used the short form notice of motion.

45 The plaintiff's submissions did not deal with any prejudice that the plaintiff may have suffered. There is also no affidavit by the plaintiff explaining any

prejudice that he may have suffered by the defendant having adopted what the plaintiff submits was an incorrect procedure.

46 The plaintiff's answering affidavit was deposed to by the plaintiff's attorney. In it she says (emphasis supplied):

> *"1.5 Given the draconian time constraints dictated by the applicants in which to file supplementary answering affidavits, I will be unable to deal with each and every allegation contained in the supplementary founding papers. Therefore, unless an allegation contained in the applicants' supplementary founding papers is specifically admitted, it should be deemed to be denied."*

47 I have three problems with this submission. The first is that, as it happened, in fact the plaintiff took twelve court days to prepare the answering affidavit. Rule 6(5)(d)(ii), if it applied, would have afforded the plaintiff fifteen days. Therefore the plaintiff would have been prejudiced by three days. However, neither the submissions nor the affidavit by the plaintiff's attorney explains whether those three days were really a matter of prejudice.

48 The second difficulty I have is that the substance of the supplementary founding affidavit of the defendants dealt with the sequence of events after the order. Those events span some two years and involve only the exchange of correspondence and the setting down of the matter on two occasions. It ought to have been a matter of relative ease for the plaintiff's attorney to have responded to those allegations, within a few days. The plaintiff also had sufficient time to depose to the merits of his claims, at least the way he saw them.

49 The third difficulty I have is that according to Rule 6(5)(a) every application other than one brought *ex parte* is required to be as near as may be in accordance with Form 2(a). That is a reference to the long form notice of motion. However, according to Rule 6(11) (emphasis supplied):

> *"(11) Notwithstanding the aforegoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a Judge."*

50 In my view, the application to dismiss a pending proceeding for want of prosecution qualifies as an application *"incidental to"* pending proceedings, and therefore the short form notice of motion was appropriate. I therefore dismiss the plaintiff's application, and I proceed to deal with the merits of the defendants' dismissal application.

**The merits of the dismissal application**

51 The correct place to start is the order. Having regard to paragraph 4 of that order, I approach the defendants' application on the basis that the defendants would have to show that the plaintiff had failed to comply with the provisions of the order, or at least some of them. This follows from the terms of the order of Mathopo, J; in particular, the postponement of the dismissal application, and not its outright dismissal.

52 Further, I approach the application on the basis that if the defendants are able to show that the plaintiff had failed to comply with the provisions of the order, then the matter may be looked at, and should be looked at, afresh in its entirety. In other words, the application is not then to be judged simply on the

basis of whether or not the plaintiff had complied with the order; but then the defendants are entitled also to refer to any delays in prosecution that may have occurred over the entire period, including before the matter was argued before Mathopo, J.

53 As regards compliance with the order, the argument between the parties ultimately came down to whether or not the plaintiff had complied with paragraphs 3.5 and 3.6. I deal with these two paragraphs sequentially.

54 Paragraph 3.5 concerns the question of trial documents, and in particular the obligation on the plaintiff to provide a list of documents which it required the defendants to include in the trial bundle. The list ought originally to have been provided within two months of the date of the pre-trial conference, and it was not.

55 The plaintiff's response is that the requirement was that the plaintiff would only notify the defendants in writing not less than five days before the trial of the identity of the documents to be included in the trial bundle. The plaintiff concedes that it has not provided that list, but argues that since the trial set down for 15 October 2014 has been postponed by agreement, it is not necessary that the directive be complied with now. It needs only to be complied with when the trial is due to commence.

56 The defendants stress that paragraph 3.5, read in its context, and in particular its introductory part, plainly requires of the plaintiff to provide the list of documents to be included in the trial bundle within three weeks from the date of the order, which was 10 October 2012. The defendants argue that there is therefore no scope to suggest, as does the plaintiff, that the plaintiff need only

have complied with the directive not less than five days before the trial is due to commence.

57 In my view the defendants' contention is sound. The terms of the order are unambiguous. They require that the list of documents is to be provided within three weeks from the date of the order. It was not. Accordingly in this respect the plaintiff has not complied with the provisions of the order.

58 This failure is not irrelevant in the context of the allocation of a trial judge. Without the plaintiff's list of documents a trial bundle cannot be prepared. And according to the practice manual, it is clear that before the commencement of a trial the parties must agree the evidential status of the documents contained in the bundle. In turn, that agreement is required to be contained in the pre-trial minute, and as a general rule, precedence in the allocation of matters will be given to trials in which a proper pre-trial minute was timeously filed with the Registrar. The point is, the non-compliance with paragraph 3.5 of the order is not merely technical, without consequence.

59 The next respect in which it was argued that the order was not complied with, relates to paragraph 3.6, and in particular paragraphs 7.44, 8.1 to 8.5, 8.8, 8.9, 8.16, 8.17 and 8.18. I deal with these in turn.

60 In terms of paragraph 3.6 of the order, the plaintiff was to provide, within three weeks from the date of the order, supplementary responses to the defendants' request for further particulars of trial dated 29 November 2007, and in particular the paragraphs identified above. Three weeks from the date of the order expired on 2 November 2012. On 31 October 2012 the plaintiff served its supplementary response.

61 Paragraph 7.44 of the defendants' request was as follows:

> *"Precisely what efforts has the plaintiff made to obtain the information referred to in paragraphs 10.1 to 10.4?"*

62 The answer that was furnished was the following:

> *"Plaintiff is unable to obtain the information referred to in paragraphs 10.1 to 10.4 as such information is not within plaintiff's knowledge. The defendants, more particularly AMC and its liquidators ought to have such information. To this end plaintiff will request further and better discovery and further particulars for trial as provided for in the Rules of Court."*

63 The defendants argue that this answer is disingenuous. They argue that clearly the plaintiff ought to know the answers to these questions.

64 Paragraphs 10.1 to 10.4 of the plaintiff's particulars of claim provide as follows:

> *"10. Save that the defendants acted jointly in allowing or causing the sale of the plaintiff's motor vehicles, the plaintiff is not aware of:*
>
> *10.1 the dates on which the vehicles were sold;*
>
> *10.2 the circumstances in which the vehicles were sold;*
>
> *10.3 the terms or prices on which the vehicles were sold;*
>
> *10.4 the identity of the purchaser(s) of the plaintiff's motor vehicles."*

65 The question in paragraph 7.44 of the defendant's request for further particulars for trial was of course directed not at the information which the plaintiff asserts in paragraphs 10.1 to 10.4 was not available to him; the

question was directed at the efforts that the plaintiff had made to obtain that information. The plaintiff clearly ought to know what efforts he made to obtain that information.

66 The plaintiff argues that should it be contended that the replies are inadequate, it is legitimate for a party that has been ordered to reply to a request for further particulars, to answer that the information sought is unavailable and unknown to him. However, in the present case the information must by definition be within the plaintiff's knowledge.

67 Moreover, the information is relevant. In the defendants' amended plea a plea of prescription is raised, and in particular in paragraph 18.3 the following assertion is made:

> *"The plaintiff knew, or could, by the exercise of reasonable care, have known more than three years prior to 26 June 2006 of the facts from which the claim arose."*

68 The conclusion is then asserted in paragraph 18.4 that the claim has prescribed pursuant to the provisions of s.11 of the Prescription Act 68 of 1969.

69 It follows that the plaintiff did not comply with paragraph 3.6 of the order insofar as it relates to paragraph 7.44 of the defendants' request for further particulars for trial dated 29 November 2007.

70 The next issue relates to paragraphs 8.1 to 8.5 of the defendants' request for further particulars. The order refers to *"8.1 – 8.1"*. This is clearly an error, more particularly since the order was one obtained by consent. This is self-evident when one has regard to the defendants' list of pre-trial requests under

Rule 37(4), paragraph 5, from which this part of paragraph 3.6 of the order was clearly lifted. There the reference is plain: *"8.1 – 8.5"*.

71 The plaintiff's supplementary response of 31 October 2012 deals with this part of the order by responding only to paragraph 8.1 and thereafter paragraph 8.8, thereby ignoring entirely paragraphs 8.2 to 8.5.

72 The plaintiff argued that, although the reference in the order to *"8.1 – 8.1"* is a typographical error and should represent *"8.1 – 8.5"*, the plaintiff ought not to be faulted for the defendants' mistake. The plaintiff continued, in his heads of argument, as follows:

> *"A reply to paragraphs 8.2 to 8.5 shall be furnished once instructions can be obtained from the plaintiff himself."*

73 In his supplementary heads of argument which were handed up on 17 October 2014, the plaintiff added that he *"cannot be faulted until such time as the Court Order is sought to be amended so as to rectify the mistake contained therein."*

74 In an alternative submission, he submitted:

> *"Even should the Honourable Court find that it was incumbent upon the plaintiff to respond to paragraphs 8.2 to 8.5, it would indeed be a drastic step to dismiss the plaintiff's claim based on a failure to respond to four questions in a request for further particulars spanning 24 pages."*

75 In my view any reader of the order, in the context of the defendants' request for further particulars for trial dated 29 November 2007, would have appreciated that the order contained a typographical error and that it should have referred to paragraphs 8.1 to 8.5. When one has regard to the contents

of paragraphs 8.2 to 8.5, i.e. those paragraphs that were not responded to at all, they are pertinent to the issues that arise in the matter:

> *"8.2 Precisely how is the fair market value of each of the vehicles computed?*
>
> *8.3 Insofar as certain of the vehicles may have been sold for less than what the plaintiff contends the fair market value of the vehicles to be, the plaintiff is required to specify upon what basis the plaintiff contends that the fair market value of the vehicles is greater than the price at which they were sold.*
>
> *8.4 What methodology has been utilised in order to determine the fair market value of each of the vehicles?*
>
> *8.5 Insofar as different values have been attached to different vehicles, the plaintiff is required to specify the basis of each valuation."*

76 These questions were directed at paragraph 12 of the plaintiff's amended particulars of claim. That paragraph reads as follows:

> *"The plaintiff is entitled to return of the plaintiff's motor vehicles."*

77 There is an alternative claim, which is for damages representing the fair market value of the motor vehicles, amounting to R35 974 824,25. The information sought by the defendants is accordingly relevant and ought to have been supplied.

78 In this respect then too, the order was not complied with.

79 Paragraph 8.8 of the request read as follows:

> *"Insofar as the plaintiff relies upon comparative sales of similar motor vehicles, the plaintiff is required to identify those sales."*

80 The supplementary response provided was:

> *"Defendants are referred to Annexure A to the plaintiff's particulars of claim."*

81 However, no Annexure A was annexed to the plaintiff's particulars of claim, and during argument neither Counsel was able to identify what that document referred to.

82 To this extent, too, the order was not complied with.

83 Paragraph 8.9 of the defendant's request for further particulars for trial read as follows:

> *"The plaintiff is required to specify the properties of each of the vehicles that were taken into account in effecting the valuation."*

84 The supplementary response was:

> *"Plaintiff took into account the selling price of the vehicles."*

85 The defendants submit that this is not a meaningful response. The defendants' frustration is understood, because the plaintiff does not provide the individual selling prices of the vehicles; presumably it is a reference to the price at which the plaintiff acquired the vehicles and not the price at which they were sold on public auction, the latter amounting in the aggregate to only R2 439 570. The plaintiff's submission in relation to this paragraph is the same as in relation to the other paragraphs: that a party that has been ordered to reply to a request for further particulars may answer that the information sought is unavailable and unknown to him.

86 In this case, however, that answer will not avail, because in fact the plaintiff asserts positively what he took into account in effecting the valuation of the vehicles. However, the assertion is incoherent having regard to the question that was posed.

87 In this regard then, too, the order was not complied with.

88 Paragraph 8.16 of the defendants' request read as follows:

> *"Insofar as the vehicles were not SABS compliant, the plaintiff is required to identify the market for the vehicles and to specify where, when and to whom it would have sold the vehicles had the vehicles been delivered to the plaintiff."*

89 The supplementary response was as follows:

> *"The vehicles would have been sold to businesses and/or natural persons inter alia in Malawi, Zambia, Zimbabwe, Botswana and Tanzania."*

90 The difficulty with the answer is that all that it does is to identify the markets; it does not answer the second part of paragraph 8.16, which is to specify where, when and to whom the vehicles would have been sold. The defendants submitted that the answer raised more questions than it answered.

91 The plaintiff's argument remained the blanket submission referred to above. It does not apply in this case either, because the plaintiff identified positively the market which it had in mind for the vehicles.

92 This answer is therefore inadequate and the order was not complied with in this respect either.

93 Paragraph 8.17 of the defendants' request for further particulars for trial read as follows:

> *"Insofar as the plaintiff does not allege that the vehicles were SABS compliant, the plaintiff is required to specify what was required in order to bring the vehicles up to SABS's specification, the cost of bringing the vehicles up to SABS specification, and the manner in which that cost is calculated."*

94 The supplementary response was as follows:

> *"Plaintiff has no knowledge of the particulars sought in these paragraphs. AMC was responsible for and dealt with all SABS compliance issues."*

95 This response was also offered in relation to the next and final paragraph involved, being paragraph 8.18:

> *"Insofar as the vehicles were not SABS compliant, the plaintiff is required to specify upon what basis the vehicles could have been sold as vehicles capable of being utilised on a South African road."*

96 Here, in my view, the plaintiff's stock answer does in fact avail him. He does not know the answer to these questions, and therefore cannot provide them. In relation to paragraphs 8.17 and 8.18, the order therefore has been complied with.

97 It follows from the above discussion that in my view the order of Mathopo, J was not complied in a number of instances. This entitled the defendants to reinstate the dismissal application, duly supplemented. The question that arises now is whether, having regard to all of the relevant facts over the entire period, the plaintiff's claims should be dismissed.

**The legal principles and their application**

98 In the recent judgment of Cassimjee v Minister of Finance, 2014 (3) SA 198 (SCA) Boruchowitz, AJA enunciated authoritatively the requirements for the dismissal of an action due to inordinate delay in its prosecution. With reference to s.173 of the Constitution, the Learned Judge held that the High Court has the inherent power and right to prevent an abuse of its process in the form of frivolous or vexatious litigation. An inordinate or unreasonable delay in prosecuting an action falls into the category of abuse of process and may warrant the dismissal of an action.

99 His Lordship held that there were no hard and fast rules at the manner in which the discretion to dismiss an action for want of prosecution was to be exercised. He did, however, identify three important factors. The first was that there should have been a delay in the prosecution of the action. The second was that the delay must have been inexcusable. And the third is that the defendant must be seriously prejudiced by the delay. I turn to consider the application of those three requirements to the facts of the present case.

**The delay**

100 Since the summons in this matter was first issued back in 2001, and since there is as of October 2014 no trial date yet, there has clearly been a significant delay in the prosecution of the action. The internal periods of delay over the past 14 years that are particularly significant, are in my view the following.

101 First, there is the lapse of five years from when pleadings closed in 2001 until 2007 when the plaintiff served a notice of intention to amend his particulars of claim. That delay is completely unexplained.

102 The next period of delay was that caused by the failure of the trial to proceed on the first trial date allocated, namely 29 August 2008. It will be recalled that slightly more than a month before the trial date, the plaintiff's attorney withdrew, and for that reason the matter was not ready to proceed to trial. The reasons for the matter not being ripe were set out in the agreed pre-trial minute of the pre-trial conference that was held on 24 July 2008. Those reasons are all the fault of the plaintiff.

103 Third, the delay caused by the removal of the matter from the trial roll on 25 May 2012, being the third trial date, also stands out. It will be recalled that the defendants' attorney received a letter from the plaintiff's attorney on 27 March 2012 unilaterally removing the matter from the trial roll and offering as a reason that *"we are having difficulty getting hold of our client"*.

104 The plaintiff's attorney elaborated upon this explanation in his affidavit opposing the previous dismissal application, when he said that *"the respondent was on a pilgrimage to India, was out of reach and would not return in time for the trial."*

105 There is no information given as to whether the plaintiff's attorney had advised the plaintiff well in advance of the allocation of the trial date, and whether appropriate steps were taken sufficiently in advance to ameliorate the prejudice that would be suffered by the defendants.

106 After that removal from the trial roll followed the argument before Mathopo, J and the order made by the Learned Judge. Two trial dates were allocated since that order, and both of them were in the event not taken up.

107 In this context then, the fourth event that stands out as a significant delay-causing agent was the failure of the matter to be ripe for hearing for the trial date of 22 October 2013. The reason why the matter was not ripe to proceed on that day is set out in the plaintiff's attorney's letter of 8 October 2013. On 4 April 2013 the plaintiff's attorney had received the note from their messenger advising that the trial date had been allocated. However, it was not until 13 September 2013 that plaintiff's attorney advised the defendants' attorney that the Registrar had allocated 22 October 2013; and additionally that the plaintiff's Counsel was not available during that particular week.

108 There is mention in the plaintiff's attorney's letter of 8 October 2013 of difficulties encountered at the office of the Registrar in obtaining a formal notification advising that the matter had been enrolled for 22 October 2013. It is said that this could ultimately only be obtained on 27 September 2013.

109 But if regard is had to the content of that letter, the difficulties were overcome during the period 13 September 2013 to 27 September 2013. If that approximately two week period had been engaged on the 4th of April 2013, then the plaintiff would have been able sufficiently well in advance of 22 October 2013 to have obtained the formal notification from the Registrar advising that the matter had been enrolled.

110 Therefore, the delay caused by this inability to use the fourth allocated trial date of 22 October 2013 is also the fault of the plaintiff.

111 Finally, there is the inability to utilise the fifth allocated trial date being 15 October 2014. There was some debate between the parties as to whether or not the defendant was ready to proceed with the trial. The debate was this:

the parties agreed that the matter was, objectively, not ripe to proceed, whereas the defendant argued that it was not ready to proceed because the plaintiff had not complied with the order.

112 The parties were, however, agreed that irrespective of the above issue, the plaintiff himself was not ready to proceed and would have had to have applied for a postponement in any event.

113 Since it is clear that in fact the plaintiff had not complied with the order, as set out above, the defendants' inability to be ready to proceed to defend the action against them is understandable. But in any event, the primary responsibility for energising the progression of the litigation is that of the plaintiff. And what therefore confronts the plaintiff is that, apart from the inexplicable lapse of five years between 2001 and 2007, on four of the five occasions on which a trial date had been allocated for the matter, the plaintiff was not ready to proceed.

114 In view of these moments, therefore, the delay was clearly inordinate; and the next question is whether it was excusable.

**Was the delay excusable?**

115 As regards the first period of delay referred to above, that of the five years between 2001 and 2007, there is no explanation at all. As regards the inability to proceed on the first and the third allocated trial dates, the fault was clearly that of the plaintiff. Whether it was excusable has also not been disclosed by the plaintiff, who has not deposed to an affidavit explaining the reasons for those delays. For instance, there is no affidavit explaining what

the arrangements were between him and his attorney when he went on the pilgrimage to India; and there is no explanation as to why his first attorney withdrew shortly before the first trial date of 2008.

116 Similarly, as regards the fourth trial date, there is no explanation for the delay between April and September 2013, and as regards the fifth trial date, there is equally no explanation for the inability of the plaintiff to proceed with the trial on 15 October 2014.

117 The plaintiff is the person who ought to have taken the court into his confidence and to have explained why it was that, particularly in respect of 15 October 2014, he was still not ready to proceed with the trial. The absence of an affidavit by him is regrettable for two further reasons.

118 The first is that the order must be regarded as having been a watershed. His Lordship heard argument in an opposed application for the dismissal of the plaintiff's claim. And it is clear from the court order, in particular paragraph 4, that His Lordship was affording the plaintiff one more chance. The fact that, in terms of paragraph 4, the defendants were granted leave to renew their application duly supplemented if the order were not complied with, underscores this. Yet on the face of it there was no sense of urgency on the part of the plaintiff in preparing either for the trial date of 22 October 2013 or for the trial date of 15 October 2014.

119 The second reason is that the defendants, and in particular the first defendant, have raised substantive and substantial allegations against the plaintiff's cause of action. Apart from the plea of prescription, there is the significant challenge to the plaintiff's assertion of ownership; and there is the reliance on

s.34 of the Insolvency Act 24 of 1936. One would have expected of a plaintiff who was seriously intent on prosecuting his claim to have traversed those issues on oath, and to have dealt with, at least at *prima facie* level, the defences raised against his large claim. This was not done.

120 It follows that in my view the significant delays are not excusable. Rather, the picture that emerges is that of a plaintiff who has not prioritised the prosecution of his claims, that despite the lifeline which Mathopo, J had afforded him. There was, and apparently still is, no appreciation of the escalating urgency to have the matter adjudicated upon.

121 That leaves for consideration the question of whether the defendants are being prejudiced.

**Defendants' prejudice**

122 Their prejudice was dealt with in the original founding affidavit at paragraphs 66 to 73, and in the supplementary founding affidavit at paragraphs 77 to 84. The response to the defendants' allegations of prejudice in the initial founding affidavit is contained in paragraph 40 of the original answering affidavit, in these terms:

> *"The contents hereof are denied. The parties agreed not to proceed with the trial on any of the three occasions. On all three occasions the trial was removed from the roll timeously so as to avoid unnecessary costs such as costs of counsel. Preparation costs are not in any way wasted as the matter will ultimately proceed to trial. Any preparation already done is to be benefit of the applicants, surely. The applicants on their own version failed with a further application for security for costs which is indicative of the fact that the court rejected the applicants' version that they will be unable to recover their costs from the respondent, if costs were ever granted in their favour."*

123 This is not an answer to the prejudice that was raised. The defendants are self-evidently being prejudiced by the matter not coming to a head, and it is no answer to say that the matter can be postponed every time it comes up for trial, because the benefit of the trial preparation is simply carried forward to the next occasion.

124 As regards the prejudice raised in the supplementary founding affidavit, the defendants pointed to paragraphs 12 to 15 of the original founding affidavit. Those paragraphs explain that the first defendant has ceased trading as a commercial bank and has retained funds to cover potential claims against it. The delay in finalising the action is delaying the distribution of the first defendant's liquidated assets to its shareholders.

125 Further, the defendants explained that the administration of AMC's estate is also at an end. There are no assets left to liquidate. However, the liquidators cannot close AMC's estate and make a distribution to creditors until the action will have been concluded.

126 Finally, as a consequence of the delay in bringing the proceedings to finality, the defendants have lost contact with their witnesses. Documents have become lost or hard to trace. In short, they have been prejudiced in their ability properly to defend the action.

127 The answering affidavit which was filed by the plaintiff's attorney on behalf of the plaintiff on 16 October 2014 does not deal at all with the prejudice suffered by the defendants.

128 In the original answering affidavit, the plaintiff's attorney challenged paragraphs 12 to 14 of the original founding affidavit by arguing that the defendants themselves have not taken any steps to bring the matter to fruition. The defendants, he argues, made no attempt to apply for a trial date in the normal course and have not used any of the interlocutory procedures at their disposal to drive the matter towards finality. The attorney asserted that the defendants have done so at their own peril.

129 The defendants' conduct is, of course, a factor that must be taken into account. But it cannot be viewed in isolation, because ultimately a defendant who does not obtain answers legitimately directed at a plaintiff's cause of action, is prejudiced in the preparation of its defence. And, as indicated above, the primary responsibility for bringing a matter to a head, is that of the plaintiff, not that of the defendant. And the defendants' failure to have sped up resolution can, by definition, not have contributed to a delay in prosecution caused by the plaintiff.

130 That the defendants are prejudiced by the delay must accordingly be accepted as uncontestable. The only point ultimately made by the plaintiff in this regard is that the defendants are also to blame for the delay. But that point does not present an answer to the application. In my view it follows that the application must succeed.

131 A special costs order is sought. I am disinclined to grant such an order; the plaintiff's conduct was dilatory, not egregious.

132 In the result I make the following order:

1. The plaintiff's claims against the defendants are dismissed.

2. The plaintiff is directed to pay the costs of the action, including the costs of the application brought under amended notice of motion dated 26 September 2014, the costs reserved on 10 October 2012, and the costs reserved on 24 July 2008.

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**VAN DER LINDE AJ**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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