IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISON, PRETORIA

CASE NUMBER: 57611/2014

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

..... 22/06/2022

SIGNATURE DATE

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF ARGRICULTURE, RURAL

DEVELOPMENT, LAND, & ENVIRONMENTAL

AFFAIRS MPUMALANGA PROVINCE Applicant

And

KANJANI (PTY) LTD Respondent

JUDGMENT

SARDIWALLA J:

Introduction:

[1] This is an application brought on notice of motion whereby the Applicant seeks an order dismissing the Respondent's action with costs for undue delay over some seven years.

Background to the Application:

[2] During 2003/2004 the Applicant developed a programme which became known as the Masibuyele Emasmini Programme ("the MEP"). The purpose of the programme was to encourage rural communities to till the land. The MEP targeted subsistence farners who do not have the means to till the land for food production.

[3] In order to make the MEP work, the department required service providers in each of the three districts: Gert Sibande, Nkangala and Ehlanzeni North and South. The Department then published tenders and called for invitations to bid on a contract basis for three years.

[4] The Respondent was awarded two of these contracts, one in Gert Sibande and Nkangala. The Respondent issued invoices to the value of R 190 million and the Applicant has paid approximately R121 million, however after discovering what the Applicant regarded

as “invoicing irregularities”, it stopped paying which has led to the current dispute and aforesaid action.

[5] The Respondent instituted the action in 2014 and pleadings were exchanged between the until 2016. The matter has been set down for trial on several occasion but has never proceeded to trial. Of particular reference is 31 July 2017 and 11 May 2020 as the Respondent claimed that it was not ready to proceed and has resulted in the current application to dismiss.

[6] The application is opposed by the Respondent on the grounds that:

6.1 The Applicant’s conduct in June/July 2017 resulted in that the trial could only proceed some three years later because of the amended counterclaim as well as a rejoinder that materially affected the nature of the issues;

6.2 The Rule 39 (11) application which was voluminous was brought by the Applicant days before the trial and was set down for 27 May 2020 and as a result the parties agreed that the trial should be postponed until after the Rule 39(11) application was heard; and

6.3 That the Respondent’s interactions with the Applicant’s employees created an impression that there existed a real prospect for an out of court settlement. calculation of the Waste Tyre Fee for the period of October to December 2016 was unlawful and unconstitutional.

Applicant’s Argument

[7] It is the Applicant's submission that the Respondent has instituted the action several years ago but that the action should be dismissed on two grounds namely; that the Respondent has a hopeless case and secondly that it has unduly delayed in actively advancing the litigation. It avers that before the trial was set down for May 2020 its attorney repeatedly advised the Respondent's attorney that its particulars of claim was not trial ready. It indicated that it also stated this when the Rule 39(11) application was argued and that despite the fact the Respondent denied this, my ruling of the Rule 39(11) application was to the effect that the Respondent needed to amend its papers. On 23 June 2020 the Applicant's attorney requested that the proposed amendment be filed by 30 August 2020 to which the Respondent stated that it would consider an amendment but would not be committing to a deadline. However, the Respondent never amended its papers. Further that three months after that another request was made to have the amended papers by October 2020 failing which the Applicant will take the necessary steps to bring the litigation to an end. The Respondent still refused to comply. In February 2021 the Applicant again wrote to the Respondent indicating that the 10 months' delay after the Rule 39(11) order dated 8 June 2021 was unreasonable to which the Respondent stated that there was a third wave of Covid-19. The Applicant submits that at no stage before this current application was launched did the Respondent acknowledge let alone indicate any intention to amend its particulars of claim. However, the situation changed after the application was filed with the Respondent acknowledging in its answering affidavit that amendments were necessary but still refused to commit itself to a date for the filing of that amendment.

[8] It argues that the Respondent's actions are *mala fide* with the purpose of holding out for a better settlement and has made no effort to advance its claim. The Applicant states that

eleven months after the order of 8 June 2021 the Respondent files an answering affidavit to this application and for the first time in all its correspondence has indicates that it has been liaising with a Department official for the last eleven months in an effort to settle the matter and therefore this is the reason for no attending to the amendment. However, no confirmatory affidavits have been provided by the Respondent and thus its version cannot be confirmed. To the contrary the Applicant has put up affidavits of its officials that make it clear that they do not know the official that the Respondent is referring to and have no knowledge of the Respondent's version of settlement negotiations. Despite the refuting evidence, the Respondent has put up no evidence at all. The Applicant claims that the defence raised combined with the documentary evidence to support it indicates that the Respondent will never be able to prove its claim and has been purposely evasive awaiting a settlement offer.

[9] The Applicant argues that it is not always practically possible to adjudicate satisfactorily cases that have become stale as memories of those required to testify may become faded and unreliable, documentary evidence can disappear as well as costs involved in wasting taxpayer funded money indefinitely defending a matter year after year with no end in sight. It states that the Respondent was never a serious litigant and is unduly delaying the matter which has now become a vexatious, frivolous, malicious and reckless claim. It has filed to deal with material issues in its answering affidavit but rather puts up for the first time in this application a version of settlement that cannot be confirmed with an intention of yet another unreasonable delay and that this Court should frown upon such conduct and on this basis should grant the relief sought.

Respondent's Argument

[10] The respondent opposed the application and argues that it has the right to a fair public hearing in open Court granted by the Constitution and common law that an application of this nature which has the effect of directly affecting that in that the Applicant's plea and counterclaim was defective which led to the Respondent being forced raising and enrol an exception which was only days before the hearing did the Applicant indicate that it would not oppose. The order upholding the exception was granted on 11 May 2015 being that the Applicant's plea and counterclaim were struck out. The Applicant then filed its amended plea and counterclaim in June 2015 after the summons was served.

[11] It avers thereafter the matter proceeded but in May 2015 and March 2017 the Applicant's attorneys withdrew leading to transfer of documents and indulgences sought from the Respondent to acquaint themselves with the matter. It alleges that the amended plea and counterclaim led changed the nature of the matter from at which point the pleadings had not closed and the trial was three weeks away to commence on 31 July 2017. Therefore, the Applicant's conduct necessitated a postponement. The Respondent also indicated that it had set the matter down for trial on 18 August 2016 prior to the Applicant's second change of attorneys.

[12] It further argues that the allegation that the Respondent is responsible for the postponements is *mala fide* and without substance. It further stated that the matter was set down for 11 to 22 February 2019 which the parties agreed was insufficient and therefore the Respondent sought a new trial allocation on 15 October 2018 which was then set down from 11 May 2020. The Respondent therefore claims that between the period of 2017 and 2020 the Applicant was responsible for the delay for three years. In May 2020 Covid-19 led to another delay which rendered consultations with witnesses impossible due to inter-provincial travel

was prohibited. However, a postponement was overtaken by the Rule 39(11) application to be heard on 11 May 2020 which was voluminous and complicated requiring comprehensive responses delaying its preparation for trial and that the Applicant should have enrolled the matter earlier and not so close to the trial. This also led to the trial being postponed.

[13] Lastly it argues that the denial of settlement talks by the Applicant and/or its failure to provide confirmatory affidavits in this regard do not detract from Mr Grey's evidence that he had such discussions and that he had *bona fide* impression that there was a real possibility of settlement and accordingly the Respondent's attorney was instructed not to agree to a specific date for the filing of the amendment. The Respondent alleges that the Applicant strung it along by setting dates for the amendment so that it could use the delays against to build a case and therefore the current application came as a surprise. It avers that it did not anticipate a dismissal of action application but rather that the Applicant would apply for a trial date. It avers that an attempt to settle the matter should not be viewed as inexcusable and is not tantamount to an intention not to proceed with the matter or abandon the litigation. As soon as it received the current application it acknowledged that it would file an amendment of its particulars of claim and corroborates its intention to prosecute the action. It claims that the constant requests for the Respondent to file an amendment also corroborates that there is a triable case to meet.

[14] The Respondent that the Applicant's argument of having a contingent liability on its books and allegations that some witnesses or documents may not be available cannot be the kind of prejudice that warrants a dismissal. The Applicant should have preserved evidence they would require and some witnesses passing away does not justify a dismissal. It states that a mere delay of some ten months' even if it does result in prejudice, which it denies, does not warrant the dismissal as it must be inexcusable and inordinate to constitute an abuse of process.

Lastly that if a case of abuse is established the court has the discretion on how to deal with the matter so as not to cause prejudice to either party and dismissal should be an exception and that this is not.

Dismissal of an action

[15] There is no rule of court or of practice which lays down a period that must elapse before a summons is regarded as being stale, and it is in the discretion of the court to allow proceedings on a stale summons to continue.[1]

[16] The high court has the inherent power, both at common law and in terms of section 173 of the Constitution to regulate its own process. This includes the right to prevent an abuse of its process in the form of frivolous or vexatious litigation.[2] An inordinate or unreasonable delay in prosecuting an action may also, depending on the circumstances, constitute an abuse of process and warrant the dismissal of an action arising from the court's same discretion to prevent an abuse of its process.[3] An inordinate or unreasonable delay in prosecuting any action

[1] Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 5th Ed at page 505; Hunt v Engers 1921 CPD 754; Kuhn v Kerbel and Another 1957 (3) SA 525 (A) at 534 F – G; Molala v Minister of Law & Order and Another 1993 (1) SA 673 (W) at 676 C; Sanford v Haley N O (2004) 3 SA 296 (C) at 299 – Para [7].
[2] Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271; Corderoy v Union Government (Minister of Finance) 1918 AD 512 at 519; Fisheries Development Corporation of SA Ltd v Jorgensen & another 1979 (3) SA 1331 (W) at 1338F-G; Beinash & another v Ernst & Young & others 1999 (2) SA 116 (CC) paras 10 and 17. Cassimjee v Minister of Finance 2014 (3) SA 198 (SCA) at para [8].
[3] Verkouteren v Savage 1918 AD 143 at 144; Schoeman & andere v Van Tonder 1979 (1) SA 301 (O) at 305C-E; Kuiper & others v Benson 1984 (1) SA 474 (W) at 476H-477B; Molala *Supra*, at 676B-679I; Bissett & others v Boland Bank Limited & others 1991 (4) SA 603 (D) at 608C-E; Sanford *Supra*, at para 8; Gopaul v Subbamah 2002 (6) SA 551 (D) at 558F-J; Golden International Navigation SA v Zeba Maritime Co Ltd; 2008 (3) SA10 (C); Zakade v Government of the RSA [2010] JOL 25868 (ECB) at par [36].

may constitute an abuse of court process that, in certain narrowly defined circumstances, may justify dismissal of the action (see *Verkouteren v Savage* 1918 AD 143 at 144; *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558; *Sanford v Haley NO* 2004 (3) SA 296 (C) at para 8; *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (C); and *Zakade v Government of the RSA* [2010] JOL 25868 (ECB)).

[17] It is a trite principle of law however that a court should not easily dismiss an action for want of prosecution, except in cases where there has been a *clear* abuse of the process of court.[4] Indeed, a court will exercise such powers sparingly and only in exceptional circumstances because the dismissal of an action can have serious impacts on the constitutional and common law rights of a plaintiff to have his dispute adjudicated in a court of law by means of a fair trial.[5] In Cassimjee[6] held that even though section 34 of the Constitution does provide that every person the right to have a dispute adjudicated by a court or tribunal in a fair public hearing, that there exists a limitation of that right provided that the limitation is reasonable and justifiable. The question before the court therefore is not just if there is an unreasonable delay but whether or not the Plaintiff is guilty of an abuse of process.

[18] In Molala[7] it was held that the court's discretion to dismiss an action are constrained:

[4] Kuiper *Supra* at 477A and Molala *Supra* at 676 A – 677 A.
[5] Harms Civil Procedure in the Superior Courts A3.5; Western Assurance Company v Caldwell's Trustee 1918 AD 262 at 27; Corderoy v Union and Government 1918 AD 512 at 517; Schoeman en Andere v Van Tonder 1979 (1) SA 305 (O) at 305 F; Fisheries Development Corporation of SA LTD v Jorgensen and Another 1979 (3) SA 1331(WLD) at 1338 G; Kuiper S*upra* at 477A - C; Molala *Supra* at 677 A*;* Sanford *Supra* at par [8]; Sanford *Supra* at 300 B – C.
[6] *Supra*
[7] *Supra*.

> "The approach which I am bound to apply is therefore not simply whether more than a reasonable time has elapsed. It should be assessed whether a facility which is undoubtedly available to a party was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but knowingly in such fashion that the manner of exercise of that right would cause injustice."[8]

[19] In Cassimjee v Minister of Finance[9] the Supreme Court of Appeal noted the proper approach to be adopted in respect of the exercise of the court's discretion to dismiss an action for want of prosecution as follows:

> "There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable and, third, the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the

[8] *Supra* at 677 C – E.
[9] *Supra*.

defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.

An approach that commends itself is that postulated by Salmon LJ in the English case of Allen v Sir Alfred McAlpine & Sons Limited; Bostic v Bermondsey & Southwark Group Hospital Management Committee. Sternberg & another v Hammond & another [1968] 1 All ER 543 (CA), where the following was stated at 561e-h:

> '[A] defendant may apply to have an action dismissed for want of prosecution either *(a)* because of the plaintiff's failure to comply with the Rules of the Supreme Court or *(b)* under the Court's inherent jurisdiction. In my view it matters not whether the application comes under limb *(a)* or *(b)*, the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the

> plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself; prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.'"[10]

[20] On the issue of prejudice, the defendant bares the onus of proving that a real prejudice exists from the delay of the prosecution setting out clearly what those prejudices are or will be if the matter remains in a stalemate.

[21] I am not inclined to agree with the submissions of the Respondent that it's late acknowledgement of the amendment as required by my order dated 8 June 2021 indicates an intention to ensure that the matter is prosecuted. Nor do I agree that the action on the part of the Applicant was done deliberately so as to prejudice the Respondent or build a case against it. Indeed, to the contrary, the Respondent admits that when confronted with necessary legal steps to ensure that the Applicant amended its plea and counterclaim that the Applicant in fact duly complied. In fact, the Applicant complied within a month of the Respondent securing such order. However, to the contrary the Respondent despite the order of 8 June 2021 blatantly disregarded this Court's directives when called upon for eleven months and did not provide any explanation as to its inability to meet the timeframes set for the filing of the amendments by the Applicant. The Respondent wants this Court to believe that its failure to agree to a date on which the Applicant could reasonably expect the amendment or even acknowledge that the amendment, was a calculated strategy employed to derail the Respondent's case and to

[10] At paragraphs [11] – [12]

rather build a case of dismissal against it. I cannot find any merit in this argument on the simple basis that the Applicant could not have expected or anticipated that the Respondent despite numerous requests, not accede to its request to file the amended particulars of claim, so as to place reliance on such unwillingness so in advance to provide it with a legal instrument to dissemble the Respondent's case.

[22] A further factor to be considered is that if the Respondent's version was even in the slightest of possibilities to be accepted as true, it still does not provide any explanation as to why it did not inform the Applicant or its legal representatives, in any of its responses to its request for the amended particulars of claim that it was in fact as it alleges liaising with the Applicant's officials to explore a possibility of settlement. Surely this would have been the reasonable actions of a party, who if they honestly believed that the steps they were taking in those settlement talks was with the sole intention of prosecuting its claim, that the Applicant would need to be informed why the amendment of the particulars of claim was being stayed for the time being. I cannot find any defence legitimately raised by the Respondent on why several years later firstly, it proceeded this far in the litigation without amending its particulars of claim, even after being ordered to do so and secondly only after several years of instituting the action acknowledges that the amendment is necessary.

[23] Turning to the allegation made by the Applicant that the Respondent does not know how or not what basis to formulate its claim can only be drawn as the logical inference when one looks at the "behaviour" of the Respondent and therefore the assumption that the Respondent was holding out for a better settlement can be accepted as a reasonable and logical inference. In terms of the principles above if no credible excuse is made out then the natural inference must be drawn that it is inexcusable, which in this matter I am inclined to agree with.

[24] Instead, the Respondent alleges that it is surprised by the present application and the allegations of an abuse of process. Whilst the Respondent may have on several occasions set the matter down for trial, its intention to proceed with the trial remains to be determined by the facts before this Court. The facts before this Court are that if the Respondent's particulars of claim were not amended at the point that it set the matter down each time, it cannot be said that it had a real intention that the matter would proceed. It is a prerequisite that pleadings close before a trial date can be secured and clearly the pleadings were not closed when the trial dates were in fact requested as the Respondent now admits that it has acknowledged that it will amend its particulars of claim. One can infer that setting the matter down prematurely under the suggestion that it was ready for trial was an attempt to strong arm the Applicant into settlement negotiations and should the Applicant have assumed such intention on part of the Respondent's actions, it would in my opinion be right to infer so.

[25] It is abundantly plain in my view that the conduct of the Respondent in action is *male fide*. In my view The Respondent should have recognized what was at stake when the order of 8 June 2021 was granted and that there was real prejudice to the Applicant by refusing to agree on a date for the amended particulars of claim to be submitted. This is undisputed as the Applicant could adequately prepare its defence and not informing the Applicant of the alleged settlement talks and allowing it to proceed to believe that it would file an amended particulars of claim at some stage, while and holding the Applicant to its bargaining with the Respondent, which the Respondent cannot approve with confirmatory affidavits or any documentary evidence of its existence is inexcusable. Fairness dictates that the Respondent should not have been allowed to take advantage of the situation.[11]

[11] See Minister of Safety & Security and others v Ndaba [2017] JOL 37748 (ECM) at [13] – [14] in which the court emphasised the point that the nature of the plaintiff's claim as well as the potential in a delay application that the relief sought by his opponent could have a devastating effect upon his ability to have that claim fairly adjudicated in a public hearing before a public court, are vital considerations to be taken into account in an application seeking

[26] In all the circumstances I am satisfied that the exercise of this Court's discretion relied upon by the Applicant is acceptable and that this court is entitled to exercise its discretion in favour of the Applicant.

[27] **In the premises I issue the following order:**

1. The application succeeds and Kanjani's action contained in its summons and under particulars of claim issued against the Department under case number 57611/2014 is dismissed with costs of two counsel on the attorney and client scale, inclusive of all costs preciously reserved.

2. Kanjani shall pay the costs of this application including the costs of two counsel on attorney and client scale.

SARDIWALLA J

JUDGE OF THE HIGH COURT

the dismissal of an action on the grounds of a claimed delay in the prosecution thereof.

APPEARANCES

Date of judgment	:	22 June 2022
Counsel for the Applicant	:	H VAN EEDEN SC K HOPKINS
Applicant's Attorneys	:	Majavu Incorporated
Counsel for the Respondent	:	JH DREYER SC JW SCHABORT
Respondent's Attorneys	:	Noltes Attorneys C/O VFV Attorneys