



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 521/2012**

**JOHANNES COETZEE**

First Plaintiff / First Respondent

**GESINA MARIA COETZEE**

Second Plaintiff / Second Respondent

and

**T VOETPAD CC**

Fourth Defendant / First Applicant

**WILLEM JOHANNES VAN ZYL BRAND**

First Defendant / Second Applicant

**JAN JURIE BRAND**

Second Defendant / Third Applicant

**WEST COAST ROOIBOS TEA CC**

Third Defendant / Fourth Applicant

**THE TRUSTEES FOR THE TIME BEING  
OF THE DAC SMIT FAMILY TRUST**

Fifth Defendant / Fifth Applicant

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**JUDGMENT**

**Judgment: 27 May 2022 (electronically delivered)**

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## **Introduction**

- 1] The Respondents instituted a delictual claim against the Applicants on 16 January 2012 for damage caused by a fire to their farm in the amount of R7 348 600.00.
- 2] The First to fourth Applicants bring this application for final relief in the following terms:
  - 2.1] That the First and Second Respondent's action be dismissed with costs due to non-prosecution of their claims.

## **Background**

- 3] The Applicants are the Defendants in the main action and the Respondents are the Plaintiffs in main.
- 4] The factual chronology which is largely not in dispute, here follows:
  - 4.1] During January 2012, the Respondents instituted action against the Applicants by issuing Summons against the First to Fifth Applicants.
  - 4.2] On 28 March 2012, the Applicants served and filed their plea to the Respondents particulars of claim.
  - 4.3] The First Applicant changed attorneys and his current attorney came on record for it on 2 July 2012.
  - 4.4] On 23 January 2013, the First Applicant served and filed its discovery affidavit and subsequently filed its notice to amend its plea on 19 June 2013.

- 4.5] On 15 November 2013 the amended plea was delivered by the First Applicant and the matter eventually reached the stage of *litis contestatio*. It appears from the record that there was a period of three years which lapsed before there was any further activity in the matter. It also appears that it was at the instance of the attorney for First Applicant who requested an audience with the Respondents' attorney to attempt to resolve and/or settle the matter. Several months passed with unrequited correspondence before the Respondent's attorney, Mr Grobbelaar entertained a telephonic discussion on 24 February 2017 at which stage he undertook to obtain full instructions from his clients.
- 4.6] The undertaking by Mr Grobbelaar came to nought and on 13 April 2017, the attorney, upon instruction from the First Applicant, requested that the matter be enrolled for trial.
- 4.7] Mr Grobbelaar once again undertook to consult with his clients and revert to the First Applicant's attorney by 11 June 2017 which was not honoured. The record confirms that the Applicants' attorneys addressed further correspondence to the Respondents' attorneys without reply.
- 4.8] Thereafter, a further 3 year period lapsed before correspondence was received from Mr Grobbelaar.
- 4.9] On 19 June 2020, First Applicant's attorney, Mr De Swardt informed Mr Grobbelaar that the First Applicant instructed him to proceed with an application for dismissal of the claim due to inaction to prosecute the claim.
- 4.10] As at the date of this application in 2022, the Respondent has failed to enrol the matter for hearing and failed to progress the matter in any manner.



4.11] The 12 year delay, it is argued, is to be considered as inordinate and unreasonable, constituting an abuse of process. Furthermore, that the delay has caused severe prejudice to the Applicants.

4.12] The matter is opposed.

### **Point in limine**

### **Lack of locus standi**

- 5] This issue was not raised by the First Applicant in its founding papers and was raised for the first time in reply. It is accepted by the parties that the Respondents were married to each other in community of property. After the death of the First Respondent on 24 March 2017, an Executor was appointed, Mr Morne van Niekerk (as a nominee of ABSA TRUST LIMITED) to attend to the administration of the late estate of First Respondent and that of the Second Respondent's massed estates'. It is common cause that the estate was finalised in and during July 2019. It is submitted by the First Applicant that in the massing of the joint estates, both Respondents' estates were subject to the Executor for administration. At that stage, the First Applicant submits that the Executor stood in the shoes of the massed estate and had an election to either be substituted as Plaintiff in the proceedings in main and to consequently prosecute the claim to its natural end, or to abandon the claim. It is common cause that the Executor elected not to prosecute the claim due to lack of liquid funds in the estate. It is further argued by the First Applicant that the Executors election not to be substituted as Plaintiff bound both the first and second respondents' estates. Expanding on the argument, the heirs and / legatees would also not have any rights to prosecute the claim since they suffered no damages. The delictual claim for damages attached to the Respondents who potentially suffered the loss.

- 6] The Second Respondent could thus only answer to these averments in argument. In the ordinary and expeditious course of litigation, this would be raised as a special plea and would stand the best chance of being fully ventilated and considered.
- 7] It is incumbent on this Court to consider the inherent prejudice in entertaining the point in limine, given the stage at which it was raised and given that the Second Respondent was not afforded an opportunity to respond to these arguments fully. The Second Respondent has her right to litigate entrenched in the Constitution.<sup>1</sup>
- 8] The point in limine was raised in reply and not raised on the founding papers. It is trite that a party is bound by the contents of its founding papers and may raise issues of law in reply only insofar as it does not cause prejudice.<sup>2</sup>

## **The Law**

### **Discretion to Dismiss**

- 9] There are at least two ways in which an action may be summarily dismissed in accordance with the provisions of the Vexatious Proceedings Act 3 of 1956 and under the Court's inherent jurisdiction.<sup>3</sup>
- 10] The power to dismiss an action encompasses a discretion to dismiss an action on account of delay in prosecution of a matter. This discretion must be exercised with consideration to three prerequisites:

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<sup>1</sup> Beinish and another v Ernst & Young and others 199(2) SA 116(CC), it held that restricting access to vexatious litigants seems an indispensable purpose designed to secure the rights of those litigants who have meritorious disputes and, further, it is a necessary step to protect the bona fide litigants, processes of Court and the Administration of Justice.

<sup>2</sup> MEC for Health, Gauteng v 3P Consulting 2012 (2) SA 542 (SCA) 551 C-D

While it is so that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers, provided that all relevant facts are before court, this will not be allowed if it causes prejudice to the other party.

<sup>3</sup> Herbstein and Van Winsen 5<sup>th</sup> edition, 2009, chapter 27 at page 700



10.1] There must be a delay in the prosecution of an action;

10.2] The delay must be inexcusable; and

10.3] The defendant must be seriously prejudiced by the delay.

11] An inordinate or unreasonable delay in prosecuting an action may, however, depending on the circumstances, in common law constitute an abuse of process and warrant the dismissal of an action arising from the Court's discretion to prevent an abuse of its process. Courts have not easily dismissed action proceedings for want of timeous prosecution except in clear cases of abuse of process of Court.<sup>4</sup>

12] Regard must also be had to the Second Respondent's rights entrenched in terms of section 34 of the Constitution.<sup>5</sup>

*"everyone has the right to have a dispute that can be resolved by the application of the law decided by a court or tribunal in a fair public hearing."*

### **Evaluation**

13] It is common cause that the First Respondent passed away on 24 March 2017. The deceased's estate was only wound up by the executors on and around July 2019. The Respondents' estates were massed for purposes of the winding up and I accept that the Executor of the estate failed to substitute himself as Plaintiff to prosecute the claim. The reason for that decision appears to have been financial constraint rather than one based on the merits of the claim. The claim in the main action is delictual in nature and emanates from damages suffered as a result of a fire which affected several farms, including that of the Respondents' herein.

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<sup>4</sup> Fisheries Development Corporation of SA LTD v Jorgensen and another 1979(3) SA1331(WLD)

<sup>5</sup> Act 108 of 1996

- 14] Mr Grobbelaar confirms that he acts on behalf of the Second Respondent and the legatees of the estate and that he has instructions to proceed with the prosecution of the matter. Mr Grobbelaar asserts that Second Respondent or the legatees were not able to give financial instructions to pursue the claim at an earlier point. The legatees are not parties to the action nor are they parties in these proceedings and whatever interest they may have in the claim cannot be ventilated in these proceedings.
- 15] It is contended by Mr Grobbelaar that he was only 'recently' given financial instructions to pursue the action. He does not commit to any particular time frame in relation to matter as a whole. However, it cannot be disputed that there has been an extensive delay in the prosecution of the claim, more especially in light of the fact that the matter had reached the point of *litis contestatio* prior to the death of the First Respondent.
- 16] The question is whether the delay can be considered as inordinate so as to cause serious prejudice to the Applicants.
- 17] Here, I consider the extensive delay caused by virtue of the winding up of the First Respondent's estate. The First Applicant does not dispute that it had knowledge of the First Respondent's death or the Executor's decision not to be substituted as Plaintiff as far back as 2019. I consider that the Applicants had knowledge of the fact that an Executor was appointed to wind up the massed estate and that he had ultimately elected not to be substituted as Plaintiff in the main action. It is curious that Applicant would not have raised the issue of locus standi then, to bring the matter to speedier conclusion.
- 18] That said, I find the sluggish conduct of the Respondents' attorneys to be of concern. It appears from the papers that he was non responsive to a barrage of communications from First Applicant's attorney for an extended amount of time



without explanation. This concern extends into these proceedings, since no further steps have been taken by the Respondents in the matter.

- 19] The matter appeared to gain momentum in the form of communication just as the country was placed under national lockdown.<sup>6</sup>
- 20] The lengthy delay was clearly primarily caused by the untimely death of the First Respondent and can be considered as excusable on the available facts.
- 21] Whether the accepted delay caused serious prejudice must of course also be examined.
- 22] The Applicants have had this matter hang over their proverbial heads for almost 12 years. The claim is substantial and has the potential to severely impact their lives and livelihoods. However, the extent of this prejudice was not placed before this court. An assessment of the severity of prejudice is left for this court to deduce rather than explained. I therefore am not able to fairly make that assessment.

### **Conclusion**

- 23] I find that although there has been an extensive delay in the matter, I do not consider it to be inordinate in the particular circumstances. Moreover, as previously stated, I cannot deduce the severity of the prejudice as it was not expounded on. That said, I am of the view that the Second Respondent must be put to terms to prosecute the main action in the interest of justice. To this end I believe it appropriate to include this in the order that follows.

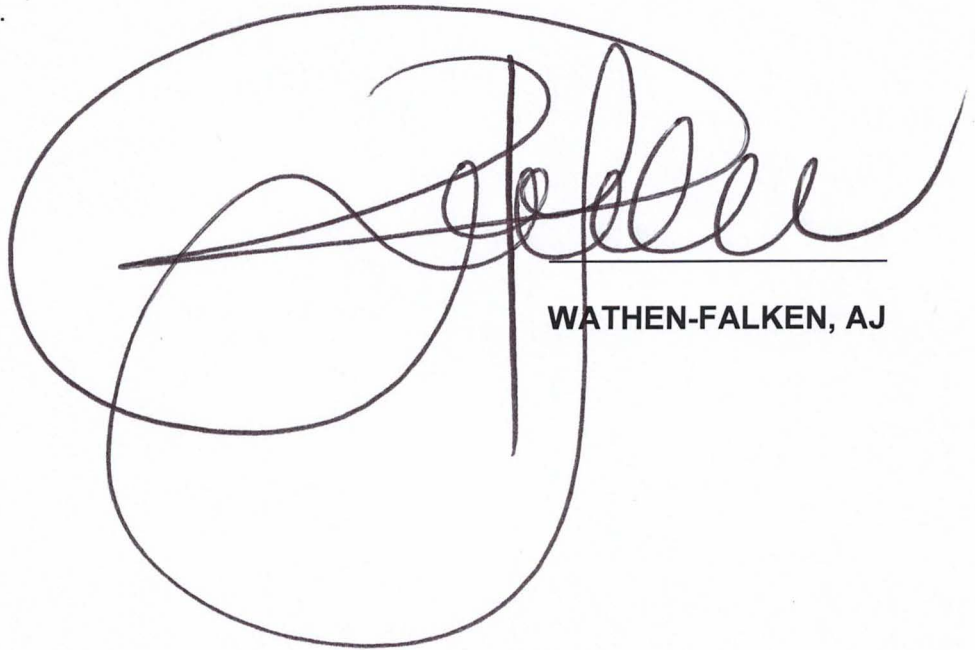
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<sup>6</sup> Disaster Management Act 57 of 2002



**Wherefore I order as follows:**

- i] The application for the dismissal of the action is postponed *sine die* with no order as to costs;
- ii] The Respondents are directed to enrol the main action for pre-trial case management within 30 (thirty) calendar days from date of this order and to prosecute it timeously to finality in accordance with the case management Judge's direction and the notice of set down issued by the Registrar once it has been declared trial ready.
- iii] Should the Respondents fail to do so, the Applicants are granted leave to approach this Court on the same papers duly supplemented, on not less than 10 (ten) days notice to the Respondents for an order dismissing the main action.

A large, stylized handwritten signature in dark ink, featuring a large loop on the left and a series of vertical strokes on the right, crossing over itself. The signature is written over a horizontal line.**WATHEN-FALKEN, AJ**