



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no
Circulate to other Judges: yes/no
Circulate to Magistrates: yes/no

Case Number 4973/2013

In the matter of:

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE DEPARTMENT OF HUMAN SETTLEMENTS,
FREE STATE PROVINCE**

Applicant

and

CEM BRICK CC	1 st Respondent
BUNKER HILLS INVESTMENTS 115 (PTY) LTD	2 nd Respondent
MOELETSI TRADING CC	3 rd Respondent
BOKANG Q TRADING CC	4 th Respondent
PEOPLE FIRST INVESTMENTS CC	5 th Respondent
REHAUWE CONSTRUCTION & DEVELOPMENT CC	6 th Respondent
KAELO CONSTRUCTION & PROJECTS CC	7 th Respondent
SEDITI CONSTRUCTION SERVICES CC	8 th Respondent
ZIQOQE CONSTRUCTION CC	9 th Respondent

CORAM: BERRY, AJ

HEARD ON: 04 MAY 2023

DELIVERED ON: 02 OCTOBER 2023

JUDGMENT BY: BERRY, AJ

JUDGMENT

INTRODUCTION

[1] I refer to the parties as they are cited in this Application and not as they are cited in the main action proceedings.

[2] The Applicant instituted action against the 1st to 9th Respondent on 2 December 2013.

[3] The claim against the 1st Respondent is for payment in the sum of R56,643,232.51 together with interest and costs.

[4] Orders are sought against the Respondents for delivery and debatement of accounts.

- [5] The 1st and 9th Respondents defend the action.
- [6] The Applicant pursued the action by requiring the 9th Defendant in the action to deliver its Plea and by applying for default judgment against those Defendants who did not defend the matter.
- [7] The legal representatives of the 1st Respondent were informed by e-mail that the Application for Default Judgment would proceed on 1 October 2015, but that judgment would not be sought against the 1st Respondent.
- [8] Default judgment was granted against the 3rd, 5th, 6th, and 7th Respondents on 1 October 2015.

- [9] The Applicant brought an Application to Self-Review and set aside the contracts and various decisions taken by its officials on 21 December 2016 under case number 241/2016.
- [10] The Action under case number 4973/2013 was placed on hold, pending the outcome of the Review Application.
- [11] The Court granted an order against certain Respondents in the Self-Review Application on 26 August 2019, setting aside the various agreements and decisions.
- [12] The Self-Review Application in relation to the 1st Respondent was postponed to 2 December 2019.
- [13] A further Order setting aside the agreement between the Applicant and the 1st Respondent, (65th Respondent in the Self-Review Application under case number 241/2016) was granted on 2 December 2019.

- [14] The order of 2 December 2019 was erroneously granted in respect of the 1st Respondent as there was an agreement between the legal representatives of the Applicant and the 1st Respondent, to postpone the matter further for opposition.
- [15] The legal representative for the 1st Respondent directed a letter to the Applicant's legal representative confirming that in their view, the Order dated 2 December 2019 in respect of the 1st Respondent had to be rescinded.
- [16] The Applicant served a Notice of its intention to amend its Particulars of Claim on 5 October 2022.
- [17] The 1st Respondent delivered a Notice of Objection in terms of Rule 28(3) to the intended amendment of the Applicant's Particulars of Claim, on 4 November 2022.

[18] The Applicant served an Application for Leave to Amend its Particulars of Claim on 17 November 2022.

[19] This Application was met with an Answering Affidavit in opposition to the intended amendment, and a Counter Application by the 1st Respondent for the action instituted under Case Number 4973/2013, to be struck down for lack of prosecution.

[20] The Applicant opposes the Counter Application.

[21] These two Applications served before Court on 04 May 2023.

[22] As often happens in matters that take years to resolve, the Application to Review the Order erroneously granted against the 1st Respondent on 02

December 2019 under Case Number 241/2016, served before another Court by the time these Applications were heard.

[23] The Honourable Justice Van Zyl granted an Order setting aside the Order against the 1st Respondent, which was erroneously granted on 02 December 2019, on 28 April 2023.

[24] Thus, on the date of hearing this Application, the Applicant abandoned its Application for Leave to Amend its Particulars of Claim and tendered costs for the Application.

[25] This leaves the Counter Application and its costs to be determined.

THE COUNTER APPLICATION FOR THE CASE TO BE STRUCK DOWN

[26] The Counter Application to strike down the claim is based on the following grounds:

- (a) The Applicant failed to take any further step in the prosecution of the action proceedings relevant to the 1st Respondent for more than eight years.
- (b) The Applicant, as *dominus litus*, failed to take the necessary steps to ensure close of pleadings in the action proceedings.
- (c) The Applicant attempts to breathe life into the action proceedings by trying to amend its Particulars of Claim in circumstances where the proposed amendment would introduce a new cause of action, which has prescribed.
- (d) The Applicant's failure to prosecute the action proceedings are causing prejudice to the 1st Respondent in that the delay is so inordinate and inexcusable to the extent that it constitutes an abuse of process. Consequently, the action proceedings stand to be dismissed for want of prosecution.
- (e) More than ten years have lapsed at the time of hearing the Application, without the 1st Respondent filing its Plea.

[27] In **Cassimjee v Minister of Finance**¹ the Supreme Court of Appeal held that an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of the action.

[28] The Court held that this power stems from the Court's inherent jurisdiction to control its proceedings to prevent abuse of process, particularly in the form of vexatious or frivolous litigation².

¹ **Cassimjee v Minister of Finance** 2014 (3) SA 98 (SCA).

² *Ibid* at para 10.

[29] The exercise of this power is discretionary and ought to be exercised when there is an inexcusable delay in the prosecution of the action, which seriously prejudices the defendant³.

[30] The enquiry involves a careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefor and the prejudice caused to the Defendant.

THE APPLICANT'S OPPOSITION TO THE COUNTER APPLICATION

[31] The Applicant contents that there is no merit to the Counter Application and that it stands to be dismissed with costs for the following reasons:

- (a) The relief sought unjustifiably infringes on the Applicant's Constitutional and Common Law rights to have the dispute fairly adjudicated in a Court of Law.
- (b) The relief sought is a drastic and extraordinary remedy which should be exercised sparingly and in exceptional cases and only when there has been a clear abuse of the process of Court.
- (c) The test is stringent, and dismissal should not easily be granted.

³ Ibid at para 11.

- [32] The Applicant submits that on proper examination of all the relevant facts and circumstances that this is not a case in which dismissal of the action would be appropriate or warranted, because:
- (a) The Applicant gives detailed and justifiable reasons to fully explain all periods of ostensible delay.
 - (b) The Applicant never abandoned the action.
 - (c) The action is not frivolous or vexatious.
 - (d) The action involves substantial amounts of public funds and public interest.
 - (e) The 1st Respondent relies on vague and unsubstantiated allegations of prejudice, without any detail or supporting evidence.
 - (f) Any evidentiary challenges which may be faced by the 1st Respondent in the action are neither conclusive nor sufficient to justify the drastic relief sought and will be a factor that may be taken into consideration by the Trial Court.
 - (g) The 1st Respondent did not take any remedies available to it to bring the action to trial.

[33] The Applicant provides a detailed chronology of events dating back to 02 December 2013 stretching to 15 February 2023, which I do not repeat.

[34] There is no Rule of Court, practice or Common Law that results in a summons automatically becoming invalid should the Applicant not proceed to seek judgment thereon within the time which this is usually done⁴.

⁴ **Rigby Engineering v Rockboring & Drilling (Pty) Ltd** 1981 (1) SA 328 (O); **Morgan-Smith v Elektro Vroomen (Pty) Ltd en 'n Ander NO** 1977 (2) SA 191 (O) at 194.

[35] Under the Common Law, Courts are open to all, and it is only in very exceptional circumstances that the doors of Court will be closed on a party who desires to prosecute an action⁵.

[36] This right has since been enshrined in our Constitution which expressly grants a litigant the right to have any dispute adjudicated before a Court of law or any other appropriate forum.

[37] Sec 34 of our Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum.”

[38] A litigant’s right in terms of Sect 34 of the Constitution can only be limited in terms in terms of Sec 36 by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

⁵ **Western Assurance Co v Caldwell's Trustee** 1918 AD 262 at 273.

[39] Sec 173 of the Constitution provides that the High Court has the inherent power to protect and regulate its own process and to develop the common law, considering the interest of justice. As such it has the power to dismiss a summons or an action on account of the delay or want of prosecution⁶.

[40] The power of a Court to strike down claim is an extraordinary remedy, which should be exercised sparingly and in exceptional cases; and only when there has been a clear abuse of the process of Court⁷.

[41] The test is stringent, and dismissal should not be granted easily. It will depend on the facts and circumstances of each case and based on fairness to both parties⁸.

THE APPLICANT'S SUBMISSIONS ON COSTS

[42] The Applicant tendered costs for the abandoned Application for Leave to Amend its Particulars of Claim.

⁶ **Cassimjee v Minister of Finance** 2014 (3) SA 198 (SCA).

⁷ **Kuiper and Others v Benson** 1984 (1) SA 474 (W).

⁸ **Sanford v Haley NO** 2004 (3) SA 296 (C) at [9].

[43] The Applicant did not make any substantive submissions on costs of the Counter Application, other than that costs should be paid by the 1st Respondent on the basis that the Counter Application should be dismissed.

[44] The Applicant submitted that the costs should include the costs of two counsel.

THE 1ST RESPONDENT'S SUBMISSIONS ON COSTS

[45] The 1st Respondent submits that punitive cost Orders should be made for both the Application for Leave to Amend and the Application to strike the claim in the light of the Applicant's unambiguous concession that the amendment was premised on an improperly obtained Order and that the Application to amend was hopeless⁹.

[46] Counsel did not make any substantive submission on why costs at a punitive scale for the Application to strike the claim should be awarded.

CONCLUSION

[47] As the Applicant withdrew its Application to amend its Particulars of Claim and tendered costs.

[48] Our Courts does not order a litigant to pay the costs of another litigant on an attorney and client scale, unless some special grounds are present,

⁹ **Public Protector v South African Reserve Bank** 2019 (6) SA 253 (CC).

such as dishonesty or fraud or the motives were vexatious, reckless, or malicious, or that the party has acted unreasonably in the conduct of the litigation, or that its conduct was in some way reprehensible.

[49] The Counter Application seeks to dismiss a claim for Millions from a public entity, without the matter being properly ventilated at trial.

[50] The 1st Respondent has provided the Applicant with documents which consists of some 20 000 pages.

[51] The 1st Respondent has not pleaded to the claim at the time this matter was heard.

[52] The 1st Respondent has not taken any steps to pursue the matter. I am not suggesting that it is for the 1st Respondent to pursue the Applicant's claim, but I consider this to be a relevant aspect.

[53] The Constitutional Court held in **Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others**¹⁰:

“There are cases where there is gross abuse by the procedure employed by a litigant to the extent that the court, as a rare instance, will dismiss the claim, without any regard to the merits”.

[54] The Court held in **Molala v Minister of Law and Order and Another**¹¹ that in an Application for an order dismissing an action on the ground of abuse of process in that there has been an unreasonable delay in proceeding with the action, the approach the Court must apply is not simply an enquiry into the delay.

[55] It should be assessed whether a facility which is 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 used in such a manner that the exercise of that right would cause injustice.

[56] The issue is whether there is behaviour which oversteps the threshold of legitimacy. In the premises the Applicant cannot be barred simply because the 1st Respondent was/is prejudiced.

¹⁰ **Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others** - 2023 (2) SA 68 (CC) at Par [52].

¹¹ **Molala v Minister of Law and Order and Another** 1993 (1) SA 673 (W) at 667C-D.

[57] The increasingly difficult position of the 1st Respondent is a factor which may or may not assist in justifying an inference that the Applicant's intentions were directed at causing or increasing such difficulties.

[58] The loss or non-availability of relevant documents and/or one or more witnesses due to delay in prosecution is not decisive at this stage as it constitutes speculation of what may happen or may not happen at trial.

[59] The trial Court will be in a much better position to assess all relevant factors, including any potential prejudice to the 1st Respondent¹².

[60] I do not find that the delay in prosecuting this case constitute a gross abuse of procedure.

¹² **Kuiper and Others v Benson** 1984 (1) SA 474 (W) at 475F and 477D.

[61] It will not be in the interest of justice to infringe on the Applicant's Constitutional Right to have its matter properly adjudicated in Court as such an Order should be granted in rare instances.

[62] The Counter Application was not necessarily ill conceived in view of the long delay in this matter. Therefore, I do not consider it appropriate to make an Order of costs against the 1st Respondent at this stage.

ORDER

1. The Applicant is ordered to pay the costs of the 1st Respondent for the Application to amend its Particulars of Claim, which costs shall include the costs of two counsel.
2. The Counter Application is dismissed.
3. The costs of the Counter Application and its opposition are to be costs in the cause.



AP BERRY, AJ

APPEARANCES:

For the Applicant:

Adv. N Snellenburg SC
with **Adv. SMC Johnson**

Instructed by:

Phatshoane Henney Attorneys

BLOEMFONTEIN

For the Defendant:

Adv. S Grobler SC

with **Adv. S Tsangarakis**

Instructed by:

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