IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

SIGNATURE DATE: 14 August 2023

Case No. 2015 / 3010

In the matter between:

OKECHUKWU NOBLE NWAEZE Applicant

and

RICHARD SPUTNIC NDLOVU First Respondent

TOLLAS JULIA NDLOVU Second Respondent

ABSA BANK LIMITED Third Respondent

JUDGMENT

WILSON J:

1 On 30 January 2014, the applicant, Mr. Nwaeze, purchased a property in Bramley View at a sale-in-execution. The sale-in-execution was arranged by the third respondent, ABSA. The first and second respondents, the Ndlovus, resided at the property at the time of the sale, and apparently still reside

there. The Ndlovus had themselves previously entered into an agreement with the property's erstwhile owner, a Mr. Mearlender, to buy the property from him.

2 The circumstances under which Mr. Mearlender decided not to go through with the sale of the property to the Ndlovus are not fully explored on the papers before me. It appears that Mr. Mearlender was in hock to ABSA for a significant sum of money, which was secured by a mortgage bond passed over the property in ABSA's favour. It was on the strength of that bond, it seems, that ABSA caused the property to be sold to Mr. Nwaeze.

3 The property was in due course registered in Mr. Nwaeze's name, but, in 2015, the Ndlovus, assisted by the Legal Resources Centre, brought an application to set aside the sale-in-execution on grounds of illegality. The founding papers alleged that the sale-in-execution had taken place in breach of various provisions of the Alienation of Land Act 68 of 1981. It is not necessary for me to explore the merits of the Ndlovus' case here, but if their claim is good, then the sale to Mr. Nwaeze was void *ab initio*, as was the transfer of the property into Mr. Nwaeze's name. In other words, Mr. Nwaeze never became the owner of the property, which is still, as a matter of law, owned by Mr. Mearlender (see, in this regard, *Menqa v Markom* 2008 (2) SA 120 (SCA), paragraph 24).

4 Mr. Nwaeze's attempts to evict the Ndlovus from the property have foundered on the obstacle presented by the pending application to challenge the legality of the sale-in-execution. That application has yet to be finalised, over eight years after it was instituted. There are the ingredients of an

explanation for this extraordinary delay scattered throughout the papers before me. The Legal Resources Centre withdrew, leaving the Ndlovus without representation. Mr. Mearlender disappeared, and so could not be served. The Ndlovus spent a great deal of time negotiating with ABSA Bank in the hope that they could somehow reverse the sale. But none of these ingredients adds up to a coherent account of why the Ndlovus' application has taken so long to finalise.

5 Mr. Nwaeze now applies to me for an order dismissing the Ndlovus' application for non-prosecution. However, despite my sympathy for his situation, I do not think I can assist him. These are my reasons for saying so.

6 The dismissal of a claim for non-prosecution is a drastic remedy which has grown up as a species of a court's inherent power to protect its process from abuse. An applicant to dismiss for non-prosecution must show (a) a delay in the prosecution of the claim; (b) that the delay is inexcusable and (c) that the applicant is seriously prejudiced by the delay (*Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) ("*Cassimjee*") paragraph 12).

7 I accept that there has been a delay in the prosecution of the Ndlovus' application, and that there is no real excuse for that delay evident on the papers. However, I have some doubts about whether the requisite prejudice has been shown. It is clear that Mr. Nwaeze has been seriously affected by the delay. He wants to live in the property himself with his partner and children. He remains responsible for the rates and utilities that have been run up on it. This in itself is clear "prejudice" in the ordinary sense of the word.

8 However, it seems to me that the type of prejudice that must be shown in an application to dismiss a claim for want of prosecution is prejudice that will hamper the applicant in their presentation of their case in the main claim. The underlying rationale for the remedy is that a claimant ought not to be able to delay a claim for so long as to make the presentation of any defence to it virtually impossible. In other words, it is prejudice that may be caused to the applicant "at trial" or at the hearing of the main claim that counts, not other disadvantages that they may have suffered as a result of the delay (see *Allen v Sir Alfred McAlpine & Sons Ltd; Bostik v Bermondsey and Southwark Group Hospital Management Committee; Sternberg v Hammond* [1968] 1 All ER 543 (CA), 561e – h). For example, if a claim is delayed for so long that documentary evidence useful to the defendant is lost or destroyed, witnesses die or witnesses can otherwise no longer recall the facts to which the defendant needs them to testify, then the applicant suffers prejudice. But I am not sure that an applicant suffers legally relevant prejudice simply because their life plans or personal affairs are affected by the delay.

9 This may seem an unduly constricted approach to the definition of "prejudice", but it must be borne in mind that an application to dismiss for want of prosecution is an extreme remedy that disposes of a claim without considering it on its merits. Disallowing what might be an otherwise just pursuit of a litigant's rights requires a high threshold of justification. It seems to me that if, by their delay, that litigant makes it impossible to adjudicate their claim fairly, then the threshold is met. It is not clear to me, however, that the threshold can be met simply because the claim causes extra-curial problems for the other parties to the litigation.

10 Even were I to accept that the prejudice Mr. Nwaeze has shown is relevant and admissible, it would not overcome that fact that the Ndlovus' claim can in principle be considered on its merits, and that there is no good reason why Mr. Nwaeze should not have set the main application down himself. The remedy of dismissal for non-prosecution is generally pursued in the context of trial proceedings, where no evidence has been led, and where it is obviously unrealistic to expect a defendant to put a court in the position necessary to consider the merits of the plaintiff's claim. Save in the rare case that the onus in a trial action is on the defendant, it is the plaintiff that must bring a matter to trial and lead evidence first. The defendant obviously cannot do this, and an application to dismiss for non-prosecution is a legitimate way of bringing to an end a trial action that has been all but abandoned.

11 But this case is different. The Ndlovus have brought their claim on motion. All the papers have been filed, which means all the evidence necessary to adjudicate the claim is already before the court. To dismiss the claim for non-prosecution at this stage would mean turning a blind eye to that evidence. In my view, this will rarely, if ever, be appropriate simply because of a delay in moving the claim along. It is of course different in trial proceedings, where an application for dismissal for want of prosecution will generally be brought and determined before any evidence is led. In that situation, a court will seldom run the risk of ignoring relevant evidence.

12 The only outstanding steps to be taken before the Ndlovus' claim can be heard are service on Mr. Mearlander (he has, perhaps predictably,

disappeared, but a substituted service order has been granted), and the drawing and exchange of heads of argument. Once these steps are taken, there is no obvious barrier to the matter being considered on its merits. There is also the striking out remedy provided for in this court's practice manual, which can be engaged in the event that the Ndlovus do not file their heads of argument (although the merits of the application would still have to be considered. See *Capitec Bank Limited v Mangena* [2023] ZAGPJHC 225 (16 March 2023) and *Gefen v De Wet* NO 2022 (3) SA 465 (GJ)).

13 Ultimately, then, there is no reason why Mr. Nwaeze cannot simply set the main application down and argue for its dismissal on its merits. Not having been favoured with the papers in the main application, or argument on that application, that is an exercise that I cannot undertake. But it seems to me to be the obvious solution to Mr. Nwaeze's problems. Critically, it is also a solution that would not preclude the consideration of the justice of Ndlovus' case.

14 Mr. Shull, who appeared for Mr. Nwaeze argued that this would be a costly and time-consuming exercise. I was constrained to point out to him that it would have been no more costly and time-consuming than the process that led to the full opposed argument that I heard on the application to dismiss for want of prosecution.

15 Mr. Shull further argued that the main application is essentially a contest between the Ndlovus and ABSA. It is, as Mr Shull put it, "not [Mr. Nwaeze's] fight". But even if that characterisation is correct (it is not), I do not see what difference it makes. The issues in the main application appear to be entirely

matters of law, with which Mr. Nwaeze will be able to engage fully, and at no foreseeable disadvantage.

16 Even if I am wrong on the question of whether Mr. Nwaeze has shown the right sort of prejudice, I retain a residual discretion to refuse the application, having considered all the relevant circumstances (see *Cassimjee*, paragraph 11) . It seems to me, for the reasons I have given, that my discretion should be exercised against dismissing the Ndlovus' application for want of prosecution.

17 Wisely, Ms. Maharaj, who appeared for the Ndlovus, did not press for costs in the event that I reached this conclusion.

18 The application is dismissed, with each party paying their own costs.

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 14 August 2023.

HEARD ON:	7 August 2023
DECIDED ON:	14 August 2023
For the Applicant:	B Shull Instructed by Stabin Gross & Shull
For the First and Second Respondents:	N Maharaj Instructed by N Maharaj Inc