**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

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|---|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED |
| _____ | _____ |
| DATE | SIGNATURE |

**CASE NO: 46807/11**

**DATE: 7 November 2022**

In the matter between:-

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|---|---|
| **ETTIENE JACQUES NAUDE** | Applicant |
| V | |
| **LANEL BREDA N.O.** | First Respondent |
| **HERMANUS PETRUS STEYN N.O.** | Second Respondent |
| **RICHARDT SCHEFFER N.O.** | Third Respondent |

**JUDGMENT**

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**KOOVERJIE J**

[1] This is an application for the dismissal of the respondents' claim due to their failure to prosecute their claim timeously. The applicant ("Naude") seeks that the respondents' claim be dismissed.

[2] The respondents opposed this application on the following main grounds, namely that:

(i) justified reasons have been proffered for the delay;

(ii) the applicant is partially to blame for the delay;

(iii) the applicant has failed to demonstrate that he has been prejudiced by the delay.

[3] The applicant's case is that more than eleven years have passed since the respondents instituted action against the applicant. The dispute concerned fees charged by the applicant, in particular for facilitating the conclusion of the agreements between the parties. It is common cause that Naude's fees amounted to around R3.2 million.

**APPLICANT'S CASE**

[4] The main contention raised by Naude raised was that an insufficient explanation is before court. The respondents had failed to adequately explain the 11-year delay. It was pointed out that the respondents' conduct constitutes a flagrant breach of the rules of court and is unreasonable.

[5] In dealing with the inordinate delay the applicant brought the following to the attention of the court, namely that:

5.1 summons was issued during August 2011, almost 11 years ago;

5.2 although the applicant (defendant in the main action) filed a notice of exception against the summons on 9 December 2011, the exceptions were not prosecuted;

5.3 it should be noted that the exception only dealt with the claims in relation to the purported misrepresentation of the share values which led to the conclusion of the first and second agreement and not with the alleged fee dispute with Naude;

5.4 a further 8 years passed since the filing of the exception and the respondents still did not attempt to prosecute their claim. They only reacted around 20 July 2017 when the parties entered into a settlement agreement pertaining to the share issue, which resulted in the conclusion of the first and second agreements;

5.5 after the said settlement agreement on 20 July 2017, another three years passed. It was only during August 2020 that the respondents set down the exception for hearing. The exception was, once again, not pursued by the plaintiff;

5.6 this application was issued by the applicant in August 2020. The respondents once again took another two years to file their answering affidavit;

5.7 the only explanation for this inactivity was that the plaintiff wanted to prevent expending money for legal costs and further attempted to settle the matter.

[6] The applicant pointed out that he is highly prejudiced with the protracted litigation. There is the loss of evidence in the form of correspondences, witnesses and other documents pertaining to events between 2007 to 2009. Same is no longer in the applicant's possession. Furthermore, human memory is fallible and events and decisions taken years ago cannot be remembered.

[7] More notably, there was a conscious delay on the part of the respondents to prosecute their claim against the applicant. The respondents disputed this contention.

**THE RESPONDENTS' CASE**

[8] Naude was entitled to charge reasonable fees for the services rendered. Around 2009 Mr Naude represented the Shosholoza Trust ("the Trust") when written contracts were concluded in terms of which the Trust sold its shareholding to the Casee Trust for R28 million, the first contract, and then later in respect of a second contract with Trifecta for R44 million. Naude was also appointed as executor of the late Mr Breda's estate.

[9] Two policy payments were paid out on Breda's life which was in excess of R104 million. It was alleged that Naude failed to inform the respondents of the true value of the Trust shares. More particularly, it is the respondent's case that during the negotiations preceding the conclusion of the second contract, Naude advised that there was uncertainty as what the pay-outs would be in respect of the life insurance

policies.[1] Naude was aware that such representation was false. He failed to disclose that an amount of at least R109 million had been paid at the time.[2]

[10] As a result of these misrepresentations the Trust sold its shares far below the actual value, almost R230 million less than its actual value. On this basis, a damages claim was instituted by the Trust against Naude based on, *inter* alia, fraudulent misrepresentations, alternatively a breach of his mandate.[3]

[11] On the papers, the respondents' explanation for the delay is summarised as follows[4]:

11.1 since 2009 upon appointing the Trust attorney, Naude, the Trust (Shosoloza Trust) became involved in various legal disputes after Breda's death;

11.2 Breda's wife, Lanel, had to take over the reins and defend various business claims including personal claims against Breda. The plane crash that led to Breda's demise resulted in various legal proceedings being instituted, namely an inquest hearing, a claim for damages against the insurers as well as an investigation by the National Prosecuting Authority (NPA). Lanel was also faced with various confrontations by Breda's family, his business colleagues as well as political associates;

11.3 The affairs of the Trust were complex and involved and the Trust held assets in no less than 30 other companies. The other trustees, Scholtz and Els, were not satisfied with the business activities of Breda. The two co-trustees thereafter was Lanel, the wife of Breda, and one, Richardt Scheffer. The respondents further pointed out that the business partners as well as Naude were uncooperative and recalcitrant. Various court actions were

[1] Answering affidavit, par 22
[2] Answering affidavit, par 26
[3] Answering affidavit, par 30
[4] From 11-9, answering affidavit par 33 onwards

instituted against the business associates of Breda, including various entities in order to recover the Trust assets and to determine the true affairs of the Trust and Breda's personal estate.

[12] The legal challenges included:

12.1 various legal proceedings were also instituted at the time against the two trusts, Trifecta and Casee;

12.2 the Trust was confronted by claims from Trifecta and Scholtz due to Breda's unnatural death from the aircraft crash;

12.3 the Trust further issued summons against the pilot's executor at the time. This court was advised that the inquest proceedings were initiated in 2013 and finalized in 2017. In the course of 2017 Els then pursued his claims against the Trust which caused the sheriff to attach movables from Lanel's home;

12.4 thereafter Scholtz brought an application to sequestrate Breda's estate. Eventually it was declared that the Trust be wound up and trustees had to be appointed to investigate the estate assets and to further wind up the estate;

12.5 In 2012 the NDPP launched an ex parte application to freeze the Trust assets and 37 other respondents. This resulted in protracted litigation over several years. It was discovered that the Trust was not involved in this investigation. The court, however, erred in its judgment by finding against the Trust. An application for leave to appeal was consequently filed by the Trust. The court erroneously dismissed the application. The Trust then launched an application to the full bench for leave to appeal, which was also not successful. Only when the Trust instituted a petition to the SCA is when the NPA prevailed and the NPA abandoned the proceedings against the Trust.

Eventually the State Attorney withdrew its application against the Trust and tendered the payment of the Trust costs;

12.6 It was further pointed out that the Trust was involved in various actions and applications regarding the three residential properties owned by the Trust, particularly in respect of the arrear rentals and the ejectment of non-paying lessees. It was necessary to pursue these proceedings as Lanel and her sons were dependant on the rental income;

12.7 During June 2010 the Trust also learned that Els was unlawfully administering the leases that belonged to a company, Gemvest 103 (Pty) Ltd and where the Trust had a 100% shareholding of the company. This resulted in the liquidation of the company. Els then instituted a claim which the trustees disputed. It was also pointed out that the liquidators did not properly investigate the claim. This resulted in expensive and protracted litigation. Mr Els was also not cooperating at the time and the trustees had to fund the entire investigation and the legal proceedings costs.

[13] All of the said disputes and legal proceedings, were not only protracted, but extensive legal costs were incurred. It was as a result of all the factors cumulatively that the claim against Naude was not pursued. It was argued that the continued litigation and disputes caused the delay. Since 2009 the Trust was consumed with various obstacles and legal processes which needed attention. At par [38] of their answering affidavit, the respondents allege that due to them not having first-hand knowledge of the business affairs of Breda, the information had to be pieced together (bit by bit) over the past decade.[5] Furthermore the business partners and accountants as well as Naude were uncooperative and opportunistic after Breda's death.

[5] 011-10, par 38

[14] The respondents pointed out that Naude's actions prejudiced the respondents gravely. There are extremely serious allegations against Naude, particularly in respect of misrepresenting the value of Trifecta's shares to his own client as well as being a recipient to exorbitant fees. These are serious contraventions of his ethical responsibility as an attorney and which constitutes criminal conduct.

**ANALYSIS**

[15] I am mindful that this court has an inherent power both in terms of the common law and the Constitution to prevent an abuse of its processes when faced with frivolous and vexatious litigation. By virtue of section 173 of the Constitution the High Court has an inherent power to protect and regulate its own processes and to develop the common law by taking into account the interest of justice. It has also been ruled that an inordinate and unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of the action.[6]

[16] In the matter of ***Cassimjee***[7] the Supreme Court of Appeal articulated the requirements for the dismissal of a claim for want of prosecution. I deem it appropriate to reiterate the relevant extract from the judgment:

> *"[11] 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,*

[6] Par 10 of Cassimjee judgment (see below)
[7] Cassimjee v Minister of Finance 2014 (3) SA 198 (SCA) at paragraphs 11 and 12 (my underlining)

*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 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."*

[17] In laying out the test, the court approved the approach set out 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..."*

[18] The applicant argued that he satisfied all the jurisdictional factors, namely that:

18.1 it is common cause that there has been a delay in prosecuting the claim against him;

18.2 the delay is inexcusable; and

18.3 the applicant has seriously been prejudiced by the delay.

[19] In exercising my discretion, I am required to have regard to the reasons proffered by the respondents in failing to expedite its action proceedings against Naude as well as conduct a careful examination of the specific circumstances that presents itself in this matter.

[20] The applicant in argument emphasized the following factors, namely that: the delay has not only been unreasonable but that a sufficient and full explanation for the delay spanning over 11 years has not been set out; secondly, the respondents left this matter for last; thirdly, the delay has seriously prejudiced the applicant due to the evidence not in his possession and his waning memory; fourthly, the ground that the Trust did not have funds was not substantiated by evidence. It was argued that, in fact and in reality, the Trust was in a financially healthy position.

[21] On the third point, the respondents contended that there is no merit. Naude was at all relevant times aware that the claim against him would be pursued. He was kept abreast of not only the various challenges the Trust was pursuing but was informed that the claim against him would be prosecuted as well.

[22] In exercising my discretion in terms of S173 of the Constitution, a consideration of the interest of justice also plays a vital role. This court has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on a count of the delay or want of prosecution.[8]

[8] Herbstein and Von Winsen: The Civil Practice of the Supreme Court of South Africa 4th Ed at 547

[23] The dismissal of a matter, in this instance, the action proceedings against Naude, should be ordered in clear circumstances as it has an impact on the constitutional right of the plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The court will exercise such power in circumstances where there has been a clear abuse of the process of court.[9]

[24] It is common cause that there has been an inordinate delay on the part of the respondents. The respondents are well aware that condonation is not granted merely at a request of a party. A full detailed and accurate account of the reasons for the delay is required.

[25] In ***Darries***, the court set out the circumstances where the non-compliance is time related, and the reasons for the deviation must be set out.[10] In applying ***Darries***, I find that the explanation for the lengthy delays was inadequate, particularly for the period between 2009 and 2017.

[26] It was incumbent on the respondent to have set out in detail the chronology depicting the various litigation and investigations and challenges they were inundated with.

Apart from the absence in detail, the respondents have failed to explain the inactivities in proceeding with the action or advance their claim expeditiously to trial.

[9] Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271, see also Section 34 of the Constitution
[10] Darries v Sheriff Magistrates Court, Wynberg and Another 1998 (3) SA 34 (SCA) at 41 D

[27] It was also pointed out that Mr Naude was partially responsible for the delay in prosecuting the exception at the time he was the erstwhile attorney of record. Even if Naude should have followed up on the exceptions, this fact, however, cannot be viewed in isolation from the respondents' failure to expeditiously prosecute the action.

[28] Section 34 of the Constitution provides that everyone has a right to have their disputes resolved in a fair hearing before a court.[11] However, such right is subject to a limitation that is reasonable and justifiable in that of Section 36. Under common law, in the ***Western Assurance*** Matter[12] the court commented:

*"Now it is needless to say that strong grounds must be shown to justify a Court of Justice in staying the hearing of an action. The courts of law are open to all, and it is in very exceptional circumstances that the doors will be closed upon anyone who deserves to prosecute an action."*

[29] I find that the second requirement, that the delay was inexcusable, has been met. It is noted that the contracts regarding the sale of the shares were concluded in 2009 already. The payout of the insurance claims were made in 2009 as well. At that stage, the respondents became aware of the alleged misrepresentations, hence the institution of the action proceedings thereafter. Although the respondents may have been inundated with various other litigation, there was nothing in the way of the respondents to persist with the proceedings at the time. In placing the action proceedings on the back burner is, in my view, a flagrant disregard of our court processes and rules.

[11] Section 34 reads:
[12] Western Assurance v Caldwell's Trustee 1918 AD 262 at p 273

[30] The third requirement, that the applicant has been prejudiced by the delay, has also been met. The applicant alleged that he no longer has the necessary documents in his possession and "totally hamstrung in mounting any credible defence in respect to the claim more than ten years after the fact. Furthermore he could not have expected to have a detailed account of the discussions that took place at the time.[13]

[31] In argument counsel for the applicant argued that it is in the interest of justice to hear the review. However, whether the interests of justice justify an indulgence, would depend, once again, on the various jurisdictional factors, which requires at the top of the list, sufficient explanation for the delay.[14]

[32] In respect of whether there are prospects of success in the respondents' action proceedings, I find the decision in ***Van Wyk***[15] to be of guidance. The court commented in the ***Van Wyk*** matter at paragraph 33:

*"… Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay… There is now a growing trend for litigants in this court to disregard time limits without seeking condonation …."*

[33] It is not disputed that this application has been instituted at least 13 years later, if one has regard to the fact that the applicant only learnt of her deregistration in 2008. The court in ***Van Wyk*** at paragraph 31 stated:

*"A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay a*

[13] 009-18 of the founding affidavit, par 47
[14] Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality 2017 (6) SA 360 SCA at 366B-I
[15] Van Wyk v Unitas Hospital 2008 (2) SA 472

*litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice."*

[34] Having considered the papers and the arguments of both parties, I am of the view that this application should be dismissed on the basis that a case for condonation has not been made.

[35] In the premises, I find that there is merit in this application.

[36] I make the following order:

1. The plaintiff's action is dismissed with costs.
2. The respondents are ordered to pay the costs of this application.

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**H KOOVERJIE**
**JUDGE OF THE HIGH COURT**

Appearances:

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| Counsel for the applicant: | Adv HF Oosthuizen |
| Instructed by: | Walter Niedinger Attorneys |

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| Counsel for the respondents: | Adv NG Louw |
| Instructed by: | Manley Inc |
| Date heard: | 25 October 2022 |
| Date of Judgment: | 7 November 2022 |