THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 455/11
Reportable

In the matter between:

MOHAMMED CASSIMJEE Appellant

and

THE MINISTER OF FINANCE Respondent

Neutral citation: *Cassimjee v Minister of Finance* (455/11) [2012] ZASCA 101 (1 June 2012)

Coram: Mthiyane DP, Brand and Cachalia JJA, Southwood and Boruchowitz AJJA

Heard: 22 May 2012

Delivered: 1 June 2012

Summary: Procedure – inordinate delay in prosecuting claim – inherent power of the court to prevent abuse of its process – whether discretion properly exercised to dismiss action for want of prosecution.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Seegobin AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

BORUCHOWITZ AJA (MTHIYANE DP, BRAND and CACHALIA JJA, SOUTHWOOD AJA concurring)

[1] This is an appeal against the decision of a high court to dismiss an action for want of prosecution. The order was granted by the KwaZulu-Natal High Court, Durban (Seegobin AJ) on 29 July 2010 and the appeal is with leave of that court.

[2] On 23 March 1977 officers of the Department of Customs and Excise seized two tankers from the appellant who operated a transport business. On 16 November 1977 the appellant instituted an action against the Commissioner for South Africa Revenue Service (the Commissioner) in the then Durban and Coast Local Division of the Supreme Court in which he claimed return of the tankers that had been seized, alternatively, a sum of

money which then represented their value. In addition, the appellant sought payment of an amount as damages representing the loss of the use of the tankers from the date of their seizure on 23 March 1977.

[3] Over 32 years have passed between the date of the institution of the action and the delivery of the judgment appealed against. What transpired during the intervening period is largely common cause and can be briefly stated. The Commissioner delivered a request for further particulars to the summons on 25 January 1978 and the appellant furnished a response thereto on 13 October 1978. On 2 May 1979 the Commissioner delivered its plea and a claim in reconvention. The reconventional claim was for the payment of duty in respect of diesel oil that the appellant had supplied to certain unidentified persons during the period 6 May 1976 to June 1977. A request for further particulars to the plea and claim in reconvention were thereafter delivered, and on 31 March 1980 an application was brought to compel the furnishing of the further particulars. The particulars were furnished on 23 July 1980. The Commissioner took no steps to secure the delivery of a plea to the counter-claim and the pleadings were never closed. On 27 January 1981 the appellant delivered a notice calling upon the Commissioner to produce certain documents referred to in the plea and counter-claim but this request elicited no response.

[4] A period of some 20 years then elapsed during which no steps were taken by either party to advance the action. On 27 November 2001 a firm of attorneys placed themselves on record for the appellant and gave notice purporting to place the matter on the awaiting trial roll. In the absence of a plea to the claim in reconvention the placement on the trial role was premature. In consequence this step did nothing to bring the matter nearer to completion. In February 2002 the state attorney specifically enquired from the

appellant's then attorneys 'is your client serious in pursuing this matter', whereupon the appellant's attorney confirmed in April 2002 that he was. A further four-year period was permitted to elapse during which neither party took steps to advance the action.

[5] On 11 August 2006 a new firm of attorneys placed themselves on record on behalf of the appellant and a notice of intention to amend the particulars of claim was delivered. On the same day the Commissioner delivered a notice of objection to the proposed amendment which notice, it is common cause, did not comply with the provisions of rule 28(3) of the Uniform Rules of Court. On 3 September 2006 the appellant issued a notice in terms of rule 30(2)(*b*) to set aside the respondent's notice of objection as an irregular proceeding. The appellant then brought an application in terms of rule 30 to set aside the objection as an irregular proceeding.

[6] On 28 November 2006, the Commissioner delivered an application in which the following relief was claimed: that the Commissioner for South African Revenue Service be substituted for the Minister of Finance (the respondent); that the application to set aside the notice of objection as an irregular step be dismissed with costs; that both the action and claim in reconvention in the main action be dismissed and that the appellant pay the costs of the application.

[7] The dismissal of the appellant's action was sought on the ground that it had been dormant since 1981 and that to permit its revival would give rise to irremediable prejudice amounting to an abuse of the process of court. The appellant's answering affidavit to this application was filed 18 months later in June 2009.

[8] The high court has the inherent power, both at common law and in terms of the Constitution (s 173), to regulate its own process. This includes the right to prevent an abuse of its process in the form of frivolous or vexatious litigation (see *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).

[9] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing, but a limitation of the protected right is permissible provided that such limitation is reasonable and justifiable. The right of a high court to impose procedural barriers to litigation on persons who are found to be vexatious was recognised in *Beinash* (supra para 17). In that matter it was held that restricting access to vexatious litigants was indispensable to protect and secure the rights of those with meritorious disputes and necessary to protect bona fide litigants, the processes of the courts and the administration of justice. Compare also *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) paras 15-18. The same considerations, I believe, would apply to an abuse of court procedures.

[10] An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action. See, *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 v Minister of Law and Order* 1993 (1) SA 673 (W) at 676B-679I; *Bissett & others v Boland Bank Limited & others* 1991 (4) SA 603 (D) at 608C-E; *Sanford v Haley NO* 2004 (3) SA 296 (C) 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).

[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, 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

[12] 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.'

[13] At issue in the appeal is whether the court below had properly exercised its discretion to dismiss the appellant's claim for want of prosecution. This in turn depends on the factual question whether the delay was so unreasonable or inordinate as to constitute an abuse of the process of court.

[14] The appellant has advanced two principal reasons for the delay. First, that he had problems with the attorneys he had instructed in the matter, and second, that he had experienced health problems which prevented him from properly dealing with the matter. The appellant has explained that from the inception of the matter the various attorneys and counsel that he instructed were unable to make any progress. In 1992, one of his attorneys died while another was struck off the roll in 1997. One of the several advocates instructed on his behalf simply left without anything being done in the matter, and repeated inquiries regarding any progress elicited no satisfactory responses. The appellant went from one attorneys' firm to another with no real progress being made. Eventually in 2001 the firm of attorneys instructed by him succeeded in placing the matter on the awaiting trial roll but this was

done prematurely. Their mandate was subsequently terminated and another firm was instructed. Due to a lack of progress this firm's mandate was terminated on 11 August 2006 and on the same day a new firm was appointed. The latter firm of attorneys filed the rule 28 notice purporting to amend the particulars of claim but when no further progress was made in the appellant terminated their mandate and appointed his current attorneys.

[15] From about 1998 the appellant claims to have suffered extensive health problems. He claims that he has cardiac problems and suffers from hypertension and in 1998 he suffered a stroke and was diagnosed with Type II Diabetes Mellitus. In 2000 he underwent a coronary bi-pass and in 2000 underwent a second operation. He asserts that as a result of his poor health and repeated admissions to hospital it was not possible for him to properly attend to the litigation.

[16] The appellant's inactivity especially during the 20 year period from 1981 has not been adequately explained. Since 27 January 1981, when the notice to produce certain documents was filed and until 2001, the appellant and his legal representative appear to have taken no steps whatever to prosecute the action. The premature placement of the matter on the awaiting trial roll on 27 November 2001 did little to advance the action and the further five year delay until August 2006 is not explained. The appellant fails to explain what steps he personally took to expedite the matter and what enquiries he made of his attorneys. It is difficult to accept that he could not during the long passage of time have taken steps to insist his legal representatives to bring the matter to finality. His alleged health condition is not properly substantiated, but even if one were to accept that he suffers from ill health it is difficult to believe that he was unable to communicate with and give instructions to his legal advisers. In any event, the problems regarding

the appellant's health only surfaced in 1998 some twenty years after the action was instituted.

[17] The appellant's version is characterised by a profound absence of detail. The court below rightly observed that the appellant has not produced a shred of evidence to substantiate any of the allegations made by him. He claims not to have had access to the files that were in his attorneys' possession but has failed to explain what attempts were made to obtain such access. In my view, nothing the appellant has said properly explains or excuses his inactivity. The inference is irresistible that the appellant had decided for some unexplained reason not to proceed with the action or to advance it expeditiously to trial.

[18] That, however, is not the end of the enquiry. The court is required to consider whether the delay has occasioned prejudice to the respondent. The court must also consider, in this regard, if there was any delay on the respondent's part and whether the respondent has availed itself of the remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.

[19] That the respondent had taken a conscious decision not to actively prosecute the action is common cause. The respondent has explained that at the time of the seizure of the tankers and for some time thereafter the conventional thinking had been that any breach of regulation 410.04.04(*a*) promulgated under the Customs and Excise Act 91 of 1964 automatically constituted a contravention of the Act, and could lead to a seizure of the vehicles used in such contravention. The regulation provided, inter alia, that any seller of fuel under rebate had to obtain a declaration from his purchasers that they would use the rebated fuel in accordance with the regulations. This

approach to matters of this nature was altered by the judgment of this court in the case of *BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise & another* 1985 (1) SA 725 (A) where it was held that a failure to obtain such a declaration did not automatically disentitle the seller (or the purchaser, as the case may be) to the rebate. It was only if the fuel was in fact not used for the purposes of the regulations that a rebate could not be claimed. The effect of the judgment in *BP Southern Africa* supra was that the respondent could no longer rely solely on the failure to obtain the declaration as a cause for the seizure of the tankers, but would have to go further and establish that the persons to whom the appellant supplied diesel were not entitled to the rebate. The main question which will arise in the action, should it be allowed to proceed, is whether the appellant sold diesel under rebate to persons who were not entitled thereto. This will entail an examination of approximately 180 transactions and would require the respondent to interview and take statements from the many unidentified persons to whom the appellant sold diesel. In view of these evidential difficulties, a decision was taken by the respondent in 1985 ‘not to force the pace of the action’.

[20] To permit the appellant an opportunity to revive the action, whether in an amended form or otherwise, would in my view be extremely prejudicial to the respondent. A number of officials who were tasked with investigating the matter are now deceased or cannot recall the events in question. The relevant invoices which are necessary for the purpose of preparing for trial have been mislaid, and to complicate matters further, the seized tankers are no longer available for inspection. Counsel for the appellant also conceded that the proposed amended claim is ill conceived and that a new notice of amendment will have to be prepared.

[21] It was further argued on behalf of the appellant that any prejudice to the respondent was of its own making and a consequence of its decision not to force the pace of the action. I do not agree. Although the respondent's conduct is a factor that must be taken into account, its conduct cannot be viewed in isolation from the appellant's failure to expeditiously prosecute the action. In this regard the following remarks of Diplock LJ in his separate judgment in *Allens* supra (at 556g) are apposite:

'Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it. Moreover, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the rules of court is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible.'

[22] Applying the approach postulated by Diplock LJ to the facts of the instant case, the conclusion must inevitably be reached that it is the appellant's failure to expeditiously prosecute the action that is the primary cause of the respondent's prejudice. Should the appellant be given leave to reinstate the action there is a substantial risk that a fair trial of the issues will not be possible.

[23] The appellant has failed to demonstrate that the discretion exercised by the court below – which is a discretion 'in a strict sense' was not judicially exercised or was based upon a wrong principle of law or wrong facts. (See *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality & others* 2009 (2) SA 166 (SCA) para 11 and cases there cited.) I am therefore satisfied that the court below correctly exercised its inherent power to dismiss the appellant's action and that it also correctly dismissed the rule 30 application. Consequently the appeal cannot succeed. Though the respondent asked for the costs of two counsel, I do not believe that such order is justified.

[24] The following order is therefore made:

The appeal is dismissed with costs.

P BORUCHOWITZ
ACTING JUDGE OF APPEAL

Appearances:

For Appellant:	J A Julyan SC
	Instructed by:
	Gounder & Associates, Durban
	Claude Reid Incorporated, Bloemfontein
For Respondent:	C J Pammenter SC (with him M Neqanoo)
	Instructed by:
	The State Attorney, Durban
	The State Attorney, Bloemfontein