**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

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| **(1)** | **NOT REPORTABLE** |
| **(2)** | **NOT OF INTEREST TO OTHER JUDGES** |

**CASE NO:** 2023-046891

**DATE:** 23 DECEMBER 2024

In the matter between:

**SASRIA SOC** Applicant

and

**TUHF Limited** Respondent

**Neutral Citation**: *SASRIA SOC v TUHF (2023-046891)* **[2024] ZAGPJHC ---** (23 December 2024)

**Coram:** Adams J

**Heard**: 5 September 2024 – 'virtually' as a videoconference on *Microsoft Teams.*

**Delivered:** 23 December 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 23 December 2024.

**Summary:** Civil procedure and practice – dismissal of proceedings – delay in prosecution of action – requirements discussed – defendant applying to have an action dismissed for want of prosecution needs to show (1) that there is delay in prosecution of the action; (2) that the delay is inexcusable; and (3) that he is seriously prejudiced thereby – court to examine all the relevant circumstances in exercising its discretion whether to dismiss the plaintiff's claim – where the delay is such as to constitute an abuse of the court's process it will warrant dismissal of the action –

Application for dismissal succeeds – plaintiff's claim dismissed due to delay in prosecution.

## ORDER

(1) The applicant's application is granted.

(2) The respondent's claim in the main action is dismissed with costs.

(3) The respondent shall pay the applicant's costs of this opposed application, such costs to include the costs consequent upon the employment of two Counsel, where so employed, one being Senior Counsel, on tariff 'C' of the applicable scale in terms of the Uniform Rules of Court.

## JUDGMENT

**Adams J:**

[1]. The applicant (Sasria), as the first defendant, together with AIG South Africa Limited (AIG), as the second defendant, and Manny Garrun & Sons (Pty) Limited (Manny Garrun), as the third defendant, were sued in the main action under case number 2017-10465 by the respondent (TUHF). The summons in the main action was issued on 24 March 2017 by TUHF, which claimed from the defendants indemnity for damages suffered by it during 2014 and 2015, on the basis of insurance contracts which were in place between the parties at the relevant time. The main action, between TUHF, AIG and Manny Gurran, was settled during 2019, leaving Sasria as the only defendant against whom the main action is alive and in theory still proceeding at this stage. The last time there was any development in the prosecution of the main action against Sasria was during April 2019, when – after the matter was removed from the trial roll during February 2019 – the action against AIG and Manny Garrun was formally withdrawn, after being settled between these three parties.

[2]. Sasria is aggrieved by what they perceive to be an inordinate and an unreasonable delay in the prosecution of the main action, which delay, according to them, constitutes an abuse of process and warrants the dismissal of the action.

At issue in this opposed application is whether the court should exercise its discretion to dismiss TUHF's claim for want of prosecution. This in turn depends on the factual question whether the delay is so unreasonable or inordinate as to constitute an abuse of the process of this court.

[3]. Those issues are to be decided against the factual backdrop of the matter. In that regard, the important, salient facts are by and large common cause and I set those out in the paragraphs which follow.

[4]. However, before dealing with the facts in the matter it may be apposite at this point to have a brief overview of the applicable legal framework to place in context the issues which require adjudication. The leading authority on point is *Cassimjee v Minister of Finance*[1], in which the SCA explained that '[a]n inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action'. The court went on and held as follows at paras 11 and 12: -

'[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 therefor 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 use 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 Ltd; Bostik v Bermondsey and Southwark Group Hospital Management Committee; Sternberg v Hammond* [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

[1] *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA).

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".'

[5]. From the aforegoing, it is clear that the finding of an abuse or bad motive on the part of the plaintiff who fails to prosecute a claim within a reasonable period, is not necessary (although, where such a finding is made, the Court will protect its process from abuse by dismissing the claim). Instead of abuse, the decisive factors are prejudice and fairness – especially to the party who is subjected to the delay through no fault of its own. Where a court dismisses the claim of a plaintiff who has, without justification, delayed inordinately in the prosecution of its claim, it does so in the interests of justice.

[6]. That brings me back to the facts in the matter and to the application thereof to the law.

[7]. TUHF is the lender to another entity, Tenitor, which was, during the course of 2014 and 2015, the owner of several buildings situated on a property in Berea, Johannesburg ('the property'). TUHF seeks indemnification from Sasria in respect of damage to the property, which it claims was occasioned by events covered by the *Sasria Coupons for Special Risks*, issued to Tenitor during 2014 and 2015 respectively ('the Sasria Coupons'). AIG is Tenitor's insurer and Manny Garrun is Tenitor's insurance broker. As already indicated, TUHF, AIG and

Manny Garrun concluded a settlement agreement sometime during March 2019 and the action against them was accordingly withdrawn in April 2019, leaving Sasria as the only defendant in the action.

[8]. TUHF contends that its four-year delay in the prosecution of the action is justifiable as it required the time to ‘re-strategise’ its claim against Sasria (now being the sole defendant) and to identify, engage with and obtain opinions and / or summaries from expert witnesses. TUHF suggests that it has been consulting with experts for over two years.

[9]. Sasria contends that TUHF’s contention that it required this prolonged period of time in order to identify and consult with experts is belied by the fact that to date, it has not produced a single expert report and, in any event, the testimony of experts is entirely irrelevant (and would in any event be inadmissible) in relation to the primary issue in question – namely, whether the damage to the property was occasioned by events which are covered by the Sasria Coupons. Sasria submits that it is prejudiced by the prolonged and inexcusable delay and seeks the dismissal of the claim against it. The delay, so Sasria contends, is of such magnitude that it will not be afforded a fair trial.

[10]. I find myself in agreement with these contentions on behalf of Sasria. And I do so for the reasons in the paragraphs which follow.

[11]. TUHF alleges in its particulars of claim that over the period 31 December 2014 to 14 July 2015 (thus, for a period of over 6 months) the buildings on the property were damaged by the tenants who were, in turn, incited by the South African Communist Party (‘SACP’) in conjunction with, or through, an organisation known as Mzanzi Progressive Movement (‘MPM’) to seize control of the buildings and to damage them. TUHF contends that the purpose of the incitement by SACP and MPM was to bring about, *inter alia*, social and economic change to the inner-city of Johannesburg and to protest against the City of Johannesburg Metropolitan Municipality. It is on this basis that TUHF seeks indemnification in terms of the Sasria Coupons.

[12]. After the issue of summons in March 2017, the parties exchanged pleadings, pleadings had closed, all parties made discovery and the matter was set down for trial on 7 February 2019. By agreement between the parties during November 2018, the trial scheduled for 7 February 2019 was postponed *sine die*. During March 2019 AIG and Manny Garrun settled the claim with TUHF and TUHF withdrew the case against these parties in April 2019.

[13]. Since April of 2019, there have been no further developments in the action. TUHF denies this on the basis that it busied itself with 're-strategizing', consulting with counsel and identifying experts. The point, however, is that no further steps have been taken by any of the parties which progressed the litigation between them closer to finalisation. Consequently, as far back as 14 July 2021 Sasria's attorneys addressed a letter to TUHF's attorneys, querying whether TUHF intended to prosecute its claim further. On 26 July 2021 TUHF's attorneys responded in the affirmative and stated that TUHF was 'in the process of consulting with experts' and that they would 'revert during the course of the day with a fuller response'. The 'fuller response' was to this day never received.

[14]. Importantly, to date – for the last three years – there has not been any further developments in and progress of the matter. No new expert summaries have been delivered and none of the usual pre-trial steps have been undertaken by TUHF. TUHF has not requested any further documents from Sasria, there has been no pre-trial conference (other than the one called for by Sasria in August 2018). Simply put, and as contended by Sasria, despite TUHF's protestations that it intends to pursue the claim against Sasria, it has not done anything to evidence such an intention.

[15]. I am therefore of the view that it can safely be inferred that subjectively TUHF has no intention of prosecuting further the claim against Sasria.

[16]. Moreover, as rightly contended on behalf of Sasria, there is no justification for the delay in the prosecution of the action. I say so for the reasons which follow.

[17]. On 5 September 2019, TUHF's attorneys and counsel consulted with a quantity surveyor regarding the quantification of the damages to the buildings. As noted by Sasria, this is strange, given that the quantification exercise ought already to have been done and completed prior to the issue of the summons in 2017. The consultations during September 2019 are therefore, in my view, of no moment in relation to the delay and any justification therefor.

[18]. TUHF furthermore avers that over the period between September 2019 and January 2020 – over a period of five months – it and its attorneys consulted with various witnesses with regard to the damage caused to the buildings. Between February 2020 and July 2021 – over a year – TUHF's attorneys engaged with seventeen prospective experts. Ultimately, so the case on behalf of TUHF goes, of the twenty experts, only two were willing and able to assist TUHF. Assuming that the aforegoing (the identification of two experts) materialised towards the end of 2021, it is reasonable to expect that the expert or the experts would have been qualified in terms Uniform Rule of Court 36(9) a long time ago. To date – about three years since then – no expert notices or expert summaries have been filed. It beggars belief that it can take such an inordinate amount of time – three years and counting – for TUHF and its identified experts to produce and to finalise the summaries of the testimony to be presented by the experts. Again, the most probable inference to be drawn from this drawn-out process is that TUHF has taken a conscious decision not to pursue the main action further against Sasria.

[19]. I therefore conclude that the delays are both inexplicable and inexcusable.

[20]. I also do not accept TUHF's contention that the facts are complicated and not 'run of the mill'. This, in any event, does not justify the prolonged and prejudicial delay. Moreover, whilst this application was issued by Sasria during May 2023, TUHF has done nothing more to dispel the perception that they have no intention of prosecuting their claim further.

[21]. Sasria furthermore contends that the time of the delay has caused significant prejudice to it *qua* defendant. The prejudice is of such a nature, so the argument on behalf of Sasria goes, that Sasria will not be in the position to secure a fair trial once it is eventually enrolled. I find myself in agreement with these contentions. Self-evidently, the prejudice experienced by Sasria is, in simple terms, the passage of time since the occurrence of the events in question and the date on which the trial is ultimately to take place – 2014/2015 to about 2026, therefore a period of about eleven years.

[22]. It is, as contended by Sasria, that, in order to assess the primary issue on the merits – that being whether the damage to the property is covered by the Sasria Coupons – the Court will have to assess whether there was a direct and immediate connection between the damage and the alleged acts of the SACP and MPM and the public disorder allegedly incited by them. There is apparently no documentary evidence (and there never was any such evidence) which would indicate any correlation between the damage, which is said to have occurred over a period of an entire 6 months, and the alleged activities of the SACP and MCM. Sasria argues, correctly so, in my view, that all of the evidence points to the conclusion that the buildings on the property were simply hijacked and stripped by criminal elements.

[23]. Sasria has set out in its founding affidavit the potential witnesses who may be required to be called and of course this list is not a closed one. The best possible witnesses would be those who were involved in the activities resulting in the damage to the Property (and, arguably, those are the only witnesses who could confirm whether their actions fell under the categories described under the Sasria Coupon). Those individuals are obviously not identifiable and would not willingly come forward to incriminate themselves.

[24]. Even if the relevant witnesses could be located, it is most unlikely that the witnesses will be able to give a reliable account of the events after such a long passage of time. It is worthwhile considering the exercise of locating the witnesses for the moment, in order to illustrate the difficulties which Sasria is likely

to encounter as the result of the excessive delay. Identifying and tracing the members of the SAPS or the Red Ants who assisted with the eviction is likely to be impossible. Identifying and tracking down the relevant representatives of the City of Johannesburg who were around in 2014 and 2015 is similarly highly unlikely. However, identifying and securing the presence of former tenants of the property (who no longer reside there on the account of the eviction) is impossible. Yet these are the crucial witnesses in the matter.

[25]. The aforegoing, in my judgment, demonstrates convincingly the prejudice to Sasria. The prejudice to Sasria cannot be underplayed. The simple fact is that after a decade it will be impossible for any witness to state anything with any certainty. This means, in simple terms, that a fair trial cannot ensue. In the present case, TUHF's delay will inevitably render any prospective trial fundamentally unfair to Sasria. It is simply not reasonable to expect a party to effectively conduct a defence of a civil claim, over a decade after the occurrence the events in question.

[26]. I conclude, in sum, that the fact that TUHF took four years to secure the evidence of expert witnesses, does not displace the inference that TUHF has acted abusively. That abuse is exacerbated by the fact that TUHF refuses, in the length of its affidavit, to commit with any specificity to a date by which the work of the experts will be finalised. Similarly, TUHF's failure to amend its claim in order to indicate the quantum that Sasria is actually facing, is also inexplicable and therefore abusive. It may very well be, as submitted by Sasria, that it is now to face a further three years in preparation for the trial of what ultimately may prove to be an insignificant quantum. This is not the conduct of a serious, bona fide, claimant.

[27]. It is, however, not necessary for this Court to find that TUHF has purposively and intentionally abused the Court process. It is sufficient for the Court to find that TUHF has not properly and sufficiently explained its delay and that, as the result of the delay, Sasria will not be able to secure a fair trial. I have already found accordingly. The simple point is that TUHF's explanation that it was

re-strategizing for two years and then consulting with experts for another two years is highly improbable, insufficiently detailed and is rejected.

[28]. In the final analysis, the delay is, as per the requirements set out in *Cassimjee*, inexcusable, vaguely explained, unnecessary and grossly prejudicial to Sasria. TUHF's conduct in all likelihood means that a fair trial for Sasria is no longer possible and on that basis alone the relief sought should be granted.

[29]. The applicant's application for a dismissal of the respondent's claim should therefore succeed.

**Costs**

[30]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[2].

[31]. In this matter the applicant has been successful. I can think of no reason why I should deviate from the aforegoing general rule. The respondent should therefore be ordered to pay the applicant's costs.

**Order**

[32]. In the result, the order which I grant is as follows: -

(1) The applicant's application is granted.

(2) The respondent's claim in the main action is dismissed with costs.

(3) The respondent shall pay the applicant's costs of this opposed application, such costs to include the costs consequent upon the employment of two Counsel, where so employed, one being Senior Counsel, on tariff 'C' of the applicable scale in terms of the Uniform Rules of Court.

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[2] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

**L R ADAMS**
*Judge of the High Court*
*Gauteng Division, Johannesburg*

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| HEARD ON: | 5 September 2024 |
| JUDGMENT DATE: | 23 December 2024 |
| FOR THE APPLICANT: | C D A Loxton SC and<br>A Milovanovic-Bitter |
| INSTRUCTED BY: | Edward Nathan Sonnenbergs Inc,<br>Sandown, Sandton |
| FOR THE RESPONDENT: | I P Green SC and R Ismail |
| INSTRUCTED BY: | Cliffe Dekker Hofmeyr Incorporated,<br>Sandown, Sandton |