REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 1.4029/77

In the matter between :

MOHAMMED CASSIMJEE **PLAINTIFF**

And

THE HONOURABLE MINISTER OF FINANCE **DEFENDANT**

JUDGMENT

[Delivered on 29 July **2010]**

SEEGOBIN AJ

INTRODUCTION

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means."[1]

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[1] Extract from Chapter 1 of 'Bleak House' by Charles Dickens published by Penguin Books

[1] *Dickens* most wide-ranging and symbolic novel, *Bleak House*, is set in the world of Chancery and focuses in particular on the case of *Jarndyce* and *Jarndyce.* The case, which was originally brought to settle a dispute over a will, ran at Court "*for generations and has used up a great deal of health and wealth in its course.*"

[2] While the present matter has not occupied the attention of our courts for "*generations*", it has certainly been around for more than 3 decades; Counsel originally employed by the parties were either elevated to the Bench and have since retired, others remain in practice while some have moved on to greener pastures. No less than 8 firms of attorneys have been employed by the plaintiff over this period. Instituted on 16th November 1977, the principal dispute between the parties is a vindicatory claim for certain motor vehicles alternatively damages in the sum of R12 500.00. These vehicles, referred to in the pleadings as "*tankers*", were allegedly seized and detained by the Controller of Customs and Excise at Durban on 23rd March 1977. It is common cause that the Controller of Customs and Excise was an employee of the then Minister of Finance acting in the course and scope of his employment at the time. I will hereafter refer to the parties as they have been referred to in the pleadings.

[3] I am currently faced with two applications brought by the respective parties. The first is an application by the plaintiff for the striking out in terms of rule 30 of the uniform rules of the defendant's notice of objection to a proposed amendment to

the plaintiff's particulars of claim. The second is a counter-application by the defendant in which it seeks orders firstly for the substitution of the Commissioner for the South African Revenue Services as the defendant in the main action and secondly, that both the main action and the counter-claim in that action be dismissed. The latter aspect is premised mainly on the grounds of an unreasonable delay on the part of the plaintiff to finalise the litigation in question. No objection lies to the substitution of the Commissioner for the South African Revenue Service as the defendant in the main action. This is in line with the amendment of the Customs and Excise Act No 91 of 1964 ("the Act") by means of Act No. 34 of 1997, which, *inter alia*, places the duty of administering the Act in the hands of the Commissioner.

[4] In order to place the current applications in their proper context, it is necessary to set out the relevant facts and circumstances, most of which are either common cause alternatively not seriously disputed by either party.

RELEVANT FACTS AND BACKGROUND

[5] As already mentioned the plaintiff's vehicles were seized and detained by the Controller of Customs and Excise on 23rd March 1977. Attempts on the part of the plaintiff to resolve the matter with the defendant's officials proved futile and on 16th November 1977 the plaintiff issued summons. The matter was opposed

by the defendant who delivered a request for further particulars on 26th January 1976. Further particulars were delivered by the plaintiff on 13th October 1978. On 2nd May 1979, the defendant delivered both a special plea as well as a plea on the merits. On 4th May 1979 the defendant delivered his claim-in-reconvention in which it sought payment of a sum of money, together with interest, representing a rebate of duty on diesel oil which the plaintiff had allegedly received and which it was not entitled to receive in view of the fact that persons who purchased such diesel oil were legally not entitled to do so. On 4th October 1979 the plaintiff delivered a request for further particulars to the claim-in-reconvention. On 31st March 1980 the plaintiff brought an application to compel the defendant to furnish the further particulars. This was done on 23rd July 1980. On 27th January 1981 the plaintiff delivered a notice calling upon the defendant to produce certain documents referred to in the plea and counter-claim. It is common cause that the plaintiff did not file a plea to the counter-claim inasmuch as it is common cause that the defendant took no steps to secure the delivery of a plea to the counter-claim by the plaintiff.

[6] The matter then lay dormant for more than 20 years and on 27th November 2001 a new firm of attorneys placed themselves on record for the plaintiff and gave notice purporting to place the matter on the awaiting trial roll. Five years later on 11th August 2006 the plaintiff filed a notice of intention to amend his particulars of claim. On 18th November 2006 the office of the State Attorney (KwaZulu-Natal)

delivered a notice to oppose the proposed amendment. The effect of the amendment was to escalate the claims from a total of R23 750.00 to amounts approximately R3 500 000.00 and interest. It is common cause that this notice was defective in that it failed to set out the grounds upon which such opposition was based, hence the present application by the plaintiff in terms of rule 30 and the counter-application by the defendant for a dismissal of the main action and the counter-claim. In my view it is the latter application which requires determination first as the issues raised therein will no doubt affect the future conduct of the principal dispute which lies between the respective parties.

LEGAL PRINCIPLES

[7] For the purpose of this judgment I merely summarise the legal principles which have evolved over a long period of time concerning an unreasonable delay in prosecuting a matter to finality and / or conduct which amounts to an abuse of the process.

[8] It is well established that once the plaintiff has instituted an action, the periods within which he or she must take various steps through to judgment are set out in the rules of court[2]. However, no specific rule of practice provides for the superannuation of an action by the effluxion of time for want of prosecution.

[2] *Kuhn v Kerbal*1957 (3) SA 525 (A) at 534 A

[9] While Roman law provided that civil suits were to be deferred for no longer than three years, this has not been incorporated into South African law[3]. A court may dismiss an action on account of delay in prosecution of the matter[4]. This inherent power is further derived from s173 of the Constitution which gives a court the power to protect and regulate its own process[5].

[10] The test is essentially whether the plaintiff has abused the court process in engaging in frivolous or vexatious litigation[6]. This test is fairly stringent and one not easily passed,[7] and a court will only exercise its discretion if there exists strong grounds for doing so. As pointed out by Solomon JA in *Western Assurance Co. v Caldwell's Trustee:*[8]

'the courts of law are open to all, and it is only in exceptional circumstances that the court will close the doors on anyone who desires to prosecute an action'[9]

[11] Theoretically such an order will rarely be granted since on abuse of process is difficult to prove.[10] It also impacts on a litigant's constitutional and common law rights to have a dispute adjudicated in a court of law.[11] Nevertheless, it is in the

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[3] *Sanford v Haley* NO 2004 (3) SA 296 (C) para 6
[4] Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5ed 2009, 719
[5] Note 2 para 8
[6] Note 2 para 9
[7] Ibid
[8] 1918 AD 262
[9] At 273
[10] *Molala v Minister of Law & Order and Another* 1993 (1)SA 673 (W) at 677A
[11] Note 2 para 8

public interest that litigation be finalised without undue delay[12] and a court will exercise its discretion where the abuse of court process is clear.[13]

[12] Neither an unreasonable nor an inexcusable delay on the part of the plaintiff or any prejudice to the defendant on their own is decisive of the matter.[14] For a court to exercise its discretion both of these prerequisites must be present[15] and the proper approach is to weigh these two aspects against one another.[16] It is possible, therefore, that there may be a small delay but with great prejudice, particularly where the matter rests on the evidence of eyewitnesses whose memories have become blurred over time.[17] It is equally possible to have a long delay, but little prejudice, as where the matter largely rests on documentary evidence.[18]

[13] Where there is a long delay, the court can nevertheless dismiss the action if it is clear that the plaintiff has lost interest in pursuing the matter and its presence on the court roll is prejudicial to the due administration of justice.[19] The issue is ultimately about whether the delay is so unreasonable so as to amount to an

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[12] *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C)
[13] Note 2 para 8
[14] Note 10 at 677 C
[15] Note 2 para 9
[16] *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558 B
[17] Ibid at 558C
[18] Ibid at 558 E-F
[19] Ibid at 558F

abuse of the court process [20] and the plaintiff's behaviour oversteps the '*threshold of legitimacy*'.[21]

[14] As justice is a double-edged sword, a court should have some regard to a defendant's failure to take advantage of the procedural steps available to him in circumstances where he might reasonably be expected to do so.[22] However, what is reasonable conduct on the part of a defendant depends on the circumstances and a defendant might be justified in believing that a plaintiff has lost interest and to '*let sleeping dogs lie*'.[23] Ultimately, however, although a defendant's action may be relevant to deciding the issue, the enquiry remains essentially directed towards the intention of the plaintiff.[24]

[15] The impact of the delay in prosecuting cases was analysed in a critical manner by Flemming DJP in *Molala v Minister of Law and Order.*[25] The plaintiff had sued for damages arising out of a police assault. Summons was issued on 3 March 1987 and a request for further particulars was delivered on 16 April 1987. Thereafter nothing occurred until the further particulars were delivered on 23 September 1991, a lapse of nearly four and a half years. After discussing various earlier decisions the court held that the fact that a plaintiff in an action had

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[20] Note 12 above
[21] Note 10 at 677 C -D
[22] Note 16 at 588G-I
[23] Note 16 at 588 J
[24] Note 10 at 677 E
[25] Note 10

permitted an unreasonable time to elapse before taking the next procedural step, was not in itself conclusive. Nor was it conclusive that such delay had caused prejudice to the defendant.

In assessing the overall approach of how our system deals with delays, the court said the following at 679 D-F:

'*I should not refer to 'system' but to the total lack in our system of attention to the effective counteracting of slackness. Our system leaves the defendant with three poor choices. One is to incur the costs of application, perhaps not recoverable from the other party, in order to forge ahead with litigation started by a plaintiff who to all outward appearances shows clear signs of lack of interest in the whole business. The second alternative is to hope that the surrounding facts will develop sufficient cogency to enable him to convince the court in a formal application, often also at the defendant's expense, that the plaintiff is abusing the court process to an extent which warrants dismissal of the action.*'

The court was persuaded to dismiss the action due to the prejudice caused by the delay both to the defendant and to the administration of justice.

[16] In *Gopaul v Subbamah*[26] it was reiterated that the High Court has an inherent power to dismiss an action on account of a delay in its prosecution by the plaintiff. However, the circumstances under which the court will exercise this

[26] 2002 (6) SA 551 (D)

power are not clear. It was observed that the proper approach is for a court to weigh up the period of delay and the reasons therefore against the prejudice caused to the defendant. A court should also have regard to the reasons for the defendant's inactivity in the matter. There are many procedural devices open to a defendant during the course of an action to force a dilatory plaintiff to bring his action to finality. If a defendant failed to avail himself of these remedies when he might reasonably have been expected to do so, the court will look askance at an application by him to dismiss the plaintiff's action merely because of a delay in the prosecution.

[17] In *Kuiper and Others v Benson*[27] it was observed that a delay caused by the plaintiff's dispute with various attorneys was of no concern to the defendant and that it was not reasonable or acceptable conduct to have allowed years to roll on while attempting to settle these disputes. However, the court added that although this was unreasonable and reprehensible conduct, it did not amount to an abuse of court process.[28]

[18] In *Sanford v Haley NO* [29] the court held that the "*...prerequisites for the exercise of such discretion are, firstly, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the defendant is seriously prejudiced by such delay.*"

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[27] 1984 (1) SA 474 (W)
[28] Ibid at 477 D
[29] Note 2 above

[19] It was further held that the court will exercise its power to dismiss an action or account of a delay or want of prosecution only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law rights of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial.

[20] Having regard to the facts it was found that the plaintiff had failed to explain the reason for the delay, and secondly, given that the proceedings were provisional sentence proceedings, the long delay had destroyed the very basis of such proceedings, which were meant to provide a speedy remedy. It was pointed out that the delay, therefore, seriously called into question the legitimacy of the plaintiff's conduct.[30]

DELAY AND PREJUDICE

[21] There has undoubtedly been a long delay on the part of the plaintiff in the prosecution of this matter. The crisp question for decision is whether this delay has been so unreasonable or inordinate to amount to an abuse of the process of the court.

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[30] At para 23

[22] As explanation for the delay, the plaintiff avers that he experienced problems with a number of attorneys (and it would seem Counsel as well) who were instructed by him from time to time.[31] Briefly stated these problems related, *inter alia*, to a lack of progress on the part of his attorneys and Counsel in pursuing this matter on his behalf. In the course of this period and in 1992 one of his attorneys died while another was struck off the roll in 1997. An advocate instructed on his behalf "*packed up and left*" without anything further being done in the matter. Repeated enquiries made by him regarding any progress solicited no satisfactory responses. It would seem that he went from one firm to another with no real progress being made. In 2001 a firm of attorneys instructed by him succeeded in placing the matter on the awaiting trial roll, albeit prematurely. Their mandate was, however, terminated and another firm was instructed. On 11th August 2006 and due to a lack of progress, this firm's mandate was terminated and on the same day a new firm was appointed. There was some noticeable progress by this firm with the filing of a Rule 28 notice, the filing of the application in terms of Rule 30 and the adjournment of the application on the 29th November 2006. No further progress was made. Plaintiff once again terminated his attorneys mandate and appointed his current attorneys in 2008.

[23] A further reason advanced by the plaintiff for the obvious delay relates to the "*extensive*" health problems which he alleges he suffered. He states that he has

[31] See para 18 of Plaintiff's answering affidavit at pages 87-118 of the bundle containing the application papers

a cardiac problem and suffers from hypertension. In 1998 he was diagnosed with type 2 diabetes melitis and suffered a stroke. In the year 2000 he underwent a coronary artery bypass at the Westville Hospital. In 2001 he underwent a second operation at the St Augustines Hospital. He avers that his poor health has resulted in numerous visits to a number of doctors and repeated admissions to hospital. It is for these reasons that litigation matters took a second place. The plaintiff avers that during all this time the defendant did nothing to advance the action or to set it down for hearing.

[24] The plaintiff has not produced a single shred of evidence to substantiate any of the allegations referred to above. Since 27th January 1981 (when the notice to produce certain documents was filed) until 2001 the plaintiff took no steps whatsoever to prosecute the action. Thereafter in 2001, all that occurred was the attempt to place the matter on the awaiting trial roll in circumstances when the pleadings has not yet closed.[32] Nothing further happened until August 2006. In all this time it is apparent that the plaintiff had access to attorneys and Counsel. No complaint seems to arise about a lack of funds on his part to pursue this matter. While he complains bitterly about the lack of progress and / or the failure on the part of his legal representatives to take the matter forward, he did not report any of this conduct either to the Law Society and / or to the Bar Council. It seems that he was content to allow the matter to drag on. Problems concerning his health seem to surface only during or about 1998, if his version is to be

[32] No Plea was filed to the counter claim.

accepted. Between 1981 and 1998 seventeen (17) years lapsed. I find it completely unacceptable that not a single positive step was taken by him in this time to advance his matter in any way. In my view and as previously observed[33], the plaintiff's disputes and problems with his own attorneys and Counsel are of no real concern to the defendant who quite reasonably may have been under the impression that the matter was "*dying a natural death*". While I accept that there are circumstances when delay on the part of a litigant can be condoned, the delay in this instance is so great that the conduct of the plaintiff oversteps the "*threshold of legitimacy*" and accordingly the continued presence of this matter on the court roll is prejudicial to the due administration of justice.

[25] Apart from the above, there are other considerations that apply as far as the position of the defendant is concerned. If this matter was allowed to continue at this stage, the prejudice to the defendant would indeed be substantial, as the following facts demonstrate:

[25.1] According to the defendant, it is common cause that the trucks were first subject to a lien in terms of Section 114 of the Act and thereafter seized in terms of Section 87 (2) of the Act by the defendant's officials.

[25.2] In terms of the Minister's plea and the further particulars supplied in connection therewith, it appears that the cause of the seizure of the trucks was that they had

[33] See: Kuiper and Others v Benson, supra

been used in the carriage of fuel contrary to the provisions of the Act and this rendered them liable to seizure.

[25.3] The further particulars indicate that the fuel (i.e. diesel) was acquired by the plaintiff in terms of certain regulations promulgated under the Act under rebate of excise to which he was not entitled because he did not intend to dispose of the fuel in accordance with such regulations.

[25.4] The actual instances in which the plaintiff had sold diesel in contravention of the regulations were evidenced by his own invoices to his customers. The relevant invoice numbers are listed in a Schedule annexed to the further particulars to the counter-claim.

[25.5] According to the defendant the main issue which will arise in the action, if it should be allowed to proceed, is whether the plaintiff did indeed sell diesel under rebate to persons who were not entitled thereto. This will entail an examination of each transaction evidenced in the Schedule annexed to the further particulars. It would seem that only the relevant invoice numbers are listed and not the names of the parties to whom the invoices were issued. The defendant avers that while at some stage his officials must have been in possession of copies of these invoices, they cannot now be found. Neither are these invoices contained in the head office file in the matter nor in the file of the State Attorney.

[25.6] Of the 5 officials who were initially involved in this matter, 2 are now deceased while the remaining 3 are unable to assist as a result of the lapse of time, the lack of documents and a difficulty to recollect the events which took place in 1977 when the vehicles were seized.

[25.7] A further difficulty which arises on the issue of the *quantum* of the Plaintiff's claim is that after all these years it's going to be extremely difficult to find evidence with regard to, *inter alia*, the condition of the vehicles when they were seized, their value in 1977 and what income those vehicles could have earned at that time.

[26] It was submitted in behalf of the plaintiff that in as much as the defendant complains about the delay on the part of the plaintiff, the defendant is not blameless as, on its own version, [34]the defendant had deliberately chosen not to "*force the pace of the action*" in light of the judgment by the Appellate Division in the matter of **BP South Africa (Pty) Ltd v Secretary for Customs and Excise 1985 (1) SA 725**. It would seem that the effect of this judgment on the defendant was that there could now be obstacles in trying to prove that the persons to whom the plaintiff supplied the diesel were indeed not entitled to the rebate. In my view, this attitude on the part of the Commissioner does not detract from the clear failure on the part of the Plaintiff to prosecute this matter to finality.

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[34] See: para 36 of Mohape's founding affidavit in the bundle containing the application papers at pages 57 - 58

LACK OF MERITS

[27] Apart from not allowing this matter to proceed because of the inordinate delay as set out above, there is yet a further reason why this matter should not be allowed to proceed any further. This relates to the proposed amendment of the particulars of claim by the plaintiff. The proposed amendment envisages:

[a] amending the amount of money claimed should the defendant not be in a position to return the trucks; and

[b] amending the damages claimed as a result of the plaintiff being deprived of the use of the trucks.

[28] It has been contended on behalf of the defendant that both these proposed amendments are ill-founded for the following reasons:

[28.1] In regard to the monetary claim in lieu of the return of the trucks, the amount mentioned in the amendment appears to be the current value of vehicles the same age as the trucks were when they were seized in 1977.

[28.2] The claim for the trucks is a vindicatory one. If the defendant is ordered to do so but cannot return the same, the plaintiff's monetory claim would be for the value

of the trucks seized at the date the order to return same is granted. This claim would therefore be for the current day value of the trucks, both of which will be in excess of 30 years old.

[28.3] With regard to the amendment of the claim for damages, if same is granted it will render the particulars of claim directly contrary to the further particulars supplied by the defendant's attorneys.

[28.4] The further particulars indicate that the claim for damages was based on the nett earnings per truck of R35.00 per day for five days per week.

[28.5] The proposed amendment claims that the nett loss was R750.00 per day in respect of the one truck and R500.00 in respect of the other, working six days per week.

[28.6] No explanation has thus far been provided by the Plaintiff as to how the trucks, which in 1977 had a combined value of R12 500.00, could now earn an amount of R1250.00 per day (i.e. daily earnings of 1/10 of their value).

[28.7] It would seem that the claim for damages is based on the current day value of the earnings of similar but modern trucks.

[28.8] If that is the case then, so it is submitted, this is a completely novel and incorrect method of calculating damages bearing in mind that a damages claim must be calculated as at the date when the cause of action arose i.e. when the trucks were seized in 1977.

[29] I am in agreement with the defendant that the proposed amendment has been ill-founded and may be excipiable for the reasons set out above. I am accordingly driven to the conclusion that the plaintiff's claim, particularly after a lapse of almost 32 years, lacks merit and would be unsustainable.

CONCLUSION

[30] While I am cognisant of the fact that everyone has the right [35] to have any dispute decided in a fair public trial before a Court, there are rules governing any trial. Even though I am sympathetic to the plaintiff's cause, I cannot allow this matter to proceed any further particularly in view of the extreme prejudice which will be caused to the defendant in particular and to the due administration of justice in general. Insofar as the issue of costs is concerned I believe that justice would be served if the parties are ordered to carry their own costs herein.

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[35] See Section 34 of the Constitution

[31] In the circumstances, I grant the following order:

[a] The plaintiff's application in terms of Rule 30 is dismissed;

[b] The action instituted by the plaintiff under Case No: I4029/77 and the counter-claim instituted by the defendant are dismissed.

[c] Each party is ordered to pay their own costs.

SEEGOBIN AJ

23/07/10

LEGAL REPRESENTATIVES

1. PLAINTIFF'S COUNSEL : J.A JULYAN SC

Instructed by:

Govender & Associates

Nedbank House

30 Albert Street

Durban

2. DEFENDANT'S COUNSEL : C.J PAMMENTER SC

Instructed by:

State Attorney (KwaZulu-Natal)

6th Floor

Metropolitan Building

391 Smith Street

Durban

3. DATE OF HEARING : 23 MARCH 2010

4. DATE OF JUDGMENT : 29 July 2010