REPORTABLE

REPUBLIC OF NAMIBIA

CASE NO.: I 382/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KUUME NGHIPANDULWA **PLAINTIFF**

and

GEORGE VAN WYK **DEFENDANT**

CORAM: KAUTA, AJ

HEARD ON: 3RD JULY 2012
DELIVERED ON: 27TH JULY 2012

JUDGMENT

KAUTA, AJ:

[1] This is a special plea to dismiss an action for want of prosecution.

[2] On the 1st of May 1999 the Defendant borrowed the Plaintiff's Volkswagen Citi Deco 1.6 motor vehicle. The Plaintiff alleged that without any permission the Defendant drove the vehicle to Otjiwarongo where it was damaged in a collision. As a result of the collision the Plaintiff issued summons in this court on 5th November 1999 and served it on the Defendant on the 25th of January 2000 in which the Plaintiff claimed payment in the sum of N$30 525.00 and interest thereon at the rate of 20% a tempore morae.

[3] Ten months after the service of the summons on the Defendant, the Plaintiff wished to amend his particulars of claim on the 6th of November 2000 and consequently served a notice to that effect on the Defendant on the 9th of November 2000. In due course the amended particulars of claim were served on the Defendant two (2) months later on the 18th of January 2001. A further two (2) months elapsed before the Defendant defended the action on the 30th of March 2001.

[4] It appears that default judgment was requested by the Plaintiff on the 23rd of April 2001. Nothing came of this request for default judgment because the matter was defended. By the 24th of April 2001 the Defendant filed his plea to the Plaintiff's claim.

[5] Over five (5) and a half years passed between the date of the institution of the action and the withdrawal of the erstwhile legal practitioners of the Plaintiff on the 9th of August 2006. Armed with new legal practitioners the Plaintiff invited the Defendant to a Rule 37 conference on the same date. After the Defendant's Legal Practitioners received the invitation they withdrew as legal practitioners of record on the 14th of September 2006, consequently the Plaintiff was forced to invite the Defendant personally to the Rule 37 conference. This the Plaintiff did on the 26th of November 2006, some two (2) months later.

[6] It is common cause that the Rule 37 conference never took place between the parties. One (1) year and three (3) months after the last pleading in this matter Plaintiff applied for a trial date on the continuous civil roll, on the 7th of February 2008. The Plaintiff invited the Defendant to appear at the High Court on the 20th of February 2008 in order to obtain a trial date. It is common cause that the Registrar did not allocate a date for hearing to this matter. Five (5) months later on the 24th of July 2008 the Plaintiff served an application on the Defendant in which he sought leave to obtain a trial date from the Registrar. The application was set down for hearing on the 15th of August 2008. My brother Muller J, after hearing the application, granted leave to the Plaintiff to obtain a trial date from the Registrar with costs. On the 5th of September 2008 the Plaintiff invited the Defendant to attend to the offices of the Registrar on the 15th of October 2008 to obtain a trial date in this matter. It appears that a date for hearing was allocated and served on the 18th of October 2008 on the Defendant. The matter was to be heard the next year, on the 17th of March 2009.

[7] Before the hearing of the matter the Plaintiff served the paginated index of the pleadings on the Defendant on the 8th November 2008. The legal practitioners of the Plaintiff however withdrew on the 26th of January 2009 before the hearing of the matter. The record is silent as to what happened on the 17th of March 2009. Two (2) years and nine (9) months later the Plaintiff engaged his current legal practitioners who duly filed a notice of representation. At this stage the rules of the High Court were already amended to provide for Case Management and the docket in this matter was allocated to my brother Unengu AJ, who invited the parties to an Initial Judicial Case Management Conference on the 11th of April 2012. At this Case Management Conference Plaintiff was represented by Mr Nekongo and the Defendant in person. They were ordered to file a Case Management Report forthwith and comply with the provisions of Rule 37(16). Consequently the matter was postponed to 23rd of May 2012. The Defendant instructed his current legal practitioners of record and they served a notice of representation a day before the hearing of this matter

on the 22nd of May 2012. The matter came before my brother Damaseb JP, and he postponed it to the 20th of June 2012.

[8] On the 19th of June 2012 the parties served a joint case management report on the court. After hearing the parties on the 20th of June 2012 Damaseb JP made an order in the following terms:

1. The Defendant must file the special plea not later than **22 June 2012**.

2. The Plaintiff must replicate thereto no later than **27 June 2012**.

3. The matter is postponed to **03 July 2012 at 09:00** for arguments on the special plea on the Interlocutory roll of **Kauta, AJ**.

4. Both parties are directed to simultaneously file their Heads of Arguments three (3) days prior to the date of hearing of the special plea.
5. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 37(16)(e)(i)-(iv).

6. A failure to comply with any of the above directions will ipso facto make the party in default liable for sanction at the instance of the other party or the court acting on its own motion unless it seeks condonation therefore not less than 10 court days before the next scheduled hearing, by notice to the opposing party.

[9] On the 22nd June 2012 the Defendant amended his plea, and pleaded that the summons became stale and the proceedings stand to be set aside with costs. The plea is silent as to what is meant by *stale*, but it appears the Plaintiff knew fully well what that term meant because he did

not enquire. When the matter came before me Mr Nekongo appeared for the Plaintiff and Mr Denk for the Defendant.

[10] Mr Denk argued that the important date in this matter is the 24th of April 2001, which is the date on which the Defendant pleaded to the merits. He argued further that the Plaintiff's notice of the 9th of August 2006 was delivered five (5) years after this date. In his opinion the Plaintiff did not enforce his rights by bringing an application to compel the Defendant to attend the Rule 37 conferences. In any event so the argument goes, another year and six (6) months elapsed between the time the application for a trial date was made and when the matter was eventually set down for hearing. The final submission on behalf of the Defendant is that the Plaintiff's summons is stale and that the proceedings must be set aside.

[10] Mr Nekongo argued that the lengthy periods of time between the pleadings were caused by the Defendant's refusal and/or unwillingness to expedite the prosecution of this matter. He further argues that the summons is therefore not stale.

[11] The dismissal of the Plaintiff's action is essentially sought on the ground that it had been dormant since the 24th of April 2001 and that to permit its continuance will give rise to irremediable prejudice amounting to an abuse of the process of the court. The High Court has the inherent power, both at common law and in terms of the Constitution (Article12), to regulate its own process. This included 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 and another* 1979 (3) SA 1331 (W) at 1338F-G; *Beinash and another v Ernst & Young & others* 1999 (2) SA 116 (CC) paras 10 and 17). Article 12(1) of the Constitution provides that: "In the determination of their civil rights and obligations….,

all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court". This right is not absolute and is subject to reasonable and justifiable limitations, especially where the litigation process is vexatious or amounts to an abuse of process. See *Beinash* (supra para 17).

[12] 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).

[13] 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 recognized. First, there should be a delay in the prosecution of the action;secondly, the delay must be inexcusable and, thirdly, 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.

[14] 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 recognize 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.'

[15] The manner in which this matter was argued before me is most unfortunate. The parties decided to argue the facts underpinning their respective positions from the bar. Such facts are not supported by any affidavits. I enquired from both counsels what weight, if any, I should give to such facts. Counsels were both *ad idem* that there were no other facts to put before me and deemed it unnecessary to call witnesses. I am compelled to dispose of this matter on the facts presented from the bar. The Plaintiff was unable to explain the delay of more than five (5) years in paragraph 5 above. The only explanation proffered relates solely to the unwillingness of the Defendant to move the pace of the process. I shall now turn to the respective contentions.

[16] It was argued on behalf of the Plaintiff that any prejudice to the Defendant 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 Defendant's conduct is a factor that must be taken into account, its conduct cannot be viewed in isolation from the Plaintiff'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.'

[17] In *Molala v Minister of Law and Order and another* 1993 (1) SA 673 (W) Fleming DJP made an exhaustive analysis of the authorities applicable in the current context and held at 676D-I:

"However, it has been accepted in various Divisions that there is a discretion to refuse altogether to grant judgment. But there is not always certainty about the basis of the discretion and therefore about the facts which should guide the exercise of the discretion. In the Cape, in Rowsell v De Stadler (1895) 12 SC 399, in deciding that the defendant was entitled to an order barring the appeal, the Court may have been guided by the fact that the defendant was justified after such a long delay in inferring that the intention to prosecute the appeal had been abandoned. In Hunt v Engers 1921 CPD 754, despite the argument that there was no Rule about superannuation, it was regarded as unreasonable to have allowed such a period of time to elapse since the issue of the summons. In Schoeman en Andere v Van Tonder 1979 (1) SA 301 (O) abandonment was not proved and, finding it unnecessary to decide whether the Court's inherent jurisdiction or something else was the basis, the Court was apparently swayed by the reasonableness or not of the time which the plaintiff allowed to elapse. Reasonableness would then be influenced, inter alia, by the reasons for a plaintiff's delay - an issue on which the present plaintiff is completely silent. It is not clear from Barber v Barber

1932 NPD 751 whether, in referring to the possibility that a Court would or would not 'allow a plaintiff to continue' with an action, the Court had in mind to accept that a discretion exists. What I know of the Eastern Cape is only what is reflected in Stoltz v Ho Kee 1975 (1) SA 100 (E). The reference at 104G, while dealing with a different issue, to three decisions which are not harmonious on the point now under consideration shows that for the purposes of that case no closer analysis was necessary. In the Transvaal it was, despite doubts earlier in the year, accepted in Bernstein v Bernstein 1948 (2) SA 205 (W) that 'it is in the discretion of the Court to allow proceedings to continue where there has been this lapse of time".

[18] I am not surprised about the stance taken by Mr Nekongo because the Plaintiff changed legal firms without any real progress being made. And he became involved in this matter only in January 2012. The lack of explanation for a period of five (5) years as from the Defendant's plea to the 9th of August 2006 when the Plaintiff awoke from his slumber is fatal. I agree with Mr Denk that *litis contestatio* set at this stage. Mr Denk further, criticized the unexplained inactivity and premised his argument that the Defendant is prejudiced on this score. The trial prejudice contended for by the Defendant is that damages to the motor vehicle, if any, can no longer be ascertained because the vehicle is no longer available for inspection. As a result the Defendant will be unable to engage an expert to dispute damages. In my view because of the five years that elapsed after the setting of *litis contestatio* the inference is irresistible that the Plaintiff decided for some unexplained reason not to proceed with the action or to advance it expeditiously.

[19] Applying the approach postulated by Diplock LJ to the facts of the instant case, the conclusion must inevitably be reached that it is the Plaintiff's failure to expeditiously prosecute the action that is the primary cause of the Defendant's prejudice.

[20] In these circumstances I am of the opinion that it will be wrong for the court to allow the action to continue and I exercise my discretion in the Defendant's favour. The present summons is *stale* and continuance thereon constitutes an abuse of process. In the result I make the following order:

1. The Defendant's special plea succeeds with costs.

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KAUTA AJ

COUNSEL ON BHELAF OF THE PLAINTIFF: **MR. NEKONGO**

INSTRUCTED BY : **SISA NAMANDJE & CO INC.**

COUNSEL ON BEHALF OF THE DEFENDANT: **ADV. DENK**

INSTRUCTED BY: **LORENTZANGULA INC**.