REPORTABLE

CASE NO.: SA 23/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AUSSENKEHR FARMS (PTY) LTD **APPELLANT**

and

NAMIBIA DEVELOPMENT CORPORATION LTD **RESPONDENT**

Coram:	Maritz JA, Mainga JA *et*Ngcobo AJA
Heard on:	28/03/2012
Delivered on:	13/08/2012

APPEAL JUDGMENT

NGCOBO AJA:

Introduction

[1] This appeal concerns the circumstances under which a court may: (a) dismiss the plaintiff's action for abuse of the process of the court; and (b) declarethe filing of a pleading in the course of litigationan irregular step under Rule

30. Thesequestions arise from an action instituted by the Namibian Development Corporation Ltd, the respondent, against Aussenkehr Farms (Pty) Ltd, the appellant,in the High Court. For convenience, the parties will be referred to as in the court below.

[2] In the course of the proceedings in the High Court, the defendant launched two applications. In the one application, the defendant sought an order declaring that the late filing of the plaintiff's amended particulars of claim without an application for condonation of such late filing, constituted an irregular step under Rule 30. In the other, it sought the dismissal of the plaintiff's action on account of (a) inordinate delay in the finalisation of the litigation which, the defendant contended, constituted dilatory abuse of the process of court; and (b) vexatious proceedings which the defendant claimed were without merit.

[3] Heathcote, AJ, refused both applications and ordered the defendant to pay the plaintiff's costs, including costs of one instructing and two instructed counsel.[1]The present appeal, which comes to us with the leave of the High Court, is against the refusal of those applications as well as the costs order.

[4] In addition to the above orders, the High Court upheld the application to strike out that had been brought by the plaintiff. At the commencement of oral argument in this Court, Mr Barnard, who appeared on behalf of the defendant, informed us that the defendant was no longer pursuing the appeal against the

[1]The decision of the High Court is reported as *Namibian Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703.

order of the High Court granting the application to strike out. He tendered costs occasioned by that appeal.

[5] In order to appreciate the merits of the defendant's contentions, it is necessary to set out the material parts of the history of this litigation. That history appears from the pleadings and other papers filed of record. The defendant has yet to plead to the plaintiff's action.

Relevant history of litigation

[6] This litigation commenced some eight years ago, on 2 February, 2004,when the plaintiff instituted an action against the defendant for payment of N$5 228 267,96 together with interest. The original particulars of claim alleged that on 16 February 1994 the plaintiff and the defendant entered into a suspensive sale agreement and a loan agreement.In terms of these agreements, the defendant was obliged to pay the plaintiff certain monthly instalments. On 22 August 2000 the payment obligations of the defendant under these agreements were rescheduled pursuant to an addendum to both agreements (the addendum).

[7] In terms of the addendum, the defendant was obliged to pay equal yearly instalments of N$1 008 714,43, the first instalment being due on the last day of March 2001, and subsequent instalments on the last day of March each succeeding year.The particulars of claim alleged that in breach of the addendum, the defendant, despite demand, failed to pay the first instalment and anysubsequent instalment; and, that in terms of both the supensive sale

agreement and the loan agreement the plaintiff became entitled to claim the full balance outstanding, due and owing by the defendant.

[8] On 25 February 2004, the defendant entered appearance to defend. This triggered an application for summary judgment by the plaintiff which was filed on 19 March 2004. The defendant opposed summary judgment and filed a comprehensive opposing affidavit on 15 April 2004. It advanced a number of defences, including that: the allegations in the particulars of claim do not sustain the cause of action asserted; the claim is vexatious and without merit and constitutes an abuse of the court process. The plaintiff did not pursue the application for summary judgment; instead it called upon the defendant to file its plea.

[9] In response to the invitation to file a plea, on 21 October 2004, the defendant filed a request for further particulars. The plaintiff only delivered its response to this request on 12 March 2008, that is,some three and a half years later. Simultaneously with its further particulars, the defendant filed a notice of amendment. The effect of the proposed amendment was threefold: (a) it altered the amount claimed from N$5 228 267,96 to N$6 211 472,28; (b) it alleged failure to pay the second instalment that was due and payable on 31 March 2002 instead of the first instalment as originally alleged; and (c) it alleged that the demand for the payment of this instalment was made on 9 April 2002.

[10] There was no objection to the proposed amendment within the period allowed by Rule 28(2).[2] In terms of Rule 28(3), the defendant was deemed to have consented to the proposed amendment. That being the case, the defendant was required by Rule 28(5) to file its amended particulars of claim by end of March 2008, the precise date is not relevant. The defendant only filed its amended particulars of claim on 5 December 2008, some nine and a half months later.

[11] The delay in the filing of the further particulars as well as the late filing of the amended particulars of claim triggered three sets of Rule 30 applications. The

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[2] Rule 28 provides:

28. (1) Any party desiring to amend any pleading or document other than an affidavit, filed in connection with any proceeding, may give notice to all other parties to the proceeding of his or her intention so to amend.

(2) Such notice shall state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document in question accordingly.

(3) If no objection in writing be so made, the party receiving such notice shall be deemed to have agreed to the amendment.

(4) If objection is made within the said period, which objection shall clearly and concisely state the grounds upon which it is founded, the party wishing to pursue the amendment shall within 10 days after the receipt of such objection, apply to court on notice for leave to amend and set the matter down for hearing, and the court may make such order thereon as to it seems meet.

(5) Whenever the court has ordered an amendment or no objection has been made within the time prescribed in sub-rule (2), the party amending shall deliver the amendment within the time specified in the court's order or within 5 days after the expiry of the time prescribed in sub-rule (2), as the case may be.

(6) When an amendment to a pleading has been delivered in terms of this rule, the other party shall be entitled to plead thereto or amend consequentially any pleading already filed by him or her within 15 days of the receipt of the amended pleading.

(7) A party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party.

(8) The court may during the hearing at any stage before judgment grant leave to amend any pleading or document on such terms as to costs or otherwise as to it seems meet.

(9) Where any amendment is made it shall be made on a separate page to be added in an appropriate place to the pleading or the document amended.

first was filed on4 April 2008 by the defendant, in which it alleged that the plaintiff's late filing of further particulars constituted an irregular step. At the time of filing this application, the amended particulars had not yet been filed. In response, the plaintiff launched its Rule 30 application on 10 April 2008 alleging that the defendant's Rule 30 application constituted an irregular proceeding because the defendant's remedy for the plaintiff's late filing of further particulars lay, not in Rule 30, but in Rule 21(6) which allows a non-defaulting party to compel the delivery of further particulars.[3]

[12] The defendant did not persist in its Rule 30 application, instead,on 15 July 2008, it filed an application to amend the notice of motion in its Rule 30 application. The effect of the proposed amendment was to convert theRule 30 application into an application for the dismissal of the plaintiff's action "on account of plaintiff's inordinate delay in prosecuting its action, and the vexatious conduct of its proceedings". The plaintiff indicated that it would oppose this application.

[13] The defendant's notice of application to amend thenotice of motion as well as the plaintiff'sRule 30 application eventually came before Parker J on 16 September 2008. He granted the defendant's application to amend its Rule 30 notice of motion and set out a schedule for the filing of further affidavits to what had become an application to dismiss the plaintiff's action on the grounds of abuse of the process of court. It appears from the order made on that day that the

[3] Rule 21(6) provides: "If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet."

plaintiff withdrew its Rule 30 application. This left the abuse of court process application that eventually come before Heathcote AJ on 29 September 2009.

[14] In the meantime the plaintiff filed its amended particulars of claimon 5 December 2008 which, as I have said, were late by some nine and a half months.This triggered a further Rule 30 application by the defendant on 11 December 2008. The defendant alleged that the late filing of the amended particulars of claim without an application for an order condoning such late filing, constituted an irregular step. The plaintiff resisted this application. This application was initially set down for 30 January 2009. It is this Rule 30 application that eventually came before Heathcote AJ.

[15] To complete the narration of the litigation history, the plaintiff filed its answering affidavit in the abuse of process application on 16 December 2008. The defendant's replying affidavit was filed on 3 April 2009. It is this affidavit that contained portions that triggered the application to strike. In the light of the abandonment of the appeal against the order granting the application to strike out, nothing more need be said about this application.

[16] On 16 November 2009 Heathcote AJ, made an order, *inter alia*: (a) dismissing the defendant's Rule 30 application; (b) dismissing the defendant's abuse of the process of court application; (d)ordering the defendant to pay costs including costs of one instructing and two instructed counsel; and (e)directing the defendant to file its next pleading within 15 days.It is these orders that are the subject of the appeal in this Court.

[17] If the appeal against the order refusing the defendant's abuse of process application is upheld, that is the end of the litigation. It is therefore convenient to deal first with that appeal, and, if necessary, to consider the appeal against the dismissal of the defendant's Rule 30 application. But before considering the specific forms of abuse of the process alleged by the defendant, I consider it appropriate to make some general observations on the inherent power of the court to prevent the abuse of it process

The abuse of process of court application

[18] The Court has an inherent power to protect itself and others against an abuse of its process.[4]As was said in *Hudson v Hudson and Another*, "when the court finds an attempt to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse".[5]The power to prevent the abuse of the process of the court is an important tool in the hands of courts to protect the proper functioning of the courts and to prevent the judicial process from being abused by litigants who institute proceedings to harass their adversaries with vexatious litigation. It prevents the court process from being turned into an instrument to perpetuate unfairness and injustice, and the administration of justice from being brought into disrepute.[6]

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[4]*Western Assurance Co v Caldwell's Trustees* 1918 AD 262 at 272; *African Farms Township v Cape Town Municipality* 1963(2) SA 555 (A) at 565D-E; *Corderoy v Union Government* 1918 AD 512 at 517; *Hudson v Hudson and Another*1927 AD 259 at 268; *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734C-G.

[5]At 268.

[6]*Hunter v Chief Constable of the West Midlands Police* [1981] UKHL 13 (1982) AC 529 at 536.

[19] The exercise of this power protects the public interest in theproper administration of justice. As it has said, albeit in a different context:

> "Public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."[7]

[20] The primary function of a court of law is to dispense justice with impartiality and fairness both to the parties and to the community that it serves. Public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly to facilitate the resolution of genuine disputes. Unless the court protects its ability to function in that way, public confidence in the administration of justice may be eroded by a concern that the courts' processes may be used to perpetrate unfairness and injustice, and ultimately, this may undermine the rule of law. And public confidence in the courts is vital to the judicial function because as, Justice Felix Frankfurter once reminded us,"[t]he Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction".[8]

[21] Abuse connotes improper use, that is, use for ulterior motives. And the term "abuse of process" connotes that "the process is employed for some purpose

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[7] *Moevao v. Department of Labour* (29) (1980) 1 NZLR 464, at p 481.
[8] *Baker v Carr* 369 US 186, 267 (1962).

other than the attainment of the claim in the action".[9] At times "vexatious" conduct or litigation is used synonymously with or as an instance of abuse of the process of court. In its legal sense, "vexatious" means "frivolous, improper; instituted without sufficient ground, to serve solely as an annoyance to the defendant".[10]What amounts to abuse of process is insusceptible to precise definition or formulation comprising closed categories. Courts have understandably refrained from attempting to restrict abuse of process to defined and closed categories.

[22] While there can be no all-encompassing definition of the concept of "abuse of process", that is not to say that the concept of abuse is without meaning. It has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process.[11]In *Beinash v Wixley,* the Supreme Court of Appeal in South Africa held that"an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective"[12]. In *Price Waterhouse Coopers and Others v National Potato Co-operative Ltd*, it was held the "[i]general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end."[13]

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[9]*Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91.

[10]*Short Oxford English Dictionary*; *Fisheries Development Corporation of SA Ltd v Jorgensen and Another: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1339E-G.

[11]*Hudson v Hudson and another* supra at 268

[12]*Beinash v Wixley, supra,* at 734C-G.

[13] [2004] ZASCA 64; 3 All SA 20 (SCA) (1June 2004) SAFLII at para 50

[23] In *Walton v Gardiner*, the High Court of Australia held that the power to strike out an action on the grounds of abuse of process "extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".[14]

[24] As a general matter, an abuse of the process of the court occurs when the court process is used for improper purpose. But the mere use of a court process for a purpose other than that for which it was primarily intended does not establish abuse.[15]In order to prove abusemore is required; it must be established that an improper result was intended is required.[16]Thus, a plaintiff who has no *bona fide* claim but intends to use litigation to cause the defendant financial (orother) prejudice will be abusing the process.[17] Improper result or motive can be established by way of inference.

[25] Whether the court process has been used for improper purpose and therefore constitutes an abuse of the process of the court is a question of fact that must be determined by the circumstances of each case.[18]The circumstances in which abuse of process can arise are varied. It is therefore neither possible nor desirable to attempt to list exhaustively the circumstances under which the inherent power will be exercised. Inordinate delay in the prosecution or finalisation

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[14]*Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378; (1993) 112 ACR 289.
[15]*Price Waterhouse Coopers and Others v National Potato Co-operative Ltd*, supra, at para 50.
[16] Id.
[17]Id.
[18]*Beinash v Wixley, supra,* at 734F-G.

of litigation and the institution of a groundless action are among the grounds frequently relied upon as evidence of the abuse of the process of the court.[19]

[26] Finally on this aspect, the exercise of the power to summarily dismiss an action on account of the abuse of process constitutes a departure from the fundamental principle that courts of law are open to all. It impedes the exercise of the right to "a fair and public hearing by an independent, impartial and competent Court"[20], which includes the right to fully ventilate a case before the court. A court should be slow in closing its doors to anyone who desires to prosecute an action or to interfere with the fundamental right of the access to the court.[21]For this reason, it is a power that must be exercised sparingly and only in very *exceptional* cases.[22]It must be exercised "with great caution and only in a clear case".[23]And the court has a discretion whether or not to dismiss the action on account of abuse of its process.

[27] I now turn to the grounds relied upon by the defendant for its contention that the plaintiff is guilty of abuse of the process of the court.

Grounds of abuse of process relied upon

[28] In support of its contention that the plaintiff is guilty of abuse of process of court, the defendant submitted that (a) the manner in which the plaintiff has

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[19]*African Farms Township v Cape Town Municipality* 1963(2) SA 555 (A) at 565D-F; *L F Boshoff Investment v Cape Town Municipality* 1969 (2) SA 256 at 275B-C.

[20]Article 12 (1) (a) of the Constitution. In this case we are not called upon to consider the constitutionality of this inherent power and therefore express no opinion on that issue

[21]*Corderoy v Union Government* 1918 AD 512 at p 519.

[22]*Western Assurance Co v Caldwell's Trustees*, *supra*, at 274.

[23]*Hudson v Hudson and Another* 1927 AD 259 at p 268.

conducted the litigation is vexatious; (b) the plaintiff's action lacks merit and is foredoomed to fail; and (c) plaintiff has conducted litigation in a dilatory manner. In relation to meritless abuse claim, the defendant raised various defences to the plaintiff's action, including prescription, a counter-claim against the plaintiff, that the plaintiff is not entitled to claim under the agreement once the agreement is cancelled and that the plaintiff will not be able to establish entitlement to the interest claimed as it exceeds that which is permissible under the Usury Act, 1978.

[29] The High Court carefully considered the defendant's submissions and concluded that (a) the plaintiff was not guilty of dilatory abuse and (b) the plaintiff's action cannot be said to be "so hopeless that it can never succeed". It also added that even if its conclusion is wrong in relation to both grounds of abuse, this is not a case in which it would have exercised its inherent power against the plaintiff. It does not appear that the Court dealt separately with the ground that the plaintiff had conducted litigation in a vexatious manner.

[30] The essential question on appeal is whether (a) the High Court was correct in its conclusion that the plaintiff was not guilty of abuse of the process of court; and (b) regardless of the answer to (a), the High Court properly exercised its discretion in refusing relief.

Did the plaintiff conduct the proceedings in a vexatious manner?

[31] Mr Barnard contended that the defendant has conducted its litigation in a vexatious manner. Conduct that was said to support this contention consisted in the delay in instituting the action; the abortive application for summary judgment;

the institution and withdrawal of the two actions in the Magistrates' Court based on the same cause of action; and the so-called procedural disorder in the conduct of litigation. The said procedural disorder relates to the confusing manner in which the erstwhile and present legal representatives of the defendant handled the withdrawal of the Magistrates' Court actions.

[32] None of the conduct complained of, viewed either individually or cumulatively, amount to an abuse of the process of court.

[33] The plaintiff was within its procedural rights to apply for summary judgment and, if so advised, abandon the application and call upon the defendant to file its plea.

[34] Similarly, the plaintiff was entitled to institute proceedings in the Magistrates' Court and, if so advised, withdraw these actions and bring the action in the High Court. Clause 8.2 of the suspensive sale agreement gives the plaintiff the option to sue either in the Magistrates' Court or in the High Court. The actions that were instituted in the Magistrates' Court were subsequently withdrawn in 2004 and the plaintiff tendered to pay the defendant's costs incurred in those proceedings. The timing of the withdrawal of those actions as well as the manner in which the withdrawalwas handled can be attributed partly to the change in the legal representatives of the plaintiff and partly to ineptitude on the part of the legal representatives concerned.

[35] The argument that the plaintiff conducted the proceedings in a vexatious manner cannot therefore be sustained.

Does the plaintiff's claim lack merit?

[36] It is by now axiomatic that the institution of a groundless claim is an abuse of the process of court.[24] The applicable test can be distilled from an examination of the case law on the subject in other jurisdictions. It is not necessary to discuss in any detail this case law, it is sufficient to refer to the principles they announce.

[37] In the English case of *Lawrence v Norreys*, Bowen, L.J. said that:

> "It is an abuse of the process of the Court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief in it . . . I quite agree that this power ought to be exercised with the very greatest care, that it is not for the Court on a motion of this kind to discuss the probabilities of the case which is going to be made, except so far as to see whether the case stands outside the region of probability altogether, and becomes vexatious because it is impossible."[25]

[38] In the South African case of *Ravden v Beeten*, it was held that this power should be exercised only in plain and obvious cases, i.e. cases that are obviously frivolous or vexatious or obviously unsustainable.[26] Although this case was decided

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[24] *Western Assurance Co v Caldwell's Trustees* 1918 AD 262 at 272; *African Farms Township v Cape Town Municipality* 1963(2) SA 555 (A) at 565D-F; *Corderoy v Union Government* 1918 AD 512 at 517;*Beinash v Wixley*1997 (3) SA 721 (SCA).

[25] 39 Ch.D. at p. 234.

[26] 1935 CPD 269 at p. 276; See also *African Farms Township v Cape Town Municipality* at 565D-F*Texas Company (S.A.) Ltd v Wilson Bros. Garage*, 1936 NPD 510 at p. 515.

under the Rules of Court, the same considerations would apply where the inherent jurisdiction of the Court is relied upon. Other cases have gone as far as to suggest that this power must be exercised onlyif it appears “as a certainty, and not merely on a preponderance of probability” that the action is unsustainable.[27]

[39] I do not understand this last statement to suggest that the standard for deciding civil disputes, namely, preponderance of probabilities, is not applicable in an application to dismiss an action on the ground that it is vexatious. This is merely to emphasise the degree of clarity required before the plaintiff’s claim can be summarily dismissed for lack merit. As was said in *Hudson v Hudson and Another*, this power must be exercised “only in a clear case".

[40] In *Rogers v Rogers and Another*, the Zimbabwe Supreme Court held that an action is frivolous or vexatious in a legal sense “when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation”.[28]

[41] A useful collection of the various phrases that courts have used to describe the test to be applied appears from the Australian case of *General Steel Industries Inc. v. Commissioner for Railways (N.S.W)*, where Barwick CJ, after examining decisions in which the inherent power of the court to prevent abuse was invoked and those in which the statutory rules were relied upon, said:

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[27] *Ravden v Beeten* 1935 CPD 269 at 276; *Burnham v Fakheer* 1938 NPD 63; *African Farms Township v Cape Town Municipality* at 565D-E; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipalityv LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256(C) at275B-D;*Bisset and Others v Boland Bank Ltd and Others, 1991 (4) SA 603 (D) at 608F-G.*

[28] [2008] ZEST 7 (27 May 2008) SAFII.

> "The test to be applied has been variously expressed; “obviously unsustainable”, "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense".[29]

[42] It is clear from these authorities that the fundamental right of free access to the courts should not be interfered with by the summary dismissal of an action without hearing evidence, on the ground that it is vexatious, unless it is manifest that the action is so unfounded that it could not possibly be sustained. It must be quite clear that failure of the action is a foregone conclusion.[30]What these authorities emphasise is that the plaintiff ought not to be denied access to court unless the lack of merit in the claim is clearly demonstrated or, to borrow the phrase from Lord Herschellin *Lawrence v Norreys, supra,*the story told in the pleadings is a myth that has no solid foundation.[31]

[43] And courts rightly emphasisethe clarity with which lack of merit must be demonstrated before an action can be dismissed; this is an extraordinary power. The power summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material to reach a definite and certain conclusion.

[44] Three points must be stressed in relation to the exercise of this power.*Prima facie* every litigant has a right to have matters of law as well as of fact

[29]*General Steel Industries Inc. v. Commissioner for Railways (N.S.W.*) [1964] HCA 69; (1964) 112 CLR 125 at 129.
[30]*Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) at 74.
[31]*Per Lord Herschell at 220*

decided according to the ordinary rules of procedure, which includes the full opportunity to presenthis or her case to the court. The inherent power of the court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious should not be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed. The purpose of the exercise of this power is to prevent the abuse of the judicial process but not to prevent litigants from approaching courts to have their disputes resolved.

[45] That the claim will not ultimately succeed at trial in itself does not establish that the litigant is abusing the process of court. Something more is required;claim must be so groundless that no reasonable person can possibly expext to it to succeeed. Where the claim is genuine and is supported on substantial grounds by other documents properly before the court, it cannot be said that the plaintiff is abusing the process of the court merely because the claim might not ultimately prevail at trial.[32]Nor can the court infer that the plaintiff’s case is vexatious merely from the fact that it is weak.

[46] The second point to stress is that an application to dismiss an action on grounds that it is without merit invariably requires the court to consider the merits and the demerits of the claim and the defence. As a general matter it is undesirable that the court should prematurely determine the merits of the case under the guise of determining whether to allow the claim to proceed or dismiss it. The court must always remind itself that the remedy of a defendant who seeks the

[32]*Western Assurance Co v Caldwell’s Trustees*, *supra*, at 275

dismissal of the plaintiff's claim on the basis that it is bad in law is to raise the defences by way of an exception or a special plea. As the Australian High Courtpointed out, "the issues to be considered go beyond the question as to whether the claim is bad in law, the demurrer was developed to deal with that situation".[33]

[47] This procedure was never intended to replace the special plea or exception as a test of the plaintiff's case. Nor was it intended to provide the defendant with a unilateral advantage of testing the soundness of the defendant's defences prior to trial. Where the ground relied upon for contending that the claim is vexatious can be properly and conveniently raised in a plea, the court in the exercise of its discretion would be justified in refusing relief. Indeed is has been held that the fact that the defences relied upon can be conveniently and properly raised in the pleadings would in itself justify the court in refusing relief.[34]

[48] The final point to be stressed is that, when dealing with applications of this nature a court should not deal with the matter as if it is deciding the case on its merits. This is not the occasion for a full ventilation of issues of fact and law and to decide finally the merits of the case. All that the court is required to decide is whether there is any question of fact or law that is fairly triable or arguable. As Bowen L.J. remarked, "[i]t is not for the Court on a motion of this kind to discuss the probabilities of the case which is going to be made, except so far as to see

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[33] *Batistatos v Road and Traffic Authority NSW,* [2006] HCA 27 at para 11

[34] *Western Assurance Co v Caldwell's Trustees, supra* at 272.

whether the case stands outside the region of probability altogether, and becomes vexatious because it is impossible".[35]

[49] Thus where the pleadings raise a debatable question of law or fact or in cases of doubt or difficulty, the relief should not be granted. As was held by the High Court of Australia, "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process".[36]

[50] It now remains to apply these principles to the facts of this appeal.

Application of these principles to this case

[51] Now all the defences relied upon by Mr Barnard as showing lack of merit and therefore vexatious abuse can be conveniently and properly raised in a pleading. The defendant is inviting the Court to consider the merits if its defence even before it has pleaded them. As Mr Barnard candidly conceded in the course of argument, a ruling against the defendant on these defences would mean that it can no longer rely on them at trial. In my view this is a classical case in which the court in the exercise of its discretion should refuse the relief sought by the defendant.

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[35] 39 Ch.D. at p. 234.

[36] Per Dixon J (as he then was) in *Dey v Victoria Railway Commissioners* [1949] HCA 1 at p 91 at para 13.

[52] Apart from this, there are further considerations that militate against granting the relief sought.First, the plaintiff's claim is for the repayment of the balance outstanding under the loan agreement. The defendantdoes not dispute that it entered into the suspensive sale agreement and the loan agreement as alleged by the defendant. Nor does the defendant dispute that it failed to pay the instalment of N$1 008 714,43 that was due and payable on 31 March 2002 and any subsequent instalments. It must therefore be accepted that the defendant has a genuine claim against the defendant. Once it is accepted, as it must be, that the plaintiff'sclaim is genuine and is supported on substantial grounds by other documents properly before the court, it cannot be said that the defendantis abusing the process of the court merely because the claim might not ultimately prevail at trial.[37]

[53] Second, I am not satisfied that the points raised by the defendantestablish that the plaintiff's claim is obviously unsustainable. I do not propose to deal with all of them, it is sufficient to refer to at least three of those to illustrate the point. Where a right to performance under a contract has accrued to a party prior to the rescission of the contract, this right is not affected by rescission and it may be enforced despite the rescission.[38] The fact that the loan agreement has been cancelled does not necessarily preclude the plaintiff from enforcing rights that had already accrued to it prior to cancellation. Whether the plaintiff is entitled to claim the rights that had already accrued when cancellation took place and whether the rights sought to be enforced by the plaintiff had accrued to it prior to the cancellation, are debatable questions.

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[37] *Western Assurance Co v Caldwell's Trustees*, *supra*, at 275.

[38] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-H.

[54] The defence based on prescription is premised on the assumption that the amended particulars of claim introduced a new cause of action that had become prescribed when the amended particulars of claim were filed. Section 15(1) of the Prescription Act, 1969, provides that "the running of prescription shall…be interrupted by the service on the debtor of any process whereby the creditor claims payment of debt".[39] The test for interruption of prescription is whether the plaintiff, in the earlier process, claim payment of the same or substantially the same debt which now forms the subject-matter of the claim that is said to be prescribed.[40]

[55] The fundamental enquiry in relation to the prescription defence is whether the debt claimed in the amended particulars of claim is the same or substantially the same debt that was claimed in the original particulars of claim. Having regard to the nature and effect of the amendment which alleged that the defendant failed to pay the second as opposed to the first instalment as alleged in the original particulars of claim, it cannot be said that the plaintiff's contention that the debt claimed in the amended particulars of claim is the same or substantially the same debt that was claimed in the original particulars of claim is obviously unsustainable. This is a debatable question.

[56] Nor does the defence based on the existence of a counter-claim show that the plaintiff's claim is obviously unsustainable. It is apparent from the letter of April

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[39] Act No 68 of 1969.

[40] *Mazibuko v Ginger* 1979 (3) SA 258 (W) at 266B-C; *Standard Bank of SA v OneanateInvestment (In Liquidation)* 1998 (1) SA 811 (SCA) at 826H-I.

9, 2002, annexure B to the Further Particulars that theexistence of the alleged counter-claim isdisputed. Apart from this, it is at least arguable that under clauses 5.24 and 5.25of the loan agreement the defendant renounced its right to raise a counter-claim as a defence against the repayment of the loan. So too, is the defendant's alternative argument that these clauses are contrary to public policy.Similarly, whether the defendanthas paid interest amounting to more than double theamount of capital is a matter that must canvassed by way of a plea.

[57] Theconclusion by the High Court thatit could not conclude that the plaintiff's case is "so hopeless that is can never succeed", cannot therefore be faulted.

[58] Third, the question whether or not to grant relief is a matter that is within the discretion of the court. The High Court also held that even if it was wrong in its conclusion, this is "certainly not a case in which [it] would have exercised the court's inherent jurisdiction against the plaintiff". I understand the Court to be saying that this is not a case in which it would have exercised its discretion in favour of granting the relief sought.Absent a vitiating misdirection or irregularity, the court of appeal will only interfere with the exercise of a judicial discretion if it is satisfied that no court, acting reasonably, would have come to the same conclusion.[41].

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[41] In *S v Kearney 1964 (2) SA 495 (A)*, Holmes JA stated (at 504B – C): "When a court of first instance gives a decision on a matter entrusted to its discretion, a Court of appeal can interfere only if the decision is vitiated by misdirection or irregularity or is one to which no Court could reasonably have come - in other words if a judicial discretion was not exercised." Compare also: *Mahomed v Kazi's Agencies (Pty) Ltd and Others* 1949 (1) SA 1162 (N); *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335D - E and the discussion of those and other authorities on the matter in *TjospomieBoerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA 31 (T) at p. 40A-J.

[59] Regrettably the High Court did not indicate the basis of this conclusion. This Court is left to speculate on the factors that the High Court took into consideration in exercising its discretion. When a court is entrusted with the discretion whether or not to grant the relief sought and it exercises its discretion against granting the relief sought, it is incumbent on the court to indicate the factors that it took into consideration in exercising its discretion. This will enable the appeal court, if the matter should come on appeal and the exercise of discretion is challenged, to determine whether the discretion was exercised properly. The appeal court should not be left to speculate on what factors the High Court took into consideration in exercising its discretion.

[60] Although the High Court did not indicate the factors that it took into consideration in exercising its discretion against granting the relief sought, the exercise of that discretion has ample support in the circumstances of this case. First, the grounds relied upon by the defendant for relief sought can be conveniently and properly raised in a plea. Second,the power to dismiss an action on the grounds that it lacks merits is an extraordinary power that must be exercised very sparingly and in a clear case. This is not such a case. Third, the plaintiff has a genuine claim that is supported on substantial ground by documents that are before the court.

[61] The appeal against the order dismissing the claim based on vexatious proceedings must therefore fail.

[62] I now turn to the appeal against the dismissal of the claim based on dilatory abuse. But first the principles governingapplications for dismissal of actions based on dilatory abuse.

Principles applicable to dilatory abuse claim

[63] South African and English courts have had occasion to consider the principlesthat are applicable to applications for dismissal of actions based on dilatory abuse. A review of these relevant decisions provides a useful guide to the question presented by this aspect of the case.

[64] A convenient starting point is the decision of the South African High Court in *Molala v Minister of Law and Order and Another* on which the parties and the High Court relied upon. There the plaintifftook some two years torespond to the defendants' request for further particulars in a claim involving a motor collision. The defendant brought an application for an order barring the plaintiff from proceeding with the action and advanced various grounds why the plaintiff should not be allowed to proceed with the action. The plaintiff did not oppose. The court had to consider whether it"had any discretion to debar the plaintiff from proceeding with the action".[42]

[65] The court accepted that there is such discretion but acknowledged that "there is not always certainty about the basis of the discretion and therefore about

[42]At 676B.

the facts which should guide the exercise of the discretion".[43] It held nevertheless that "in the Transvaal it was, despite doubts earlier in the year, accepted…that 'it is in the discretion of the Court to allow proceedings to continue where there has been this lapse of time'"[44], and that "there are indications that the Court regarded such an order as resting upon the inherent power of the Court to control its own proceedings and that accordingly the Court should assess whether the plaintiff is guilty of an abuse of process".[45]But immediately added that such"an approach could, because such abuse is not easy to prove, cause a rarity of orders similar to what will follow from the views expressed in other Divisions that the discretion should only be sparingly exercised".[46]

[66] Against this background, the court adopted the following approach to the question:

> "The approach which I am bound to apply is therefore not simply whether more than a reasonable time has elapsed. It should be assessed whether a facility which is undoubtedly available to a party was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but knowingly in such a fashion that the manner of exercise of that right would cause injustice. The issue is whether there is behaviour which oversteps the threshold of legitimacy. Nor, in the premises, can plaintiff be barred simply because defendants were prejudiced. The increasingly difficult position of the defendants is a factor which may or may not assist in justifying an inference that plaintiff's intentions were directed to causing or to increasing such difficulties. But the enquiry must remain directed towards what plaintiff intended, albeit in part by way of *doluseventualis*. The increase in defendants' problems is, secondly, a factor insofar as the Court, on

[43]At 676C-E.
[44]At 677I.
[45]At 677I-678B.
[46] Id.

> an overall view of the case, is to exercise discretion about how to deal with a proven abuse of process.[47]"

[67] As I understand this approach it comes down to the question whether the court process was used for ulterior motives. On this approach neither the delay nor prejudice to the defendant is decisive. The enquiry is what the plaintiff intended by the delay and this can be established by way of inference. Prejudice may give rise to an inference of abuse of process. In addition, the Court held that where abuse has been established, the court "is to exercise discretion about how to deal with a proven abuse of process".[48] Considerations that are relevant in the exercise of discretion include the impact of the delay on the administration of justice and prejudice to the defendant. As the court put it, "the order should not follow unless the administration of justice was in fact hampered".[49]

[68] Subsequent court decisions have focussed primarily on the statement that "[t]he issue is whether there is behaviour which oversteps the threshold of legitimacy" as laying down the test for when the delay will amount to abuse. The unintended consequence of this, as I shall show presently, is that there does not appear to be harmony on precisely what the test to be applied entail or howthe test should be applied.

[69] In *Gopaul v Subbamah*, Richings AJ sitting in the KwaZulu-Natal High Court, observed that while it is clear that the court has inherent power to dismiss an action for delay in the prosecution of an action, what is less clear is the

[47] Id at 677C-E.
[48] At 677C-E.
[49] Id at 677G-H.

circumstances under which this power may be exercised.[50]After referring to the above statement in *Molala v Minister of Law and Order*, he held that “the proper approach for the Court is to weigh up the period of delay and the reasons therefor against the prejudice caused to the defendant”.[51]In addition, the court held thatthe Court should also have regard to the reasons for the defendant's inactivity in the matter.[52]

[70] In *Sanford v Haley NO,* Moosa J of the Western Cape High Court said the following concerning the test:

> "The prerequisites for the exercise of such discretion are, first, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the deceased is seriously prejudiced by such delay. (*Gopaul v Subbamah*2002 (6) SA 551 (D).) The test for the dismissal of an action enunciated by Innes CJ and reinforced by Solomon JA in the case of Western *Assurance Co (supra*) is whether plaintiff has abused the process of the Court in the form of frivolous or vexatious litigation. Such test formulated by Flemming DJP in *Molala's* case *supra* is whether the conduct of plaintiff oversteps the threshold of legitimacy. The test is a stringent one. It is understandable that the relief will not easily be granted. It will depend on the facts and circumstances of each case and on the basis of fairness to both parties. (Herbstein and Van Winsen*The Civil Practice of the Supreme Court of South Africa* at 547.)[53]"

[71] In *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV VISVLEIT*, Griesel J of the Western Cape High Court, in dealing with delay, held that: “The crisp question for decision is whether the delay

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[50]*opaul v Subbamah* 2002 (6) SA 551 (D) 2002 (6) SA 551.
[51]At 557H - 558B.
[52]At 558A-C.
[53]*Sanford v Haley NO* 2004 (3) SA 296 (C)

in this instance has been so unreasonable or inordinate as to amount to an abuse of the process of the court".[54]

[72] What the court held in *Molala v Minister of Law & Order* is that in determining whether delay amounts to an abuse the court shouldassess whether a process that is designed to facilitate the administration of justice was used for some other purpose other than the attainment of the claim in the action and with knowledge that if so used it would cause injustice. This may be inferred from the prejudice to the defendant which"may or may not" justify "an inference that the plaintiff's intention were directed to causing" prejudice. But the basic enquiry "must remain directed towards what the plaintiff intended".It is in this context that the statement "[t]he issue is whether there is behaviour which oversteps the threshold of legitimacy" must be understood.

[73] In*Gopaul v Subbamah*the court expressedthe view that South African law on this point was "very similar to that of the Supreme Court of Judicature in England". And the court in *Sanford v Haley NO* appears to have accepted this as, in explaining the test, itinvoked the principles enunciated by the Court of Appeals in *Allen v Sir Mc Alpine & Sons Ltd*[55] that were later adopted by the House of Lords in*Birkett v James*.[56] The High Court in this case criticised reliance on English law, which it held differs from "our law"because it does not require intention.[57]The High

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[54] *Golden International Navigation SA v Zeba Maritime Co Ltd;Zeba Maritime Co Ltd v MV VISVLIET* 2008 (3) SA 10 (C).

[55]*Allen v Sir Alfred McAlpine& Sons Ltd; Bostik v Bermondsey and Southwark Group Hospital Management Committee; Sternberg and Another v Hammond and Another* [1968] 1 All ER 543 (CA).

[56]1977 2 ALL ER 801 at 805.

[57]High Court Judgment paras 74-78.

Court went on to hold that "[a]lthough some of the elements referred [in English law] may be helpful when a Namibian Court determines whether a dilatory-abuse has occurred [it] would be extremely reluctant to adopt the English law as if it is the same as our law".[58]

[74] It will be convenient to refer to English law on the subject.

[75] The approach of English courts is set out in speech of Lord Diplock in the House of Lord's decision in *Birkett v James* where he said:

> "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party." [59]

[76] The first limb of the grounds for dismissal for want of prosecution included "conduct amounting to an abuse of the process of the court". However, in *Grovit v Doctor*, the House of Lords seemed to regard abuse of process as constituting a separate ground to strike out for delay under the inherent power of the court. Lord Woolf who delivered the speech of the House said:

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[58]Id at para 78. It also criticised the decision in *Sanford v Haley, supra,* for conflating the English law test and that in *Molala v Minister of Law & Order*.
[59]Id at 805.

"Mr. Jacob submits that this appeal raises that issue because the conduct by the plaintiff of which complaint is made is insufficient by itself to amount to an abuse of the process of the court so as to satisfy principle (1) [in *Birkett v James*]. Furthermore principle (2) is not satisfied since, although Mr. Jacob accepts there has been inordinate and inexcusable delay, there has been no serious prejudice to the defendants.

Although principle (1) links abuse of process with delay which is intentional and contumelious, the prevention of abuse of process, has by itself long been a ground for the courts striking out or staying actions by virtue of their inherent jurisdiction irrespective of the question of delay and Lord Diplock's statement of the principles does not affect this separate ground for striking out or staying proceedings.[60]"

[77] Later on he also said:-

"…I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James* [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no

[60] 642H-643A

> intention of carrying the case to trial the court was entitled to dismiss the proceedings."[61]

[78] It is clear from this passage that the House of Lords regards the inherent power to prevent abuse as a separate ground for striking out proceedings on account of delay. Commencing and continuing litigation that the plaintiff has no intention to bring to conclusion can amount to abuse of process. To succeed, the defendant would have to establish that the plaintiff has commenced litigation that it has no intention to conclude and this may be inferred from the plaintiff's inactivity. In this respect English law does not appear differ much from what was said in *Molala v Minister of Law & Order.* There the court postulated the enquiry as what plaintiff intended by the manner in which the process was used. If plaintiff commences litigation with no intention to conclude it, this can amount to abuse of process.

[79] Apart from the inherent power to prevent abuse, proceedings may also be struck out on the basis of the principles enunciated in *Birkett v James* which include intentional or contumelious delay;inordinate and inexcusable delay that will give rise to a substantial risk that a fair trial of issues will not be possible or is likely to cause prejudice to the defendant and other parties. These grounds including the continuation of litigation with no intention to bring it to conclusion are to my mind all examples of abuse of the process of the court.Indeed, it is apparent from the decisions of the House of Lords in *Birkett v James* and *Grovit v Doctor* that the foundation for the power to strike out an action on account of delay is predicated on the abuse of process.

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[61] t 647G-648A.

[80] Against this background, the principles, which are by no means exhaustive,that should be applied in considering applications for dismissal of an action on account of delay are these:

(a) Inordinate and inexcusable delay can amount to abuse of the process of court. But as the authorities that I have reviewed show, mere delay and the resulting prejudice are not sufficient to justify the dismissal of an action for abuse of process. The delay must be both inordinate and inexcusable, and must constitute an abuse; the reason for the delay must involve the abuse of the process of court.

(b) The question whether the delay complained of constitutes an abuse of process is a question of fact. The enquiry must be directed towards what the plaintiff intended by the delay or to put differently, what were the reasons for the delay;why did plaintiff act in the way in which he or she did. This may be inferred from the circumstances of the case.

(c) Thus if the reason for the delay is to maintain proceedings which the plaintiff has no intention to finalise, this can amount to abuse. This is the example of abuse that was involved in *Grovit v Doctor*. In that case the proceedings were dismissed because the reason for the delay involved abusing the process of the court in maintaining

proceedings when there was no intention of carrying the case to trial.[62]Where the reason for the delay is to prejudice the defendant in the conduct of his or her defence, this too can amount to abuse. This is the abuse that the court in *Molala v Minister of Law & Order* had in mind.This form of abuse is probably covered by the first limb of the statement of Lord Diplock in *Birkett*.

(d) But what must be stressed is a point that has already been made, namely, that the question whether delay constitutes an abuse must be determined by the circumstances of a case. Factors that will generally be relevant to this enquiry include the length of the delay; any explanation put forward for the delay; the prejudice caused to the defendant by the delay; the effect of the delay on the conduct of the trial, in particular, whether there is a substantial risk that a fair trial of issues will no longer be possible; the effect of the delay on other litigants and other proceedings; the extent, if any, to which the defendant can be said to have contributed to the delay; the conduct of the claimant and the defendant in relation to the action; other special factors of relevance in the particular case.

(e) From what is said above, it clear that prejudice has a particular role in applications of this nature. While the plaintiff's action may not be dismissed simply because of prejudice to the defendant, prejudice to the defendant is a factor that "may or may not assist in justifying an

[62]*Molala v Minister of Law & Order, supra,* at 648A.

inference" to abuse of process.[63] It can justify the inference that the plaintiff intended to abuse the court process by causing prejudice to the defendant in the conduct of his or her defence.

(f) It seems to me that where the delay is inordinate and inexcusable and is such that it will give rise to a substantial risk that a fair trial of issues will no longer be possible or where it is such that it is likely to cause serious prejudice to the defendant, this can amount to abuse. In *Molala v Minister of Law & Order* the court found that "[o]bjectively, the administration of justice was also burdened in this case with a decreased prospect of accurately finding the truth and of justice being satisfactorily administered" and that this was prejudicial to the defendant.[64] In effect the court found that the delay was such that it was no longer possible to have a fair trial of issues.This is the example of abuse that is referred to in the second limb of the statement of Lord Diplock in *Birkett v James*. Prejudice here is relevant to establish abuse.

(g) As would have been apparent from what is said above, even in the case whether abuse has been established, the court has a discretion whether or not to dismiss the action. Prejudice will be a relevant consideration when the court exercises its discretion to decide how to deal with the abuse in question. As the court said in *Molala v Minister of Law & Order* prejudice to the defendant "is…a factor

[63]At 677C-E.
[64]Id at 678C-D.

insofar as the Court, on an overall view of the case, is to exercise a discretion about how to deal with a proven abuse of process".[65] Obviously, at this stage, the court will, in the exercise of its discretion, also consider prejudice to the plaintiff. I therefore agree with the High Court that prejudice has a dual role in matters of this nature.

(h) But while prejudice has an important role to play in the exercise of the court's discretion, it is not the only consideration. The court must have regard to the drastic nature of remedy to summarily dismiss an action. It is a remedy that interferes with the right of a litigant to fully present his or her case in court. It must therefore be used sparingly.

(i) Equally relevant is the impact of the delay in the conduct of the trial. That it is no longer possible to have a fair trial of issues is a relevant factor as it has an impact on the proper administration of justice. No court of justice can insist on proceedings continuing when it is manifestly clear that a fair trial is no longer possible as a result of the delay. To do otherwise, may very well bring the administration of justice into disrepute and, ultimately, may erode public confidence in the judiciary.

(j) Finally, it is apparent from the authorites referred to above that the ultimate consideration is the interests of justice. Once an abused has been established, the ultimate question to ask is what is in the

[65] Id.

interests of justice, in other words, on an overall view of the case, what does justice demands.

[81] Before leaving this aspect of the case, it is necessary to deal with the High Court's criticism of the view expressed in *Gopaul v Subbamah* that the court must also look at the conduct of the defendant and if a defendant had failed to avail himself of the remedies to compel a dilatory plaintiff to progress to the next step in litigation 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.[66]The High Court took the view that as *dominislitis*the plaintiff bears the responsibility to prosecute the action and that the use of the procedural devices is "discretionary in nature" and that therefore"the defendant may, quite legitimately, sit back and do nothing".[67]

[82] There are sound reasons why courts should not sanction the proposition that because the plaintiff is the *dominislitis*, the defendant may legitimately sit idly by while delays accumulate. In the first place it is inimical to the public interest in the administration of justice that disputes be brought to trialand be resolved expeditiously, effectively and efficiently. Inordinate delays in the administration of justice, undermines public confidence in the administration of justice. To this extent Rules of Court provide procedural devices to force a dilatory party to progress to the next step in litigation.These devices not only facilitate speedy resolution of disputes, but they also prevent prejudice to the non-defaulting that may be caused by inordinate delay.

[66]At 559.
[67]At para 77.

[83] While inactivity of the defendant does not justify the dilatory conduct of the plaintiff, it is certainly relevant in the court's exercise of its discretion whether or not to grant relief. But apart from this, the use of compelling devices may, in an appropriate case, strengthen the defendant's case by showing a history of a plaintiff who had to be compelled to take the next step in litigation at every step of the way. Such conduct on the part of the plaintiff, viewed with other conduct in the course of litigation may justify a conclusion that the plaintiff has no intention to bring litigation to conclusion.

[84] In the second place, it may cause delays in the justice system. It encourages the defendant to do little or nothing to progress litigation.And this may in turn encourage litigation tactics on the part of some defendants to permit actions "to go to sleep" and to adopt the "let sleeping dogs lie" attitude. These defendants sit idly by while delays accumulate in the hope that, if of sufficient length, the delay can lead to a chance to apply for the dismissal of the action. They will then use the very delay that they have allowed to occur and the very prejudice that they have not sought to prevent through the compelling devices, as the basis for the relief.

[85] Inordinate delays have become a blot in the administration of justice. One of the foremost factors that accounts for these delays is that the pace of litigation, with few exceptions, is left in the hands of the litigants. This is exacerbated by the adversary system that prevails in our courts. With certain irrelevant exceptions, the courts cannot act of their own motion but on the application of one or other of

the parties. Courts are passive and only get involved when the parties choose to involve them. In this atmosphere procedural devices that are designed to expedite litigation and prevent delays as well as the resultant prejudice are seldom used. Parties grant one another generous extensions of time and only bring matters to court at their convenience.

[86] It is this feature of the civil justice system that has prompted the introduction of the judicial case management system in many countries including this country. The advent of the judicial case management introduced by the Judicial Case Management(JCM) Ruleshas brought about a fundamental change in the litigation culture. As Damaseb JP recently commented on the JCMRules:

> "The case management rules of this court represent a radical departure from the civil process of old. Litigation is now no longer left to the parties alone. The resolution of disputes is now as much the business of the judges of this court as it is of the parties. Courts exist to serve the public as a whole and not merely the parties to a particular dispute before court at a given time.[68]"

[87] This radical departure is apparent from the objectives JCM which include:

> "(a) to ensure the speedy disposal of any action or application;
>
> (b) to promote the prompt and economic disposal of any action or application;
>
> (c) to use efficiently the available judicial, legal and administrative resources;
>
> (d) to provide for a court-controlled process in litigation;

[68] *De Waal v de Waal* 2011 (2) NR 645 (HC) at

(e) to identify issues in dispute at an early stage;

(f) to determine the course of the proceedings so that the parties are aware of succeeding events and stages and the likely time and costs involved;

(g) to curtail proceedings;

(h) to reduce the delay and expense of interlocutory processes…"

[88] And the JCM Rules spell out the obligations of the parties and their legal representatives, which is to :

"(a) assist the managing judge in curtailing the proceedings;

(b) comply with rule 37 and other rules regarding judicial case management;

(c) comply with any direction given by the managing judge at any case management conference or status hearing; and

(d) attend all case management conferences, pre-trial conferences and status hearings caused to be arranged by the managing judge."

[89] The main purpose of the JCM is to bring about a change in litigation culture. The principal objectives of the JCM are to: ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement; increase the cost effectiveness of the civil justice systemand to eliminate delays in litigation; promote active case management by the courts and in doing so, not only facilitate the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources; and inculcate a culture among litigants and their legal

representatives that there exists a duty to assist the court in furthering the objectives ofJCM.

[90] With the advent of the JCM Rules where all parties to the proceedings have the obligation to prosecute the proceedings and assist the Court in furthering the underlying objectives, it would be highly relevant to consider any inaction on the part of the parties.And there is no place for defendants to adopt the attitude of “letting sleeping dogs lie” and for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be asserted.

[91] To conclude this aspect of the case, in the exercise of their discretion whether or not to summarily dismiss an action on account of delay, courts must bear in mind that the rule of law requires the existence of courts for the determination of disputes and that litigants have a right to use the courts for this purpose. But courts must also, however, be alert to their processes being used in a way that results in an injustice or that would bring the administration of justice into disrepute. They should guard against this as it may undermine public confidence in the administration of justice and, ultimately, the rule of law. And the court cannot afford the loss of confidence in the administration of justice, as their authority “ultimately rests on sustained public confidence in its moral sanction".[69]

[92] And now to the facts of this case.

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[69] *Baker v Carr* 369 US 186, 267 (1962).

Application of the principles to this case

[93] The manner in which the plaintiff has conducted the litigation leaves a great deal to be desired. The litigation has been punctuated by two inordinate delays; it took more than three and a half years for the plaintiff to respond to a request for further particulars, and it took a further nine and a half months for the plaintiff to deliver its amended particulars of claim. While the change in the status of the plaintiff and the resultant reduction in its personnel, the subsequent uncertainty over its future status that prevailed since 15 May 2003 when the coming into operation of the winding up provisions of Namibia Development Bank Act, 2000, were suspended, and the change in its legal representatives, relied upon by the plaintiff, cannot be ignored, these do not provide a satisfactory explanation for the inordinate delay.

[94] Nevertheless, the existence of some explanation though not satisfactory, and the facts supporting it, casts doubt as to whether the conduct of the plaintiff can be said to amount to abuse of the process of the court. Merely for the plaintiff to commence litigation and then delay, which often involves a failure to comply with the applicable Rules of Court, will not necessarily amount to an abuse. The appropriate remedy in such a case is to seek an order to compel compliance on pain of dismissal of the action. For delay to justify the dismissal of an action, it must be clear that the plaintiff is abusing the process of the court.

[95] In these circumstances, I am unable to conclude that the High Court was wrong in its conclusion that the plaintiff was not guilty of dilatory abuse. Nor can I say that the High Court exercised its discretion wrongly. While the High Court did

not indicate the factors that it took into account in exercising its discretion, there is amply evidence to warrant the manner in which the High Court exercised its discretion. The relief sought is a drastic measure and must be resorted to in a clear case. It is true the plaintiff has been guilty of inordinate delay and there is no satisfactory explanation for this, but such delay will not normally, in the absence of some other special feature, be sufficient to justify an order dismissing the plaintiff's action. There is nothing to show that the plaintiff intended to abuse the process of court by this delay.

[96] On the issue of prejudice, the defendant submitted that it has lost the opportunity to pursue its counter-claim because it has become prescribed. It says it did not take any steps to safeguard its counter-claim from becoming prescribed because it believed "that the plaintiff did not seriously intend to pursue its claims". It now complains that it was plaintiff's inordinate delay in prosecuting its action and not its inaction that has resulted in its counter-claim to become prescribed. In effect what the defendant is saying is that it sat idly by and adopted the "let the sleeping dogs lie attitude" in the hope that the main claim will die together with its counter-claim. Unbeknown to the defendant, the plaintiff's claim was simply unconscious while its counter-claim went into permanent sleep.

[97] The defendant's counter-claim, if it has become prescribed, has become prescribed due to the defendant's inactivity.It could have taken a number of steps to safeguard its counter-claim by, for example, resort to the procedural devices to force the plaintiff to progress expeditiously with the litigation. It did nothing other than to wait for the delay to be long enough for it to contend that the plaintiff has

no intention to bring its claim to conclusion. To this extent it was even prepared to sacrifice its counter-claim. Apart from this, it is debatable whether the defendant is entitled to rely on the alleged counter-claim. I am unable to conclude that the delay and the circumstances of this case justify the inference that the plaintiff intended to prejudice the defendant in its counter-claim.

[98] What must be stressed here is that mere prejudice is not sufficient to establish abuse. The plaintiff cannot be "barred simply because the defendants were prejudiced".[70] Prejudice is a factor that may assist in justifying the inference that the plaintiff intended to prejudice the defendant and thus abused the court process. The evidence simply does not justify the inference that the reason for delay in this case involved abusing the process by prejudicing the defendant in the conduct of its defence.

[99] The defendant has made sweeping statements about a fire that ravaged some of its storerooms, withoutindicating whether the documents relevant to this case were kept in those storerooms; and that a number of witnesses who could have been of assistance to it if the action had been prosecuted timeously, including the official who signed all the agreements, may in future not have a clear recollection of the facts. There is no indication why these particular witnesses may not have a clear recollection of facts.

[100] It is true over time memories fade, but as the High Court correctly observed, the nature of the issues involved are relatively straight forward. The signing of the

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[70] *Molala v Minister of Law & Order, supra,* at 678A-B.

agreements is not in dispute. Nor is it in dispute that the defendant only paid the first installment that was due on 31 March 2001 and did not pay subsequent installments. Apart from the legal issues raised by the defendant, the question will, as the High Court found, how much, if anything, must the defendant pay the plaintiff. In any event, having regard to the defences raised by the defendant, I am not satisfied that the defendant will be prejudiced in the conduct of its defence or that the delay in this case involve abusing of the process of court in causing prejudice to the defendant.

[101] On facts and circumstances of this case, it cannot be said that a fair trial of issues in this case is no longer possible. Nor does the prejudice alleged, justify an inference of abuse. The evidence in this case falls far short of establishing that the reason for the delay involved the abuse of the process of court.

[102] In all the circumstances, I am unable to find fault with the conclusion of the High Court on this aspect of the case. Nor can the conclusion of the High Court that even if it were to conclude that the plaintiff was guilty of abuse, this is not such an exceptional case where the court should exercise its discretion in favour of the defendant. As can be seen from the history of the proceedings, the defendant has not itself shown much enthusiasm in revealing the true nature of its defence other than the technical defences nor to progress the proceedings to an effective resolution of its dispute with the plaintiff.

[103] It is the conduct of the defendants who adopt the attitude of “letting sleeping dogs lie” and failure to use the procedural devices that are available under the

Rules to compel the dilatory plaintiff to bring the actions to finality that accounts for some of the delays in the civil justice system. Eight years since litigation commenced, it has hardly progressed beyond the delivery of amended particulars of claim, the defendant has yet to plead and the case is nowhere near trial. There is nothing to suggest that the procedural devices to force a dilatory plaintiff to take the next step in litigation were at any stage used in the course of the delay now complained of.

[104] Overall justice in this case does not demand that the plaintiff's claim be dismissed. While there is much that could have prompted the defendant to seek the dismissal of the plaintiff's action, this is by no means a clear case of abuse that would prompt the court to dismiss the action; certainly it is by no means plain and obvious that this ultimate sanction should be utilized. No doubt, with the delay that has already taken place in this action, the present applications have, to date, taken over three years to resolve, the court and the parties will now be keen to move these proceedings along at a more acceptable pace. This will be in the interest of everyone.

[105] It follows therefore that the appeal against the order refusing to dismiss the plaintiff's action on account of inordinate delay must therefore fail. It now remains to consider the appeal against the dismissal of the defendant's Rule 30 application.

The appeal against the dismissal of Rule 30 application.

[106] As pointed out above the plaintiff's amended particulars of claim were filed some nine and a half months late and the plaintiff did not seek condonationfor such late filing. It is this step that the defendant contended was irregular within the meaning of Rule 30. That Rule provides that "[a] party to a cause in which an irregular step or proceeding has been taken by any other party may within 15 days after becoming aware of the irregularity, apply to set aside the step or proceeding".[71]

[107] The High Court dismissed this application holding that the defendant had failed to allege and establish prejudice, a prerequisite for success in a Rule 30 application.[72]In this Court, the defendant challenged this finding of the High Court and submitted that Rule 30 does not require prejudice. It maintained that the late filing of the amended particulars of claim without an application for condonation is an irregular step as envisaged in Rule 30. For its part, the plaintiff supported the reasoning of the High Court, and in addition, contended that the defendant's remedy lay in Rule 26 to compel the delivery of the amended particulars of claim.[73] It submitted that the resort to Rule 30 in the circumstances was an abuse of Rule 30.

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[71] Rule 30 (1)(a)

[72] At para 37..

[73] Rule 26 provides: "Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred, and if any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him or her require him or her to deliver such pleading within 5 days after the day upon which the notice is delivered, and any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and be ipso facto barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading."

[108] The key finding of the High Court was that:

> "As the defendant has not shown that it has suffered prejudice as envisaged in Rule 30, the result should therefore be that defendant's Rule 30 application be dismissed. Naturally, it should then follow that plaintiff's amended particulars of claim is not an irregular step, but a regular one.[74]"

[109] The reasoning underpinning this finding appears from the following passage:

> "Rule 30 concerns 'irregular proceedings or steps'. Rule 30 does not determine that a step or proceeding can be set aside if it 'does not comply with the Rules'. In short, all non-compliances with the Rules do not necessarily constitute irregular steps or proceedings as envisaged in Rule 30. Something more is required: prejudice. Rule 30(1) leaves a litigant who receives a proceeding or document which does not comply with the Rules, with an option. He can either lodge a Rule 30 application, or take a further step. If a further step is taken, or if he waits longer than 15 days to lodge a Rule 30 application, the non-compliance of the Rules by his adversary is automatically condoned by Rule 30(1) — without a formal condonation.[75]"

[110] The reasoning of the High Court raises the question as to whether prejudice is a prerequisite for declaring a step irregular under Rule 30. On its face the Rule does not require prejudice. Rule 30 contemplates two separate but interrelated enquiries, which should not be conflated. The first is whether the step or proceeding complained of is irregular. The answer to this question must be determined by considering the step itself in the light of the meaning of an irregular step or proceeding. The second enquiry, which only arises once it is established

[74] Id at para 37.
[75] Id at para 39.

that the step complained of is irregular, is what order should follow the finding of an irregularity. In this enquiry, the court has discretion whether or not to overlook irregularity.[76] It is in this enquiry where prejudice is relevant.

[111] Prejudice is therefore relevant not to the enquiry whether the step is irregular, but to the second enquiry, whether or not the irregular step ought to be set aside. Irregularity must be determined by reference to the pleading complained of. The irregularity of a step does not depend on whether or notthe non-defaulting party has suffered any prejudice but depends on the character of the step or proceeding complained of.

[112] The High Court relied upon the judgment of Silingwe J in *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*[77]for its conclusion that prejudice is a prerequisite for a successful Rule 30 application. There the court was concerned with the issue of costs in an application for default judgment. In the course of argument, it was submitted that the applicant was entitled to ignore the summons because it was excepiable. The High Court considered this submission in the context of a Rule 30 application. It held that the proper course for a party who is prejudiced by an irregular step is not simply to ignore the step but to have it set aside under Rule 30.

[113] The key passage in the judgment is the following:

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[76]*China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 675 (HC) at para 15.

[77]2007 (2) NR 675 (HC). It also relied on *Gariseb v Bayer,* 2003 NR 118 (HC) at 121I-122A-B.

> "It is, of course, important to be mindful of the fact that the court has discretion whether or not to grant the application, even if the irregularity is established. The general approach is that, in a proper case, the court is entitled to overlook any irregularity in procedure which does not occasion any substantial prejudice. Such an approach was affirmed by Hoff J in *Gariseb v Bayerl*2003 NR 118 (HC), where he said at 121I - 122A-B:
>
> 'This Court has a discretion to overlook any irregularity in procedure which does not work any substantial prejudice…'
>
> In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F - G Schreiner JA said the following:
> '(T)echnical objections to less than perfect procedural steps shouldnot be permitted in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on the real merits.'[78]"

[114] Significantly, the court held that "the court has a discretion whether or not to grant the application even if the irregularity is established",[79] and further that "the court is entitled to overlook any irregularity in procedure which does not occasion substantial prejudice".[80] It was in this context that the Court held that "prejudice is a prerequisite to success in an application in terms of Rule 30".[81]

[115] What is apparent from this passage is that the High Court made a distinction between a finding that a step or proceeding is irregular and the order that must follow from such finding. A court hearing a Rule 30 application must first make a finding as to whether or not the step complained of is irregular. If the court finds that the step is irregular, subrule 30(3) gives the court discretion whether or

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[78] Id at para 15.
[79] Id.
[80] Id.
[81] At para 16.

not to “set it aside …and grant leave to amend or make any such order as to it seems meet”. It is a discretion that, like all discretions, must be exercised properly and in the course of which prejudice will be an important consideration.

[116] It is in this context the statement in the *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* relied upon by the High Court, namely, that “prejudice is a prerequisite to success in an application in terms of Rule 30”, must be understood. It means success in the sense that the irregular step is set aside and not success in the sense of a finding that the step complained of is irregular. If the High Court and the court in *China State Construction Engineering Corporation (Southern Africa)(Pty) Ltd v Pro Joinery CC* intended to hold that prejudice is a prerequisite for a finding that a step is irregular under Rule 30, I am unable to agree with that view.

[117] The threshold question therefore is whether or not the late filing of amended particulars of claim without an application for condonationis an irregular step under Rule 30. The Rules do not define the meaning of irregular; it must therefore bear its ordinary dictionary meaning. The Concise Oxford Dictionary defines “irregular” to mean “contrary to a rule, standard or convention”; “having inflections that do not conform to the usual rule”. The word “irregular” as used in the Rule is wide enough to include non-compliance with the Rules, for non-compliance with the Rules is as contrary to the Rules as a summons that is not properly signed.

[118] The High Court cited the following passage from *Molala v Minister of Law & Order and Another, supra,*

"Then it was contended that respondent's *failure to deliver* further particulars within a reasonable time is an irregular step within the meaning of Court Rule 30. If it were at all possible for the omission of a step to be regarded as a 'step', I am unconvinced that failure to deliver a plea within the permissible time falls within Rule 30. In any event I do not understand what the Court is supposed to set aside if nothing was done; nothing was brought into being.

Turning to the third prayer, the complaint is that the lateness of delivery caused the *delivery* of the further particulars in 1991 to be an 'irregular step'. (If that is so, almost every action in this Division is tainted by such an irregular step.) The further particulars were in proper form. Plaintiff, in contrast with a step which a party is entitled to omit, for example asking for the production of documents at the trial, remained obliged to delivery thereof. In fact, it is when (and because) delivery is overdue that the Court compels a party to deliver his response. It would make no sense if it were so that a Court thereby compels the plaintiff to an irregular step or to believe that compliance with such an order will leave the delivery open to an application in terms of Rule 30. The only defect affecting delivery of the particulars rendered it a belated step but not an irregular one within the meaning of Rule 30.[82]"

[119] The Court in *Molala v Minister of Law & Order* did not cite any authority for the statement that "[t]he only defect affecting delivery of the particulars renders it a belated step, but not an irregular one within the meaning of Rule 30".However, there is a line of cases which appear to express a contrary view. Cases dealing with the question whether a plaintiff is entitled to seek default judgment and simply ignore appearance to defend that was filed late seem to hold otherwise.In each of these cases it was accepted that the late filing of entry of appearance to defend was an irregular step.[83] The principle upon which the decision in these cases

[82]At para 675E-I.

[83]*Theron v Coetzee* 1970 (4) SA 37 (T);*Gibson & Jones (Pty) Ltd v Smith* 1952 (4) SA 87 (T); *Paterson, NO v Standard Bank of SA,* 1967 (4)SA 524 (E); *Bank van die Oranje-VrystaatBpk v Cronje* 1966(4) SA 4 (O); *Creux& Sons (Pty) Ltd v Groenewald*1953 (3) SA 726 (O); *KDL*

seems to rest is that the filing of a pleading outside the time limit allowed by the Rules is an irregular step.

[120] Apart from these cases, it has been held that the Rule is applicable where, for example: a proper power of attorney had not been filed[84]; pleadings are not signed in accordance with the Rules or do not comply with the Rules as to form[85]; notice of intention to defend is delivered out of time[86]; a notice of appeal is defective[87]; an application is brought on short notice on grounds of urgency, but no reasons of urgency are set out in the supporting affidavits[88]; and a party failed to give notice resulting in the proceedings taking place in the absence of the opposite party.[89]In each of these cases the act complained of was not in compliance with the Rules of Court. The act itself was in breach of the Rules and, on that account, constituted the irregular step or proceeding.

[121] The principle involved in these cases is that a step or proceeding taken in breach of the Rules constitutes an irregular step or proceeding. This principle is in accord with the ordinary meaning of the word “irregular”. The word “irregular” is a word of wide importand there is nothing to suggest that it was not intended to apply to pleadings filed late. That the non-defaulting party may have some other remedy under the Rules such as that contemplated in Rule 30(5) does not detract from the wide ambit of the word. The existence of other remedies such Rule 30(5)

Motorcycles (Pty) Ltd v Pretorious Motors 1972 (1) SA 505 (O).

[84]*Employers' Liability Assurance Corporation Ltd v Potgieter*1959 (1) SA 850 (W).

[85]*Union & SWA Salt Snoek Corporation (Pty) Ltd v Lancashire Agencies*1959 (2) SA 52 (N).*Bredenkamp v Dart*1960 (3) SA 106 (O).

[86]*Bank van die Oranje-VrystaatBpk v Cronje*1966 (4) SA 4 (O).

[87]*D & H (Pty) Ltd v Sinclaire*1971 (2) SA 157 (W).

[88]*Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd*1967 (2) SA 491 (E).

[89]*Brenners’ Service Station and Garage (Pty) Ltd v Milne and Another* 1983 (4) SA 233 (W).

may be a factor for the court to take into consideration in the exercise of its discretion whether or not to set aside the irregular step. But it does not affect the question whether or not the step complained of is irregular.

[122] In resisting the application, the plaintiff submitted that the defendant's remedy lay in Rule 26 which permits a non-defaulting party to deliver a notice of bar to the defaulting party. But that remedy is available while the pleading remains outstanding. And as I have pointed out above, the existence of this remedy does not affect the question whether or not the pleading delivered late is an irregular step.

[123] For these reasons, I conclude that the late delivery of the amended particulars of claim without an application for condonationconstituted an irregular step. The question is whether in the exercise of its discretion, the court should set asidethe amended particulars of claim. The High Court did not consider this aspect of the case as it took the view that the defendant did not allege or establish prejudice. This Court is entitled to consider this aspect.

[124] As pointed out above, the court has discretion whether or not to set aside the irregular step.This is implicit, if not explicit from Rule 30(3). I endorse the statement in *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* that the court has discretion whether or not to grant the application to set aside the irregular step even if the irregularity has been established. The court may, in the exercise of its discretion, overlook the irregularity. A relevant consideration in this regard is prejudice. Prejudice that is

required relates to the "exercise of a party's procedural right or duty to respond to a communication received or to the taking of a next step in the sequence of permissible procedure to ripen the matter for properorderly hearing".[90]

[125] The principle involved here is that enunciated by Schreiner JA, namely, that while legal practitioners should not be encouraged to become slack in the observance of the Rules, which are vital to the administration of justice, "technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible, inexpensive decision of cases on their real merits".[91] Thus where prejudice is absent, an order to set aside a step under Rule 30 will not be granted.

[126] And then to the facts of this case.

Application of the principles to this case

[127] The complaint here relates to the late filing of the amended particulars of claim. The defendant knew at least nine and a half months prior to the filing of amended particulars of claim that the plaintiff intended to amend its particulars of claim and the extent of the amendment. It did not have any objection to the proposed amendment. The only prejudice that the defendant suffered was delay and inability to exercise its procedural right to respond to the amended particulars of claim. This prejudice could have been avoided by resorting to Rule 26 and compelling the plaintiff to file its amended particulars of claim or be barred.

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[90] *SA Metropolitan Lewensversekering v Louw NO* 1981 (4) SA (0) 329 at 334A-B.
[91] *Trans-African Insurance Co Ltd v Maluleka*1956 92) SA 273 (A) at 278F-G.

[128] But now that the particulars of claim have been filed, it is difficult to see what prejudice, if any, that the defendant will suffer if the amended particulars of claim are not set aside. Counsel was unable to point out to any such prejudice. Indeed, he could hardly do so in the light of the fact that throughout the period of delay, the defendant knew the extent of the proposed amendment and acting diligently it could safeguarded its rights. And weighing prejudice, if any, to the defendant if the amended particulars of claim is not set aside against prejudice to the plaintiff if the amended particulars of claim is set aside, the prejudice to the plaintiff outweighs that of the defendant.

[129] In these circumstances, it will not be just and proper to set aside the amended particulars of claim. The appeal against the dismissal of Rule 30 application must therefore be dismissed.

[130] It now remains to consider the question of costs

Costs

[131] As a general matter, costs should follow the result. Pursuant to this general rule the High Court awarded costs against the defendant. Sitting as the court of first instance, in view of the conduct of the plaintiff which justified these proceedings being brought, I would have ordered each party to bear its own costs. But that is not the test. The proper approach to the issue of costs on appeal is that set out by Corbett JA (as he then was) in*Attorney-General, Eastern Cape v Blom and Others*where he said:

> "In awarding costs, the Court of first instance exercises a judicial discretion and a Court of appeal will not readily interfere with the exercise of that discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order."[92]

[132] In determining costs, the High Court took into consideration the conduct of the plaintiff which it found dilatory though *bona fide* and awarded costs on an ordinary scale. I am unable to find any misdirection or irregularity on the part of the High Court. The order for costs made by it must therefore left undisturbed.

[133] Different considerations apply to costs in this Court. The manner in which the plaintiff conducted litigation is sufficiently reprehensible to warrant a departure from the general rule that the costs should follow the result. There were two inordinate delays and no satisfactory explanation was offered. While I have found that that the plaintiff was not guilty of dilatory abuse, that does not detract from the unacceptable manner in which it has conducted this litigation. Justice demands that it be deprived of the costs though successful. The costs must therefore be allowed to lie where they fall.

[134] In the event, the following order is made:

1. The appeal is dismissed.

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[92] Per Corbett JA (as he then was) in *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D – E.

2. There will be no order for costs in this Court.

3. The order of the High Court is upheld.

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NGCOBO AJA

I agree.

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MARITZ, JA

I agree.

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MAINGA, JA

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