IN THE HIGH COURT OF SOUTH AFRICA Reportable: No

(EASTERN CAPE: BHISHO)
CASE NO. 203/2000

In the matter between: DATE HEARD: 28/04/10

DATE DELIVERED: 27/05/10

THE EX TRTC UNITED WORKERS
FRONT AND OTHERS **PLAINTIFFS**

And

PREMIER OF THE EASTERN CAPE N.O. **DEFENDANT**

JUDGMENT

KEMP AJ:

A Background

[1] The Defendant in this matter claimed in a special plea that there had been an undue delay by the Plaintiffs in the prosecution of the matter and that their claims should be dismissed.

[2] The alleged cause of action dates back to the dissolution of the erstwhile Transkei Road Transportation Corporation ("the TRTC") in 1995, after which summons was issued in 2000 by 572 ex employees of the TRTC, claiming for unpaid salaries arising from

the dissolution of the TRTC, for a total amount exceeding ninety five million rand. A stated case was formulated of which the following facts are relevant.

[3] When it was still in existence, the TRTC was a parastatal that used to provide bus passenger transport services to members of the public within the borders of the former Transkei, and long distance bus services to various major centres in the Republic of South Africa. Pursuant to section 13 of the Corporations Act,[1] the Eastern Cape Provincial Government dissolved the TRTC in 1996 by Proclamation No. 2 of 1996. Consequent upon such dissolution, the Eastern Cape Provincial Government, duly represented thereto by the then Head of the Department of Transport (the Department), Dr Mkosana,[2] and other officials of the Department, concluded an agreement ("the agreement") with the Transport and General Workers Union, duly represented thereto by Mr Randall Howard and certain other persons in various capacities, including employees of the ex TRTC.

[4] The relevant portion of the agreement contained the following clause:

"3.1 The Province of the Eastern Cape Government is committed to job creation in the transport industry and public/passenger transport industry in particular.

3.2 The Government recognizes the crises with former Transkei in respect of the already high unemployment and the lack of reliable, efficient and affordable transport to the community.

[1] Act 10 of 1985 (Transkei).
[2] The parties agreed that Dr Mkosana, resigned as Head in the department of Transport in Bhisho and joined the Department of Labour, which he left in 2008, and is no longer a government employee.

3.3 To this end Government is committed to assist former TRTC employees to secure employment in a new transport arrangement, coupled with a process of job creation in the transport industry from which TRTC employees would benefit.

3.4 The Government will put in place mechanisms to address transport needs in the province and thereby creating employment opportunities.

3.5 The process of involving all stakeholders including the union should be initiated as a matter of urgency by the MEC for Transport and the Department of Transport with a view to arriving at a new transport system by 31 March 1996."

[5] The Plaintiffs claimed in the summons that certain government functionaries, including officials of the Eastern Cape Provincial Government for whom the Defendant is vicariously liable, having caused the closure of the TRTC in whose employ the Plaintiffs were and, subsequent thereto, having committed itself to assisting former TRTC employees to secure employment in a new transport dispensation, failed and/or refused to fulfill its contractual obligations towards the Plaintiffs and thus acted in breach of the agreement. The basis of the claim was that the Defendant failed to comply with a contractual obligation emanating from the agreement, in particular from the responsibilities referred to in clause 3.

B Steps taken subsequent to service of summons:

6 September 2000	Appearance to defend Notice in terms of rule 23(1) notifying the Plaintiffs that the Defendant intended excepting to the Plaintiffs' summons on the grounds of being vague and embarrassing and/or lacking averments necessary to sustain a cause of action.
15 January 2001	Defendant excepts to the Plaintiffs' particulars of claim.
15 May 2001	The Plaintiffs' amended particulars of claim pursuant to the delivery of

	the Plaintiffs' notices in terms of rule 28 of December 2000 and 30 April 2001 served on the Defendant.
31 May 2001	Exception heard
14 June 2001[3]	Judgment dismissing the Defendant's exception but ordering the Plaintiffs to pay the Defendant's costs
11 July 2001	Plaintiffs' attorneys addressed a letter to the State Attorney. The State Attorney requested that the matter be held in abeyance while he awaited instructions.
30 July 2001	Plaintiffs' attorneys enquired about a reply as they were anxious to have the matter finalized failing which the plea should be filed.
10 August 2001	Together with the delivery of the plea, the Defendant caused a notice in terms of rule 47(1) to be issued demanding that the first Plaintiff furnish security for costs in the sum of R150 000.00.
28 November 2001	The State Attorney advised, *inter alia,* that he held instructions to recover the costs awarded in the exception and in the previous matter and intended applying for a stay in the proceedings pending payment of all costs.
October 2004	A meeting involving the State Attorney and a representative from the Plaintiffs' attorney's office took place. The meeting culminated in a letter being written to the State Attorney.
8 December 2004	Plaintiffs attorneys confirmed a telephonic conversation with the State Attorney that they had been advised that the Defendant insisted on security for costs and proposed that an amount of R30 000.00 be agreed on, but conditional upon the Defendant being permitted to approach the Court for an increase once the hearing had commenced.
9 December 2004	Plaintiffs' attorneys were advised that the State Attorney would take instructions from the Defendant.
13 July 2005	Plaintiffs' attorneys requested a court date from the Registrar for mid November 2005 with the 21st November 2005 being allocated and the State Attorney was duly informed.
25 August 2005	State Attorney confirmed that they had been informed of the court date but warned that their clients still insist on security for costs and that such application would be made to court as soon as their circumstances permitted.
28 September 2005	Plaintiffs' attorneys informed the State Attorney that they wished to proceed with the hearing on 21 November 2005 and that they would request the State Attorney to produce the list of TRTC workers that had received final payments and the amounts paid by the State to each worker. Reference was also made to the issue of security for costs with the Plaintiff's attorneys advising that they were still awaiting a response to their proposal and that the issue be settled at the pre-trial conference. The attorneys finally referred to their proposal that the

[3] Unreported judgment by White J (as he then was) in *The Ex TRTC United Workers Front and 572 Others v The Premier of the Province of the Eastern Cape NO* Case No 203/2000, delivered on 14 June 2001.

	question of liability be decided before the issue of damages be dealt with.
17 October 2005	Subsequent to a telephonic conversation between the State Attorney and the attorneys for the Plaintiffs the Registrar was informed that the parties were not ready to proceed on 21 November 2005 and that an early date in 2006 would be applied for later.
22 November 2005	Plaintiffs' attorneys gave notice to the State Attorney that the Notice to Discover was in the process of being served and pointed out that they still required the final list of TRTC workers showing their last salary payments severance package payments. It was suggested that the Pre-Trial Conference be held on 24 January 2006 and the Defendant's response to the proposal on security was invited.
23 January 2006	State Attorney advised the Plaintiffs' attorney that they noted that the matter was not on the roll for that term, that they proposed that the Rule 37 conference be held in abeyance "as the writer's legal is not ready to attend such conference", that they "still have some outstanding consultations with our clients" and "our clients have also not furnished us with the documents required to be discovered."
27 June 2006	State Attorney noted the contents of the Plaintiffs' attorney's letter and advised that the Defendant had not abandoned the demand for the furnishing of security in the sum of R150 000.00 and that, in the event of the demand for security not being heeded within seven days from the date of delivery of the relevant notice on the first Plaintiff, the first Plaintiff would be regarded as contesting the amount of security demanded and the Defendant would thereupon solicit the Registrar's determination of the amount of security to be given.
12 July 2006	Defendant issued a notice in terms of rule 47 (2) calling upon the Registrar to determine that the sum of R400 000.00 should be furnished by the first Plaintiff as security for costs.
4 September 2006	Defendant taxed costs of the exception
13 November 2006	Registrar fixed the amount of security in the sum of R250 000.00.
12 February 2007	Defendant resorted to proceedings in terms of rule 47 (3) for an order directing the first Plaintiff to give security as determined by the Registrar.
5 March 2007	Plaintiffs delivered their answering affidavits, *inter alia,* disputing liability to furnish security.
19 March 2007	Defendant delivered his replying affidavit.
26 April 2007	The rule 47(3) application was initially heard but not finalized and the matter was postponed *sine die* by agreement between the parties.
8 June 2007	Plaintiffs launched a counter-application *inter alia* seeking an order reviewing and setting aside the Registrar's determination.
12 June 2007	State Attorney advised that the Defendant had abandoned the Registrar's determination on the furnishing of security for costs and of the consequent withdrawal of the rule 47(3) application, and it was

	agreed that each party should pay their own costs.
26 September 2007	State Attorney withdrew the rule 47 (3) application and tendered costs of the application and those of the Plaintiffs in the counter-application for up to and including *5* November 2007.
20 November 2007	Above settlement was made an order of Court.
22 August 2008	After further correspondence between the attorneys of the parties, Plaintiffs' attorneys had the costs of the rule 47(3) application taxed.
21 November 2008	Defendant paid the balance of the Plaintiffs' taxed costs in the rule 47(3) application after deduction of the costs of the previous court orders.
24 November 2008	A notice setting the action down for trial on 24 February 2009 was served on the Defendant's attorney.
2 December 2008	Defendant notified the Plaintiffs of his intention to amend his plea by the addition of a special plea.
18 December 2008	Defendant delivered his special plea wherein it is contended that the Plaintiffs' action fell to be dismissed due to the delay in the prosecution thereof.

[6] Also agreed to between the parties was the somewhat terse and not particularly helpful statement that:

"Not all files and documents pertaining to this matter can still be traced."

[7] I have previously also had to decide on an application launched by the Defendant in terms of Rule 7(1) on the 24th February 2010 as well as a counter application by the Plaintiff in terms of Rule 30 to set aside the Defendant's notice in terms of Rule 7(1) as an irregular step, as well as an application by the Plaintiff to amend the stated case by the addition of a paragraph relating to a letter which had been inadvertently omitted. On the 15th April 2010 I granted the plaintiff's application for an amendment, and on the 20th April 2010 I set aside the defendant's notice in terms of Rule 7(1). Prior to that, another special plea by the Defendant was upheld.[4]

C The Law

[4] See *The Ex TRTC United Workers Front and Others* 2010(2) SA 114 (ECB).

[8] As pointed out by Richings AJ in *Gopaul v Subbamah*,[5] our law in this regard appears to be very similar to that of the English law, as set out in the leading case of *Allen v Sir Alfred McAlpine and Sons.*[6] The case involved three appeals where the Plaintiffs had delayed in the prosecution of the cases. It was a matter of some concern to the judges hearing the matters and they indicated their displeasure at the slackness which appeared to be creeping into the system and dismissed two of the three appeals.

[9] The first case involved the claim by a widow whose husband had been killed after a fall on a construction site nearly nine years prior to the hearing. The deceased's employer maintained that there was a sub contractor who was partly liable. The court found that the defendants had been gravely prejudiced by the delay. Two out of six possible witnesses could not be traced and the claim depended on the investigation of facts that took place nearly nine years ago.

[10] The second matter also involved an incident that took place nearly nine years prior to the hearing. The plaintiff alleged that she had been unlawfully dismissed but the first solicitor she instructed was imprisoned without her knowing about it for a long time. The court found that the defendant's medical records on which they had relied should still be in their possession and that there was little possibility of prejudice to them. The court also found that the delay was not due to the fault of the plaintiff and that she would have no recourse to her attorney, who was in prison. The last reason relating to her prospects of recovery from

[5] 2002(6) SA 551 (D).
[6] [1968] 1 All E.R. 543. See also *Sasol Chemical Industries (Pty) Ltd vs The Competition Commission and others,* Case No 45/CR/May 06, delivered on 2 June 2008 in the Competition Tribunal of South Africa at p 7 para 24.

her attorney appears to be an equitable consideration peculiar to English law, which would not play a role in my consideration of this matter.

[11] The third appeal related to a cause of action going back for twenty years. The plaintiff alleged that the deceased had fraudulently concealed a debt due by a company which he had acquired. He alleged that the deceased's attorneys had conspired with him to conceal the debt. The deceased had subsequently died and the court found that there was a real risk of prejudice and dismissed the appeal. The first period of delay was sixteen months, with a second eleven month delay and then a fourteen month delay. The court found that the delays had caused grave injustice to the defendants.

[12] Lord Denning M.R. explained the applicable principles as follows:[7]

"The principle on which we go is clear, when delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the Plaintiff to his remedy against his own solicitor who has brought him to this plight."

[13] When considering the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution Diplock LJ said the following:[8]

"It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible

[7] at p 547 E.
[8] At p 556 A-B.

has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled…but the length of the delay may of itself suffice … if the relevant issues would depend on the recollection of witnesses of events which happened long ago."

[14] Diplock LJ emphasized the risk to reliable evidence caused by delays:[9]

"Where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they can recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court being able to find out what really happened are progressively reduced as time goes on."

This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the Plaintiff on whom the onus of satisfying the court as to what happened generally lies. There may come a time however, when the interval between the events alleged and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest demands that the action should not be allowed to proceed."

[15] Salmon LJ was of the view that mere inaction on the part of the defendant could not amount to waiver or acquiescence, although:

"Positive action, however, by which he intimates that he agrees that the action may proceed, is a different matter. If, for example, he intimates that he is willing for the action to proceed and thereby induces the plaintiff's solicitors to do further work and incur further expense in the prosecution of the action, he will be precluded from

[9] At p 553 C-E.

relying on the previous delay by itself as a ground for dismissing the action. Should there, however, be further serious delays on the part of the plaintiff after the defendant's acquiescence in or waiver of the earlier delay, the whole history of the case may be taken into account in deciding whether or not the action ought to be dismissed."

[16] In *Sanford v Haley,*[10] Moosa J had the following to say about the remedy:[11]

"In terms of s 173 of the Constitution the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interest of justice. It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a Plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will exercise such power in circumstances where there has been a clear abuse of the process of Court." (authorities omitted)

[17] The learned judge pointed out that the prerequisites for the exercise of such discretion are threefold. Firstly there must be a delay in the prosecution of the case. Secondly, the delay must be inexcusable. Thirdly, there must be serious prejudice to the Defendant. The learned judge pointed out that it has been previously held that the test is whether the Plaintiff has abused the process of the court in the form of frivolous or vexatious litigation, or whether the conduct of the Plaintiff oversteps the threshold of legitimacy. He emphasised that the test is a stringent one. [12]

[10] 2004 (3) SA 296 (C).
[11] At p 300 para 8.
[12] At p 300 para 9.

[18] The prejudice in *Sanford v Haley* was compounded by the fact that the erstwhile Defendant had passed away in the interim and that the Plaintiff was relying on provisional sentence proceedings. In January 1989 the deceased was 84 years old when he deposed to the first answering affidavit. Nothing happened for approximately four years after which there was a flurry of activity for about three months after which the matter went dormant for about six years, during which period the deceased passed away. In the same year the matter was resuscitated. The learned judge found that the Plaintiff had not adequately explained her delay in failing to file a replying affidavit for over four years and her failure to take any procedural steps prior to the death of the deceased, a lapse of almost six years. The prejudice was clear. It was a matter in which the deceased would have been able to provide input in respect of the answering affidavits and his executor would have great difficulty in accessing the required information.

[19] The learned judge also dealt with the probabilities of success in the principal case and pointed out that the Plaintiff appeared to have difficulties with her case. He found that the delay was unreasonable and inexcusable, and seriously called into question the legitimacy of the Plaintiff's conduct. The prosecution of the proceedings had become an abuse of the process and highly prejudicial to the deceased's estate.[13]

[20] In *Molala v Minister of Law and Order and Another,*[14] Flemming DJP, set out the approach to be followed as follows:[15]

[13] At p 304 para 23.
[14] 1993(1) SA 673 (W).
[15] At p 677 C-E.

"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 D 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 E intended, albeit in part by way of dolus eventualis. The increase in defendants' problems is, secondly, a factor 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."

[21] The learned judge emphasized that such an order should not follow unless the administration of justice was in fact hampered.[16]

[22] Mr *Mbenenge SC* referred me to the judgment of *Gqwetha v Transkei Development Corporation Ltd And Others.*[17] Although it involved an application for review relating to an employment related matter, Mr Mbenenge argued that it was relevant to the current matter. It appears though that Nugent JA cautioned that a different test would apply in a review application related to a labour dispute than in a civil matter.[18] Nevertheless, as argued by Mr *Mbenenge*, one can have regard to the judgment as long as the distinction is kept in mind. The test formulated in *Gwetha* seems to be twofold – firstly, whether there has been an unreasonable delay and if so, whether it should be condoned. Mpati DP, in the minority judgment, was of the view that the court was obliged to consider the merits of the case whilst

[16] At p 677 G-H.
[17] 2006 (2) SA 603 SCA.
[18] At p 614 para 34.

considering the application for condonation. He was of the view that although there had been a lengthy delay (14 months in that case), that the Appellant appeared to be strong on the merits and that there appeared to be no evidence of prejudice to the Respondent.

[23] Nugent JA, writing for the majority, was of the view that it is important for the efficient functioning of public bodies that any challenge to the validity of their decisions by way of judicial review should be initiated without undue delay.[19] The learned judge pointed out that the reasons for the rule are twofold – firstly that delays may occasion prejudice and secondly that the public has an interest in the finality of administrative decisions. The learned judge emphasised that delay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the potential for prejudice in mind.[20] The learned judge also pointed out that different considerations arise in relation to applications to condone delays in the conduct of litigation and that the test that is applied there is not necessarily transposable to unduly delayed proceedings for review. [21]

[24] Nugent JA found that in any event, the review may not have resulted in a meaningful outcome, as even if the Applicant were to be re-instated, that the original charges against her could be re-instated and saw no reason for confidence that the setting aside of the decision to dismiss would have a meaningful result.

D The Result

[19] At p 612 para 22.
[20] At p 614 par 33.
[21] At p 614 para 34.

[25] On consideration of the facts in this matter it does appear that there has been an undue delay of almost three years, between November 2001 and October 2004. There is no real explanation for the delay. Dr Delport argued that the court should have regard to the fact that there are over five hundred plaintiffs and that security for costs had been demanded at the time, and should read into those facts some sort of justification for the delay. I am not sure if I can on that basis deduce that the delay is justifiable.

[26] On the facts agreed to between the parties it is not clear what prejudice, if any, the defendant suffered by the delay. It is true that an official who assisted in drafting the agreement has since retired but there is no allegation that he is no longer accessible or if he will be required as a witness. The Defendant has not placed any facts before the court indicating that any of the evidence needs to be led *viva voce*. One would assume from the nature of the claim that there will be a paper trail relating to decisions made by the defendant and that it will not be difficult to access them. The parties have agreed that some files and documents relating to the matter can no longer be traced. I do not know which files cannot be traced and whether the non availability of those files will prejudice the defendant or not.

[27] Although the claim by the Plaintiffs might at first blush appear to be a little ambitious, White J in dismissing the exception on the 14th June 2001 was of the view that there was sufficient ambiguity in the provisions of clause 3 of the agreement for the trial court to admit evidence on the surrounding circumstances relating to the agreement, in an effort to determine the meaning of clause 3.[22] It certainly does not seem, as was held in *Golden*

[22] At p 45 of the judgment.

International Navigation SA v Zeba Maritime Co Ltd,[23] that the Plaintiffs claims are "obviously unsustainable" or that "the continuation of the plaintiff's action will be vexatious and hence an abuse of the process of this court."[24]

[28] Whilst Mr Mbenenge argued that there had been a delay of approximately seven years, I am not of the view that an argument that there has been an undue delay of any more than approximately three years can be sustained. After October 2004 the parties can have been under no illusions about each others intentions. Both were quite clearly intent on prosecuting the matter to finality and both would have realised from at least that point onwards that they would have to gather and preserve whatever evidence they would require to be used in due course. It is not clear from the agreed facts whether the missing files and documents went missing before or after this period. If before, the blame can hardly be placed at the Plaintiff's door.

[29] The Defendant's special plea alleged that the Defendant had been immensely prejudiced by the delay. There are simply no facts supporting this contention before the court. All we have is a delay with an inadequate explanation. Thereafter the cudgels are taken up and for five years the parties engaged in correspondence and towards the latter portion of the period, a flurry of skirmishes, leaving one with the impression that the defendant has acquiesced in the plaintiffs failure to prosecute the matter between November 2001 and October 2004.

[30] Under all the circumstances I am not satisfied that the defendant has proven that it would be in the interests of justice

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[23] *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008(3) SA 10(C).
[24] At p 18 para 27.

to dismiss the plaintiffs claims. As so eloquently put by Lord Atkin:[25]

"Finality is a good thing, but justice is better."

[31] The following order is accordingly made.

(a) The defendant's special plea is dismissed with costs.

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L D KEMP
ACTING JUDGE OF THE HIGH COURT, BHISHO

Counsel for the Plaintiff :	Dr Delport
Attorneys for the Plaintiff:	Delport Van Niekerk c/o Squires 44 Taylor Street King William's Town
Counsel for the Defendant :	Adv Mbenenge SC
With him	Adv Cossie

[25] In *Ras Behari Lal and Others v The King Emperor [1993] 102 LJ (PC) 144 (50 TLR 1; [1933] 150 LT 3; [1933] All ER Rep 723),* quoted by Navsa JA in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010(1) SA 333 (SCA) at p 354 para 80.

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