Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 97/1989

In the matter of

CHRISTA SANFORD (born Steinbrecher) Plaintiff

and

PATRICIA L HALEY N O Executrix
(in her capacity as Executrix in
Estate late Arthur Carol Sanford)
Defendant/Deceased

JUDGMENT DELIVERED : 11 DECEMBER 2003

MOOSA, J:

Introduction:

1. This matter has a long, protracted and unhappy history. It spans two continents and covers two decades. The origin is to be found in a matrimonial strife between plaintiff and the late Arthur Carol Sanford (hereinafter referred to as "the deceased"). Plaintiff hails from Austria and deceased from the United States of America. They were married on 7 November 1975. At the time deceased was 70 years old and plaintiff 30 years old. One child was born of the marriage. For a short period the couple resided in Cape Town and acquired certain assets.

2. On 19 July 1985 plaintiff instituted divorce proceedings against deceased in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, USA. The court granted an order of divorce, dissolving the marriage of the parties. The order was taken on appeal and on 26 June 1987 the judgment of the trial court was partly confirmed, partly reversed and partly referred back to the trial court for further hearing. On 25 April 1988 the trial court granted a final judgment on the mandate of the court of appeal. On 29 July 1987 the trial court ordered deceased to pay the costs of attorney Ronald Sales in the sum of US $ 149,004.42. This amount included the forensic accounting costs incurred by Mitch & Associates. On 3 June 1988, Mitch & Associates obtained a separate judgment for such forensic costs against plaintiff in the sum of US $ 40527.50 (The "Mitch" judgment). This amount

forms the subject matter of the present claim.

3. On 5 January 1989 plaintiff brought an urgent *ex parte* application to this court to attach, *ad confirmandam jurisdictionem,* all monies standing to the credit of deceased in his account at Nedbank pending the institution of this action against deceased. The rule *nisi* issued in this application was confirmed on 1 February 1989. On 6 January 1989 plaintiff issued a provisional sentence summons ("the summons") against deceased, setting out various claims. With the passage of time plaintiff abandoned all those claims. By the time the matter came to trial, the only claim which survived was the claim arising from the Mitch judgment. This claim had been introduced *per se* by means of an amendment to the summons in August 2000.

The Defences:

4. Defendant had raised a number of defences against the plaintiff's surviving claim. Firstly, that the provisional sentence proceedings have become superannuated; secondly, that the claim in question is not capable of founding a claim for provisional sentence; thirdly, that the claim of Mitch & Associates which had been ceded to plaintiff is a nullity and, in any case, has been satisfied; fourthly, that plaintiff has not paid the amount for which she seeks repayment by way of provisional sentence. The

court will deal with the first issue of whether the provisional proceedings have become superannuated or not. Should the court hold in the affirmative, it would then not be necessary to deal with the other defences. Should, however, the court find otherwise, then the court would be obliged to deal with one or other or all of the other defences.

The Law:

5. Provisional sentence is an extraordinary remedy designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment therefor without resorting to the more expensive and often dilatory machinery of an illiquid action. (See ERASMUS: **Superior Court Practice** B1-63.) The provisional sentence summons calls upon a defendant to pay the amount claimed (as evidenced by a liquid document including a judgment) or, failing such payment, to appear before the court on a specific date to either admit or deny his or her liability. (Rule 8 of the Uniform Rules of Court; **Rigby Engineering v Rockboring & Drilling (Pty) Ltd** 1981 (1) SA 328 (O) at 332AA-B.) The *dictum* in **Ashersons v Panache World (Pty) Ltd** 1992 (4) SA 611 (C) at 612J-613A is apposite:

> *"…the essence of provisional sentence proceedings is that it provides a creditor who is armed with the necessary documentary proof, usually in the form of a liquid document, with a*

speedy remedy for the recovery of the money due to him. It is a well-recognised, long-standing and often used mode of obtaining speedy relief where the plaintiff is armed with a liquid document..."

6. There are no specific rules of court or practice which provide that an action becomes superannuated by the effluxion of time for want of prosecution. (**Morgan- Smith v Elektro-Vroomen (Pty) Ltd en ȟ Ander NO** 1977 (2) SA 191 (O) at 194A; **Meyer v Meyer** 1948 (1) SA 484 (T) at 487.) The Constitution of the Republic of South Africa, Act No 108 of 1996 ("the Constitution"), grants a litigant the right to have any dispute adjudicated before a court of law in a fair public hearing. Section 34 of the Constitution, 1996, provides:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Such right can be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (Section 36 of the Constitution).

7. Similar rights are enshrined in the common law. **Innes, CJ** in **Western**

Assurance Co v Caldwell's Trustee 1918 AD 262 at the foot of page 273, made the following observation:

> *"Now it is needless to say that strong grounds must be shown to justify a Court of Justice in staying the hearing of an action. The courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action."*

Roman law made provision for the superannuation of civil proceedings. Emperor Justinian, in Code 3.1.11, decreed that civil suits shall not, after *litis contestatio,* be deferred longer than three years. This provision has not been adopted in either the Roman-Dutch law or in our common law. There is accordingly no time limit within which a civil action has to be concluded. Once an action has been instituted the Rules of Court stipulate a time period within which various steps have to be taken from the issuing of summons to the granting of the judgment. (**Kuhn v Kerbel and Another** 1957 (3) SA 525 (A) at 532H-534B.)

8. In terms of Section 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. (HERBSTEIN & VAN WINSEN: **The Civil Practice of the Supreme Court of South Africa** 4th edition at 547; **Hunt v Engers** 1921 CPD 754; **Western Assurance Co v Caldwell's Trustee (supra)** at 272.) 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. (**Kuiper and Others v Benson** 1984 (1) SA 474 (W) at 477A; **Molala v Minister of Law & Order and Another** 1993 (1) SA 673 (W); **Western Assurance Co v Caldwell's Trustee (supra)** at 271.)

The Test:

9. The pre-requisites for the exercise of such discretion are firstly, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the 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 & VAN WINSEN: **The Civil Practice of the Supreme Court of South Africa** at 547.)

Evaluation:

10. On the basis of the legal principles set out above, the court will examine the facts and circumstances of the present case to determine whether the conduct of plaintiff passes muster when measured against the test enunciated. The examination will proceed in line with the prerequisites for the exercise of a proper discretion, namely the delay, the excuse and the prejudice, followed by the abuse and probabilities of success in the principal case.

The Delay:

11. It is a given fact that plaintiff must proceed with his action within a reasonable time. What is reasonable depends on the facts and circumstances of each case. Deceased is entitled to rely on the Rules of Court to enforce compliance with the prosecution of the claim. Despite such entitlement, nothing prevents plaintiff from relying on the inherent jurisdiction of the court for the dismissal of the action.

(**Schoeman en Andere v Van Tonder** 1979 (1) SA 301 (O) at 305D-E.) *In casu* the action for provisional sentence was initiated in 1989. It culminated in a court hearing on 11 August 2003. The action spanned a period of 14 years.

12. The proceedings are characterised by what can be described as fits of stop and start. In January 1989 when deceased deposed to the first answering affidavit, he was 84 years old and in failing health. Plaintiff did not file a replying affidavit or set the matter down for hearing. Nothing happened for approximately four years and then there was a flurry of activity for about three months and thereafter the matter went dormant for about six years. Deceased died on 5 February 2000 at the age of 95. In August 2000 the matter was resuscitated by plaintiff. She abandoned all her claims and introduced two new ones, substituting Patricia Haley in her representative capacity as executrix of the deceased's estate.

13. The executrix filed further answering affidavits. In such affidavit she raised the defence that the judgments of the trial court of Broward County, Florida, USA have been superannuated in terms of the law of that county. For two years again nothing happened and the executrix caused the matter to be enrolled for hearing on 11 August 2003. The Rules provide for a plaintiff to enrol a provisional sentence summons. (See Uniform Rules of Court, Rule 8(4).) No provision is made for

defendant to enrol such matter. Three weeks before the trial, plaintiff filed an affidavit replying to the averments contained in the answering affidavits of the executrix and seeking condonation for the late filing of the reply.

14. Plaintiff has not adequately and with the necessary particularity explained the exceptionally long delays from the time the summons was first issued to the time the matter was caused to be set down by the executrix for hearing. Whether she could set the matter down for hearing is questionable. Plaintiff did not explain her failure to file a replying affidavit in respect of the answering affidavits for over four years; her failure to set the matter down after all the affidavits had been filed in June 1994; her failure to take any procedural steps and/or set the matter down for hearing prior to the death of the deceased on 5 February 2000 – an elapse of almost six years.

The Excuse:

15. In the application for condonation, plaintiff explains the reason for the delay in responding from the time the present claim was introduced, ie 21 August 2000 till the executrix filed her answering affidavit, ie 8 December 2000. The explanation is for the delay of approximately three months. No explanation whatsoever is given for the lengthy delays from the time the summons was first issued until the time the existing claim was introduced, ie the period from 6 January 1989 to August 2000. The

plaintiff explains the reason for the delay from the time the issue of superannuation was raised by the executrix to the time the judgments were revived. Plaintiff gives no explanation why no attempts were made to revive the judgments prior to the executrix raising the issue in her affidavit. Such judgments became superannuated after the lapse of seven years. It appears that when the present claim was introduced by means of an amendment to the summons for provisional sentence, plaintiff had no *locus standi in judicio* as the judgments in question were superannuated.

16. It is generally accepted that condonation is not to be had merely for the asking. The party asking for condonation must provide a full, detailed and accurate account of the reasons for the delay to enable the court to understand and assess such delay. If the non-compliance is time-related, the date, duration and extent of the problem that occasioned such delay, should be set out. (**Uitenhage Transitional Local Council v South African Revenue Services** [2003] 4 All SA 37 (SCA) at para 6. It is trite that where non-compliance of the rules has been flagrant and gross, a court should be reluctant to grant condonation whatever the prospects of success might be. (**Darries v Sheriff, Magistrate's Court, Wynberg and Another** 1998 (3) SA 34 (SCA) at 41D.)

The Prejudice:

17. If the plaintiff had exercised diligence in bringing the matter to trial before his death, the deceased would have been able to provide input in respect of the answering affidavits. He would, likewise, have been able to provide evidence at any trial in the principal case if such trial was to become necessary before his death. By virtue of the long delay in prosecuting the matter, the deceased suffered and his estate, since his death, continues to suffer prejudice. In order to found jurisdiction, plaintiff attached an amount of approximately R3 million in January 1989. This amount remains under attachment since then. The deceased and/or his estate have been seriously prejudiced by the fluctuation in the foreign currency rates since the attachment of the money and would continue to suffer if the matter should proceed to the adjudication of the principal case.

18. The deceased, in his affidavit dated 5 May 1994, stated that the matter was initiated in 1989. A considerable period of time, he alleged at the time, had elapsed. He experienced great difficulty in locating information concerning the claims. At the time he was 89 years of age and in very poor health. In addition to failing eyesight, he experienced serious mobility problems and had become physically frail because of his deteriorating health. The deceased died approximately six years later at the age of 95. The claim in the present form was introduced by means of an amendment to

the provisional sentence summons in August 2000 ie a few months after his death. If the deceased had problems in locating information in 1994, such problems must have been compounded with the passage of time and with his death, the problems for the executrix must have been aggravated.

The Abuse:

19. The current provisional sentence summons which has been amended from time to time, bears no resemblance to the original one issued in January 1989. All the original claims have been abandoned. The only claim which survived was introduced in August 2000. It appears that at the time such claim was introduced, the judgments on which the claim is based were superannuated. The original summons was amended on at least five occasions. In some instances the amended summons was not filed and in other instances the proposed amendment was followed by a summons. The amendments abandoned certain claims, added others, amended the amounts in respect of certain claims and eventually abandoned all claims except the one in question. As a general rule, material amendments to a provisional sentence summons will not be allowed. (See **Davis v Saxe** 1953 (3) SA 114 (C) at 120D-E; **Wiehahn N O v Wouda** 1957 (4) SA 724 (W).) This is understandable because of the nature and form of the provisional sentence summons. Any material amendment is anathema to such proceedings.

20. The estate of deceased was declared bankrupt on 14 September 1989. Ronald Sales submitted a claim for costs arising from a judgment granted in its favour. The claim included the costs which form the subject matter of the present action. According to the satisfaction of judgment dated 16 July 1990 which was issued out of the trial court, the order for costs in favour of Ronald Sales for the sum of US $149 004.42 has been fully paid. According to the trustee of deceased's bankrupt estate, only fees to Ronald Sales have been paid in full and not the claim of Mitch & Associates. Whether the amount is owing or not is therefore in dispute. Plaintiff, when introducing the claim by way of an amendment to the original provisional sentence proceedings, ought to have been aware of such potential dispute. By following that route, plaintiff took a deliberate and calculated risk with the full knowledge that the proceedings for provisional sentence could be dismissed.

21. The claim of Mitch & Associates was ceded initially to Twenty Five Moxley Road Investments CC ("the CC") on 13 October 1988. They then ceded the same claim to plaintiff on 26 March 1990. There is no evidence that the claim was divested from the CC and reinvested in Mitch & Associates prior to the cession to plaintiff. According to plaintiff, she satisfied the claim of the CC prior to the cession of the claim by Mitch & Associates to her. There is accordingly a *caveat* in the *causa* of

the claim which is now allegedly vested in plaintiff.

Probabilities of success in the principal case:

22. The provisional sentence summons by its nature is an interim relief. The deceased can enter into the principal case by giving security for the claim. *In casu* deceased has raised at least four defences. On the papers before the court such defences are not without merit and if the matter proceeds to the principal case, the probabilities of success in favour of defendant cannot be excluded. Plaintiff relies on her claim for provisional sentence not on a clear and unequivocal judgment against deceased and in favour of plaintiff. Plaintiff relies on a series of documents to constitute a liquid document. The cessions of the claim by Mitch & Associates is also not without its inherent problems. The evidence is that the judgment against the deceased in favour of Ronald Sales, which includes the present claim, has been satisfied. Although some doubt is cast thereon by the trustee of the insolvent estate of the deceased, it remains a matter which plaintiff has to surmount. Then finally, whether plaintiff has actually paid the amount of the claim which entitles her to reclaim payment thereof from the deceased's estate remains uncertain.

The Finding:

23. In the view of the court, the extraordinary delay in prosecuting the action for

provisional sentence was not only self-defeating, but destroyed the very basis of these proceedings which were meant to be extraordinary proceedings for a speedy remedy. In **Hunt v Engers** 1921 **(supra)** the cause of action was based on a money claim. The summons was six years old. The court dismissed the action. In **Commercial Bank of South Africa v Schreiner** 1929 (SWA) 38, the court dismissed the claim for money because the summons was five years old. In my view, the delay in this matter was unreasonable and inexcusable. It seriously called into question the legitimacy of plaintiff's conduct. It would be impermissible to allow her to continue to prosecute the only remaining claim with all its attendant problems. In my view the prosecution of the proceedings has, in all the circumstances, become an abuse of process and highly prejudicial to the deceased's estate. In the circumstances, the court concludes that the provisional sentence summons has become superannuated by the effluxion of time.

The Order:

24. The court accordingly makes the following order:

(1) The application for condonation is refused with costs including the costs consequent upon the attendance of two counsel.

(2) The action is dismissed with costs, including the costs consequent upon the attendance of two counsel.

(3) The monies attached *ad confirmandam jurisdictionem* in this matter are to be

released to the estate of the deceased forthwith.

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