THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Full Court Case No: A231/2016

Court a quo Case No: 12755/2011

MARIUS JACOBUS KLEYNHANS	**1st APPELLANT**
HEATHER KLEYNHANS	**2nd APPELLANT**
CORNERCADE (PTY) LTD	**3rd APPELLANT**
SHIRLEY MILLICENT KOSTER	**4th APPELLANT**
TIELMAN NIEUWOUDT AGENBAG	**5th APPELLANT**

and

OVERSTRAND MUNICIPALITY	**RESPONDENT**

Coram: ERASMUS, SAMELA & ROGERS JJ

Heard: **1 FEBRUARY 2017**

Delivered: **13 MARCH 2017**

JUDGMENT

ROGERS J (ERASMUS AND SAMELA JJ concurring):

Introduction

[1] This is an appeal against a decision of Henney J in which he dismissed the appellants' application for want of prosecution. The learned judge granted the appellants leave to appeal to a full bench, limited to only one of the proposed grounds of appeal. On petition the Supreme Court of Appeal extended the leave to all the grounds advanced by the appellants.

[2] Mr Nelson SC leading Mr van Huyssteen appeared for the appellants and Mr la Grange SC leading Mr Cilliers for the respondent.

[3] For convenience I shall refer to the appellants collectively as they were in the court a quo, namely the applicants. I shall refer to the first appellant by his surname, Kleynhans, and to the respondent as the Municipality.

Condonation and reinstatement

[4] The appellants did not comply timeously with rule 49(6). Leave to appeal was granted by the Supreme Court of Appeal on 6 August 2015. The appellants filed their notice of appeal 4 September 2015. Within 60 days, ie by 30 November 2015 (the appellants erroneously say 4 December 2015), the appellants were required by rule 49(6)(a) to make written application for a date for the hearing of the appeal. Simultaneously therewith, the appellants were required by rule 46(7)(a) to lodge and serve the requisite copies of the record. The application for a date and lodging and serving of the record occurred on 30 June 2016. By that stage the appeal had lapsed.

[5] The appellants have applied in terms of rule 49(6)(b) for the reinstatement of the appeal and condonation for their failure to comply with the time limits in question. The explanation advanced for the delay is that on 12 October 2015 the appellants' Cape Town correspondent requested transcripts of Henney J's

judgments of 11 February 2015 and 29 April 2015. Despite frequent reminders to the transcription service, the signed judgments were only received on 24 February 2016. On 2 March 2016 the appeal documents were delivered to the company tasked with binding the record. A draft appeal record was received back on 9 May 2016. The record was only released on 8 June 2016 following payment of the company's invoice. There was then a delay of a couple of weeks in order to obtain a power of attorney.

[6] The explanation is not satisfactory. I find it difficult to understand why it was necessary to obtain copies of Henney J's judgments from the transcribers. Henney J handed down written judgments, both of which must have been included in the petition to the Supreme Court of Appeal and must thus have already been to hand when leave to appeal was granted. Be that as it may, it appears that the Cape Town correspondent did in fact go through a further process of obtaining Henney J's judgments, which only came to hand on 24 February 2016, by which time the appeal had already lapsed. Once the bound record became available on 9 May 2016, the appellant's could and should have proceeded more swiftly.

[7] Although the explanation is not satisfactory, the appellants were clearly intent on prosecuting the appeal. The respondent has not suffered any prejudice. As will appear from what follows, the appellants enjoy good prospects of success in the appeal. I have thus come to the conclusion that condonation should be granted and the appeal reinstated.

Procedural background

[8] The appeal record comprises the papers in the Municipality's application for the dismissal of the main case. The papers in the main case are not part of the appeal record. Henney J did not, in granting the dismissal application, refer to the merits of the main case. Neither side in their heads of argument referred to the record in the main case or said that it should be placed before us. Accordingly, and although Mr la Grange suggested that we should have regard to the papers in the main case, I do not think that this would be appropriate nor is it necessary for a proper adjudication of the appeal. Certain information about the main case was

traversed in the dismissal application and I shall confine my attention to such information.

[9] During 2004 and 2005 the applicants were among a number of people who bought plots from the Municipality in Fernkloof Estate in Hermanus.

[10] On 20 July 2011 the applicants issued an urgent application for hearing on 27 July 2011 for an order that the Municipality arrange for Fernkloof Estate to be fully protected by electric fencing within such period as the court might direct.

[11] The application was postponed on several occasions and eventually served before Henney J on 7 June 2012 and 31 July 2012. By this stage answering and replying papers had been filed. Various interlocutory applications were pending, including (i) applications by the applicants to condone the late filing of their replying affidavits and the late filing of their heads of argument and for an order in terms of rule 35(14) directing the Municipality to make discovery; and (ii) applications by the Municipality to strike out material from the applicants' papers and for leave to cross-examine Kleynhans. The Municipality had also taken various preliminary points, one of which was a complaint that the applicants had failed to join various necessary parties, being the owners of properties within Fernkloof Estate, abutting owners, the Hermanus Golf Club, the Fernkloof Estate Master Property Owners Association ('MPOA') and various precinct owners associations.

[12] Henney J heard argument on the non-joinder objection. We were informed from the bar that the striking-out of application was also argued, the Municipality's contention being that inadmissible material should be excised before the papers were served on any parties who might have to be joined.

[13] It appears that Henney J agreed with the Municipality's non-joinder point but disagreed that the striking-out should be decided before the joinder of further parties. On 13 August 2012 he issued an order requiring that an attached notice be served on the parties indicated therein. The attached notice required any party claiming a right to be joined to file an affidavit within 100 days setting out the grounds upon which he claimed such right. In the absence of an affidavit, the person

in question would be treated as having elected to abide the court's decision and waived the right to be joined. The parties were granted leave to approach Henney J in chambers after the expiry of the 100-day period to make a ruling on who should be joined and to provide directions for the further conduct of the case.

[14] The order was duly served. The 100-day period expired on 11 September 2013. Although various recipients filed affidavits, none of them stated that they wished to be joined. Whether those affidavits are admissible in the main case is not a question with which I need concern myself.

[15] On 13 March 2014, about six months after the expiry of the 100-day period, the Municipality's attorney, Ms Chin ('Chin'), wrote to the applicants' attorney, Mr Range ('Range'), stating that according to her calculations the 100-day period lapsed on 13 September 2013. She said that it seemed that security at Fernkloof Estate was no longer a concern to Kleynhans and she assumed that the applicants no longer wished to proceed with the main case. She stated that the Municipality could not leave the matter pending. In the absence of a response by 20 March 2014, the Municipality would approach the court to dismiss the main case.

[16] Range responded on 20 March 2014, stating that he had been unable to contact his 'client' for instructions. He thought his client might be temporarily out of the country.

[17] Chin replied on 25 March 2014 stating that she assumed Range's 'client' to be Kleynhans. She questioned why Range did not communicate with Kleynhans' wife who was in Hermanus.

[18] On 28 March 2014 Range wrote to Chin stating that his instructions were that the applicants intended to proceed with the main case, that he had been instructed to update the court file in order to address Henney J in accordance with his order of 13 August 2012. He said that he would in due course provide Chin with an updated index and request available dates to appear before Henney J.

[19] Several weeks later, on 15 April 2014, Chin wrote to Range recording that she had not received an updated index or dates to appear in chambers. She said that if these were not received by 25 April 2014 the Municipality would approach the court for dismissal of the main case.

[20] Range replied on 29 April 2014 stating that he was still in the process of updating the index and would revert in due course.

[21] On 5 May 2014 Chin wrote to Range to say that in the absence of further developments her instructions were to proceed with a dismissal application.

[22] The parties met Henney J in chambers on 27 June 2014. Range says that because the meeting was scheduled without prior consultation with him, his senior counsel was not able to attend. At the meeting Chin handed to Henney J an affidavit dated 18 June 2014 in which the Municipality sought directions from the judge regarding the Municipality's proposed dismissal application. Chin did not send a copy of the affidavit to Range in advance of the meeting nor did he receive a copy at the meeting (apparently the copy intended for him was given to the judge because the latter preferred not to receive the original).

[23] It is common cause that at this meeting Range said that the applicants wished to continue with the main case but might wish to file further affidavits. According to Chin, Range gave no adequate explanation for the applicants' delay in prosecuting the case. Chin says that Henney J agreed that it would be appropriate for the Municipality to deliver a dismissal application.

[24] The Municipality delivered its dismissal application on 1 September 2014 for hearing on 14 October 2014 or on such other date as Henney J might direct. Chin made the supporting affidavit, attaching her earlier affidavit of 18 June 2014. On 10 October 2014 and by agreement the judge made an order postponing the dismissal application to 2 December 2014 with a timetable for further affidavits. Opposing and replying papers were filed during October and November 2014.

[25] Henney J heard the dismissal application on 2 December 2014. He delivered judgment on 11 February 2015, dismissing the main application with costs.

Requests for mediation

[26] The above chronology does not deal with two matters which assumed significance in the dismissal application, namely attempts by the applicants to have the matter referred to mediation and the MPOA's commissioning of a security report.

[27] As to the first of these matters, the applicants' senior counsel, Mr Nelson, is an enthusiastic proponent of mediation. On 19 May 2012 he suggested to the Municipality's counsel that the dispute be referred to mediation. On 21 May 2012 Chin wrote to Range stating that her client declined the mediation invitation. Range responded on 24 May 2012 with a detailed motivation for mediation. Chin replied on the same day, repeating her client's rejection of mediation. She said that at the hearing of the case (then scheduled for 7 June 2012) the Municipality would try to prevent a further escalation in costs by asking the court to dismiss the main case, based on the applicants' failure (at that stage) to file replying affidavits or heads of argument in accordance with the rules.

[28] As previously noted, the application was postponed on 7 June 2012. Mr Nelson repeated his proposal for mediation on several occasions during June and July 2012 but with no greater success than before.

[29] After the service of the order of 13 August 2012 on various potentially interested persons, the applicants' legal representatives sought to resuscitate mediation by canvassing it with the Hermanus Golf Club and property owners.

[30] On 16 May 2013 Range, acting on behalf of Kleynhans and his wife (the first and second applicants in their capacities as trustees of the Kleynhans Family Trust), referred the dispute between the Trust and the Municipality to a firm called Equillore for mediation, tendering to meet the cost of the initial two-hour mediation meeting. Range stated in the dismissal application that this was done in a further attempt to resolve the matter in an expeditious and cost-effective way

[31] Following a telephonic discussion between Chin and the Equillore mediator, Mr G de Kock, on 23 May 2013, Chin emailed De Kock, complaining that she had still not received the relevant information from him in order to discuss the mediation proposal with her client and counsel. On the same day De Kock sent her an email, copied to the Municipality, attaching a copy of the referral to mediation and seeking the Municipality's consent to participate in mediation.

[32] Chin responded on 30 May 2013, stating that the Municipality agreed with her that there should not be mediation. She apparently took umbrage at De Kock's having communicated with the Municipality directly (presumably by including the Municipality as a recipient of his email to Chin). This was said to be unprofessional and left her and the Municipality in doubt as to whether De Kock could be trusted to handle mediation in accordance with the ethical rules of the legal profession.

[33] De Kock responded on the same day explaining why he thought mediation appropriate and taking exception to Chin's allegation of unethical conduct.

[34] On 31 May 2013 Chin wrote to De Kock reiterating her instructions that the Municipality was not willing to participate in mediation. She said the only feasible resolution of the matter was for the applicants to abandon their case and tender costs.

[35] Despite this clear statement of the Municipality's position, De Kock on 12 July 2013 sent to Chin and to various other persons notice of a mediation meeting to be held on 20 July 2013. Various parties attend the meeting but not the Municipality's representatives. Range says that because of the Municipality's absence no vote was taken on mediation.

[36] It will be recalled that the 100-day period expired on 11 September 2013. There seems to have been no further reference to mediation prior to the Municipality's launching its dismissal application on 1 September 2014.

The security report

[37] Mr Nelson, Range and Kleynhans attended a meeting of one of the precinct property owners associations on 3 August 2013. This was shortly before the 100-day period was to expire. During this meeting they learnt that the MPOA had decided to appoint an independent security specialist, ISC, to do a survey of the weak points in Fernkloof Estate's security. Range says that after this meeting he and Mr Nelson advised the applicants not to proceed with the main case pending the furnishing of the security report. At that stage it was expected that ISC would furnish the report by early September 2013.

[38] The 100-day period expired on 11 September 2013 without the security report yet being to hand. ISC had still not produced it when Chin resumed correspondence with Range on 13 March 2014. In the letters he wrote to Chin on 20 March 2014, 28 March 2014 and 29 April 2014, Range did not say that the applicants were awaiting a security report before proceeding with the main case.

[39] ISC's report is dated 8 May 2014 but Kleynhans says that he only received it on 18 August 2014. In the meanwhile the parties had met with Henney J on 27 June 2014. It is common cause that Range did not tell the judge that the applicants were holding back because they were waiting for a security report.

[40] According to Chin, she and the Municipality first learnt of the existence of a security report when it was attached to the answering papers in the dismissal application.

Legal principles applicable to dismissal application

[41] Our courts have the inherent power to prevent an abuse of their processes. This inherent power does not violate s 34 of the Constitution which provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or Tribunal in a fair public hearing.

[42] Inordinate or unreasonable delay in prosecuting a case may constitute an abuse of process and warrant dismissal (see *Cassimjee v Minister of Finance* 2014

(3) SA 198 (SCA) para 10 and cases there collected). In para 11 of *Cassimjee* Boruchowitz AJA said the following regarding this form of abuse of process:

'There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable and, third, the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.

[43] In para 12 Boruchowitz AJA said that the following approach, articulated by Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd; Bostik v Bermondsey and Southwark Group Hospital Management Committee; Sternberg v Hammond* [1968] 1 All ER 543 (CA) at 561e-h, commended itself to him:

'[A] defendant may apply to have an action dismissed for want of prosecution either *(a)* because of the plaintiff's failure to comply with the Rules of the Supreme Court or *(b)* under the Court's inherent jurisdiction. In my view it matters not whether the application comes under limb *(a)* or *(b)*, the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.'

[44] There is some tension between the approach summarised in para 11 and the approach of Salmon LJ approved in para 12. In terms of the latter approach, inordinate delay and serious prejudice must be established. Although there is no bright line between inordinate delay and lesser delay, Salmon LJ observed that 'it should not be too difficult to recognise inordinate delay when it occurs'. Boruchowitz AJA likewise referred in para 10 to 'inordinate or unreasonable delay' as being at the heart of this type of abuse. But the second part of para 11 appears to suggest that slight delay accompanied by serious prejudice might be a sufficient basis for striking out an action as an abuse of process.

[45] Para 11 of *Cassimjee* is a summary of what Richings AJ said in *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558B-I. Richings AJ gave, as an example of relatively slight delay but serious prejudice, an action arising from an assault or a collision where the events occurred in the space of a few seconds and much depended on the testimony of eyewitnesses whose memories might become blurred in the course of time. There might, on the other hand, be cases of inordinate delay but only slight prejudice, such as where the matter turns on the construction of documents or a sequence of correspondence.

[46] In my respectful view, Richings AJ's contrasting of relatively slight delay and inordinate delay does not detract from the fundamental requirement of inordinate or unreasonable delay. His distinction, and Boruchowitz AJA's adoption of it, should rather be understood as indicating that in assessing whether a delay is inordinate or unreasonable one needs to have regard to the nature of the case and the type of prejudice which delay could potentially occasion. A delay which is inordinate or unreasonable in one type of case may not be so in another type of case.

[47] It is appropriate here to mention the types of delays which have featured in dismissal applications. In *Cassimjee* the delay was 25 years. This was inordinate on any test. Unsurprisingly the dismissal application succeeded (there was also evidence of prejudice). In *Gopaul* there was inactivity for about four years before the plaintiff demanded a plea. The judge said that the plaintiff had been extremely dilatory but so too had the defendant. In the absence of prejudice, he declined to strike out the action. The following delays featured in the cases collected in para 10

of *Cassimjee*: *Schoeman*[1] – six years; *Kuiper*[2] – seven years; *Molala*[3] – four and a half years; *Sanford*[4] – six years; *Golden International*[5] – five years. In all these cases except *Kuiper* the dismissal applications succeeded. Mr Nelson provided us with a schedule of various unreported judgments where delays ranging from three years to sixteen years were considered. In some the dismissal applications failed, in others they succeeded.[6]

[48] It has been emphasised in a number of cases that the court's inherent power to dismiss a case as an abuse of process, whether on account of delay or other grounds, is a power to be sparingly exercised and only in exceptional circumstances.

[49] Mr la Grange submitted, with reference to authority (inter alia *Grovit & Others v Doctor & Others* [1997] 2 All ER 417 (HL)), that a litigant who commences and continues proceedings with no intention of bringing them to a conclusion is guilty of an abuse of process and that such proceedings may be struck out whether or not there has been inordinate and inexcusable delay or prejudice. Assuming that to be so, and for reasons which will appear later, I do not think the appellants had the state of mind necessary to constitute this particular form of abuse. Furthermore the dismissal application was avowedly brought on the basis of inexcusable delay and resultant prejudice.

[50] Since we are considering this matter on appeal, the question arises as to whether Henney J was exercising a discretion in the strict sense, in which case we could only intervene only limited grounds. In *Cassimjee* it was held that the power in question was a discretion in the strict sense (para 23 read with para 11). There is arguably a distinction to be drawn between a finding that the claimant has abused the court's process and the decision whether or not to dismiss the claim as a result

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[1] *Schoeman & Andere v Van Tonder* 1979 (1) SA 301 (O).
[2] *Kuiper & Others v Benson* 1984 (1) SA 474 (W).
[3] *Molala v Minister of Law And Order & Another* 1993 (1) SA 673 (W).
[4] *Sanford v Haley NO* 2004 (3) SA 296 (C).
[5] *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C).
[6] See also *Elridge v ABS Bank Ltd* [2015] NZHC 44 para 104 where a New Zealand judge said that he was not aware of the case where a delay of less than 12 months had been held to be inordinate.

of the abuse, with only the latter involving a discretion, the former being more in the nature of a jurisdictional fact. It appears to me, however, that the discretion contemplated in *Cassimjee* was understood to encompass the whole evaluative exercise and by this we are bound.

The delay and the reasons for it in present case

[51] I consider under this heading the question whether the applicants were guilty of inordinate or unreasonable delay and whether the delay was inexcusable.

[52] It is common cause that the 100-day period contemplated by Henney J's order of 13 August 2012 expired on 11 September 2013. The manner in which this period is calculated does not appear in the record. The order was duly served by the sheriff during August 2012. There was a further requirement that the papers be made available electronically on the Municipality's website and in hardcopy at the Hermanus Municipal Library, with the responsibility to do this resting on the Municipality. Be that as it may, the Municipality did not allege in its dismissal application that the applicants were responsible for any delay between 13 August 2012 and 11 September 2013.

[53] In respect of the period prior to 13 August 2012, the applicants do not appear to have been guilty of any significant delay, even though they were late in filing their replying papers in the main case.

[54] The delay which needs to be assessed is the one which occurred after 11 September 2013. The Municipality delivered its dismissal application on 1 September 2014. If this is the relevant period, the delay is about eleven and a half months. It might be said, however, that the relevant period should only be reckoned to 27 June 2014, the day on which the parties appeared in chambers before Henney J, since on that day the Municipality's legal representatives informed the judge that the Municipality would be bringing a dismissal application and he indicated that this would be the appropriate course of action. On this basis the delay was about nine months.

[55] Although the delay was between nine and twelve months, this case differs from those mentioned earlier in that there was not complete inactivity. There was an exchange of correspondence between the attorneys during March-May 2014. Range wrote three letters, at least two of which made clear that the applicants intended to proceed with the main case. And in June 2014 the parties appeared before Henney J, on which occasion Range repeated that his clients wanted to go ahead with the main case. After Range's letter to Chin of 28 March 2014 the Municipality could not have been under the misapprehension that the case had 'died'. The Municipality was not in the same position as a number of the litigants in the cases previously mentioned, where 'sleeping dogs' were, after some years, rudely awakened by a bolt from the blue.

[56] As I have indicated, in assessing whether delay is inordinate or unreasonable one may have regard to the nature of the litigation and the potential for delay to cause prejudice. Most dismissal applications concern trial actions. The present case was an opposed motion. Founding, answering and replying papers in the main case had been filed. We were told from the bar that there had also been supplementary affidavits from the applicants and supplementary answering affidavits from the Municipality dealing with new allegations of fraud levelled at the Municipality. It thus appears that most if not all of the evidence relevant to an adjudication of the main case was already before the court. This was not a case, therefore, where relatively 'slight delay' might suffice as an abuse.

[57] As will be apparent from my survey of other cases, a delay of nine to twelve months, even if it were marked by complete inactivity, is well below the sort of delay which has previously been found to qualify as an abuse. Having regard to the nature of this particular case and the stage it had reached by 11 September 2013, I do not think the delay of nine to twelve months can be said to have been inordinate or unreasonable, particularly having regard to the intervening intimations from the applicants that they wished to proceed.

[58] In my respectful view, this was a sufficient basis on which the Municipality's dismissal application should have been rejected.

[59] If the delay was of sufficiently egregious to call for an explanation, I would not differ from Henney J in regarding the explanation as unacceptable. As I have already observed, the applicants' obdurate persistence with mediation after it was unambiguously rejected by the Municipality is a red-herring because mediation did not feature in the communications between the parties after 11 September 2013 and was not put up by the applicants as justifying the delay after 11 September 2013.

[60] The only explanation advanced by the applicants was that they were awaiting the ICS report. The applicants do not explain, however, how the ICS report was relevant to the litigation. The applicants had not engaged ICS as an expert witness. There is nothing to show that a finding by ICS that Fernkloof Estate's perimeter security is inadequate would have any bearing on whether the Municipality has a contractual obligation to provide such security. At best for the applicants (though this involves speculation), the ICS report might have caused the MPOA to install improved security, if necessary by raising levies from owners. Although this would have made it unnecessary for the applicants to pursue relief against the Municipality, that would be for reasons extraneous to the litigation.

[61] Mr Nelson said that the applicants expected ICS to furnish its report in early September 2013. They must soon have realised that this expectation was misplaced. Yet they allowed months to pass without taking further steps in the litigation. What is worse, Range – in response to letters from Chin – failed to disclose that the applicants were, on his advice and that of senior counsel, holding back until the security report was to hand. He also failed to disclose this to Henney J. This is quite inexplicable unless he feared, as he might well have done, that the Municipality would not have countenanced delay on this account. Instead he claimed that he was still working on an updated index but nothing in that regard was in fact done

[62] While Range's lack of candour is to be deprecated, I cannot find on the papers that his clients were not following the advice of their legal team in allowing the application to lie in abeyance. It also cannot be found that they did not genuinely intend to pursue the application. They may have hoped that the ICS report would open up an avenue for settlement or that implementation of its recommendations

would render the fight against the Municipality academic except for costs. But they say, and I cannot reject, that if the ICS report did not have the desired result they intended to proceed with the application.

[63] *Cassimjee* lays down that the court may also have regard to the reasons, if any, for the Municipality's inactivity and its failure to avail itself of remedies which it might reasonably have been expected to use in order to bring the application expeditiously to hearing. The Municipality allowed six months to pass from 11 September 2013 before its attorney wrote to Range about the expiry of the 100-day period. There is no explanation for this delay. Instead of making constructive proposals to have the main case heard, Chin stated, somewhat opportunistically, that she assumed the applicants no longer wished to proceed with their case and threatened a dismissal application in the absence of a response by 20 March 2014.

[64] There was in fact a response by 20 March 2014. I have already summarised the further correspondence. It is apparent from Chin's letters that a dismissal application, rather than the hearing of the main case, was the focus of the Municipality's attention.

[65] There were less drastic remedies than dismissal open to the Municipality. In terms of rule 6(5)(f) the Municipality was entitled to apply for the allocation of a date if the applicants failed to do so within five days of delivering their replying papers. The applicants' replying affidavits were, it seems, filed by mid-2012. There were apparently supplementary founding and answering papers. We gather that these too had been filed by the time Henney J heard argument on 31 July 2012. It seems the applicants did not file supplementary replying papers. In terms of rule 6(5)(e) they would have had ten days from the filing of the answering affidavits to do so. If after a further five days the applicants failed to apply for a date (as was evidently the case), the Municipality was free to do so.

[66] In the alternative, and more plausibly in the circumstances of this particular case, the Municipality could have sought directions from Henney J in accordance with his order of 13 August 2012. The Municipality did indeed rely on this order when arranging the meeting with the judge on 27 June 2014 but, instead of seeking

directions that would allow the main case to be heard, the Municipality's legal representatives said that their client would be bringing a dismissal application. What the Municipality should have done is to ask Henney J to rule either that the applicants were barred from filing further affidavits or that they should file them by a specified date and in either event to specify a date on which he would hear the main case. If the Municipality still required Kleynhans to be cross-examined (this would on the face of it be somewhat surprising, given that in accordance with the *Plascon-Evans* rule the applicants rather than the Municipality would be at risk in the event of disputes of fact), its legal representatives could have asked Henney J to give directions for the hearing of the evidence.

[67] To sum up so far, there was no unreasonable or inordinate delay. If there was, the applicants' explanation is most unsatisfactory but the Municipality itself is not free from criticism in the way it dealt with the delay.

Prejudice

[68] The Municipality did not demonstrate that the delay would cause it prejudice in the conduct of the litigation. Litigation prejudice was unlikely to be present, given that the case was brought on motion and the affidavits had already been filed. The Municipality did not say that if the case went to oral evidence the delay would occasion difficulty for the Municipality.

[69] In *Cassimjee* the prejudice on which the court relied as a factor in support of dismissal was litigation prejudice, ie a substantial risk that if the case proceeded a fair trial of the issues would not be possible (paras 21-22). This is the sort of prejudice that generally features in the cases and I have no doubt that it will be the type of prejudice which carries the greatest weight.

[70] For the Municipality Mr la Grange reminded us that in *Cassimjee* Boruchowitz AJA said there were no hard-and-fast rules and prejudice was thus not an indispensable requirement. He also referred us to cases in England and Australia where courts have been willing to treat as prejudicial the fact that a defendant has an action hanging over its head indefinitely, potentially affecting the conduct of its

business affairs or requiring it to carry a contingent liability in its books of account. I do not exclude the possibility that prejudice of this kind might also be taken into account by the courts of this country. Nevertheless, this sort of prejudice will usually be relatively slight. In the absence of very specific circumstances relating to the effect of uncertainty on the defendant's business affairs, I would not expect prejudice of this kind to warrant dismissal unless accompanied by very substantial delay.

[71] In the present case, as I have said, the delay was relatively slight. The prejudice is likewise slight if it exists at all. The Municipality did not show that it would suffer any real harm if the main case were allowed to proceed. There was no evidence that any contingent liability reflected in its accounts prejudiced its ability to perform its functions. If instead of seeking dismissal the Municipality had asked Henney J on 27 June 2014 to give directions for the hearing of the main case, the application could in all probability have been heard and judgment delivered before the Municipality's financial year-end (30 June 2015).

Henney J's judgment

[72] It will be apparent from what I have said above that I would have dismissed the Municipality's dismissal application. But since Henney J was exercising a discretion, the question is whether there are grounds for appellate interference. Various formulations appear in the cases: Did the lower court fail to exercise its discretion judicially? Was the court influenced by wrong principles or a misdirection on the facts? Was the result one which could not reasonably have been reached by a court properly directing itself to all the relevant facts and principles? Did the court exercise its discretion capriciously or fail to bring an unbiased judgment to bear on the question? Did the court fail to act for substantial reasons? (See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B; *S v Basson* 2007 (3) SA 582 (CC) para 110.)

[73] In my respectful view the court a quo's decision is vitiated by misdirection. Perhaps on account of the way the case was argued, Henney J appears to have treated the relevant delay as starting from the date on which he made his order on

13 August 2012. In para 31 he said that it was clear from the evidence that after 13 August 2012 the applicants, apart from having facilitated service of the court order, failed to take any further steps to prosecute the matter. The only reference to the fact that the 100-day period stipulated in his order expired on 11 September 2013 is in his quotation from Chin's letter of 13 March 2014. He did not approach the case on the basis that the delay with which he was dealing started on 11 September 2013. Although he did not quantify the delay of which he found the applicants guilty, it is apparent from his judgment that he must have regarded it as lasting for more than two years whereas it was in truth only nine to twelve months.

[74] As a result of this approach, and again no doubt influenced by the content of the affidavits and the submissions made to him, he devoted some attention to the applicants' repeated requests for mediation. Mediation was, as I have indicated, a red-herring.

[75] A further misdirection, again relating to the question of delay, is to be found in the court a quo's treatment of the three basic requirements which the court extracted from *Cassimjee*, namely (i) a delay (ii) which is inexcusable and (iii) which has seriously prejudiced the respondent (see para 51). After identifying these three requirements, Henney J went on to say that, having found that the reasons proffered by the applicants for the delay were contrived and manufactured, he could not but conclude that the reasons for the delay were inexcusable (para 52). In my respectful view, the court a quo erred in the way it framed the first requirement. The cases indicate, in my view, that the delay must be inordinate or unreasonable. The judge did not in terms identify the extent of the delay and evaluate whether or not it was inordinate or reasonable. He went straight to the question whether the delay was inexcusable.

[76] Because the first requirement was not in my view satisfied, the other questions did not strictly arise. If they did, I think Henney J was entitled to find – in relation to the second requirement – that the delay was inexcusable. However he did not address the Municipality's conduct and its failure to pursue less drastic remedies such as seeking his directions for the hearing of the main case or applying for an allocation in terms of rule 6(5)(f). This was an important part of the evaluative

exercise. A failure to consider material relevant circumstances precludes the judicial exercise of a discretion.

[77] I must also respectfully conclude that the material before the court a quo did not leave open, as one reasonable conclusion, that the Municipality was seriously prejudiced by the delay. In para 53 of his judgment Henney J, having found the applicants' delay to have been inexcusable, identified the next question as being whether the Municipality would be seriously prejudiced. In the paragraphs which follow the only prejudice which is identified is that the Municipality is an organ of state litigating with public funds which cannot be expected to sit back and wait for the applicants to decide whether to proceed with the main case.

[78] For these reasons I consider that appellate interference is warranted.

Conclusion

[79] Since the appeal must succeed, the appellants are entitled to the costs of the appeal, including those attendant on the employment of two counsel.

[80] The appellants must bear the costs of their application for condonation and reinstatement, including the costs associated with the respondent's answering affidavit.

[81] As to the costs in the court a quo, the Municipality's dismissal application was misconceived and should have failed. On the other hand, the applicants without justification delayed for nine to twelve months. Their attorney failed to disclose to the Municipality's attorneys or to the judge that the applicants were holding the application in abeyance until the ICS report was to hand. I think we should mark out disapproval of this conduct by directing that the parties bear their own costs in the court a quo.

[82] The following order is made:

(a) The appellants' application for condonation and reinstatement of the appeal is granted. The appellants must pay the respondent's costs of opposing the application

for condonation and reinstatement. It is recorded for the guidance of the taxing master that the application for condonation and reinstatement was filed after the hearing of the appeal and thus did not take up any court time.

(b) The appeal is upheld with costs, including those attendant on the employment of two counsel.

(c) The order of the court a quo dated 11 February 2015 is set aside and replaced with an order in the following terms: “The respondent’s application for the dismissal of the main case is dismissed. The parties shall bear their own costs in respect of the dismissal application.”

ERASMUS J

SAMELA J

ROGERS J

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