

Let Sleeping Dogs Lie...But Not For Long

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INTRODUCTION

People are often ready to strike the match and embark on litigation, but what happens in circumstances where proceedings are instituted by the plaintiff, yet years go by while no further steps are taken to progress the matter to its conclusion. This article considers the recourse that a defendant may have in such an instance.

THE CONSTITUTION

Section 34 of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”) deals with access to the courts and provides that, “*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.*”

An unreasonable delay in litigation proceedings has the effect of hampering the administration of justice and the right to a fair hearing. Section 173 of the Constitution provides that, “*the Constitutional Court, the Supreme Court of Appeal and the High Court have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*”

The South African courts therefore have the power to ensure that there is no undue delay or abuse of the court process, which may result in vexatious or inordinately prolonged litigation.

SUPERANNUATION OF THE PLAINTIFF’S CLAIM: A DEFENCE AT THE DEFENDANT’S DISPOSAL

Superannuation occurs when there is an inordinate delay in the matter which has the potential to result in the dismissal of the claim. It is a common law remedy that provides relief where there is an unreasonable delay. Factors which can result in the superannuation of a matter are discussed below.

INORDINATE DELAY

In the case of *Cassimjee v Minister of Finance* (455/11) [2012] ZASCA 101 (“**Cassimjee v Minister**”), the Supreme Court of Appeal (“**SCA**”) dealt with its inherent power to prevent the abuse of its process in circumstances of an inordinate delay. At paragraph 11, the SCA outlined the following three requirements to determine whether a matter should be dismissed for an inordinate delay, namely: -

1. there should be a delay in the prosecution of the action,
2. the delay must be inexcusable, and
3. the defendant must be seriously prejudiced by the delay.

The court will examine all the circumstances including the period of the delay, the reasons for such delay and whether any prejudice has been caused to the defendant. At paragraph 12, the SCA referred to a judgment that was handed down in England; In the English case of *Allen v Sir Alfred McAlpine & Sons Limited; Bostik v Bermondsey & Southwark Group Hospital Management Committee; Sternberg & Another v Hammond & Another* [1968] 1 All ER 543 (CA), the court held, “*As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.*” If the defendant can prove the above three requirements as outlined by the court in *Cassimjee v Minister*, the defendant should be successful in the defence of superannuation and the plaintiff’s claim will be dismissed.

MISPLACED EVIDENCE AND UNRELIABILITY OF WITNESSES DUE TO THE EFFLUXION OF TIME

The court in *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W) at 259 (“**Molala v Minister of Law and Order**”) held that when, “*Evidence is lost or becomes tarnished; the Court’s task to discover and recognise the true facts is made more difficult and more inaccurate.*” As time passes, witnesses may struggle to recollect events accurately, documents and evidence may go missing.

Real evidence may be tampered with, and witnesses may no longer be available due to death or incapacity. In this case, the court emphasised that, *“It is in line with the requirements of the administration of justice and is not unfair to tell a plaintiff that, if he delays, he must face up to the fact that the evidential position of another party is involved; that he delays at his own risk if such prejudice to the other party realises to an extent where the administration of real justice is hampered.”* Essentially, this means that a defendant may be prejudiced if the defendant can no longer raise certain defences when compared to the scenario where the matter was prosecuted expeditiously.

In *Molala v Minister of Law and Order*, the delay hampered the Defendant’s ability to produce sufficient evidence as he could not locate the people who were in the vicinity of where the incident occurred. Further particulars were requested on 16 April 1987 and were only delivered on 23 September 1991. In this instance, the court upheld the special plea as there had been a delay of more than four years after the delivery of further particulars.

CONCLUSION

The defendant has the right to be informed of proceedings against them, which proceedings should be reasonably progressed. If the plaintiff fails to advance the case, the defendant may be prejudiced.

A defendant may rely on superannuation to seek dismissal of the plaintiff’s claim. Excessive delays may cause significant prejudice, including loss of crucial evidence. Critically, however, the law does not prescribe a fixed time after which superannuation, or an inordinate delay arises. Each case must be judged by its own facts. The defendant must carefully examine all relevant facts, including the period of the delay, the reasons for the delay and any prejudice suffered by the defendant because of the delay.

Ultimately, defendants may wish to let sleeping dogs lie, but not for long.

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