



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3394/2022

In the matter between:

MATHE MACARTHUR LESELA

Applicant

And

DEIDRE TERBLANCHE

Respondent

HEARD ON: 15 SEPTEMBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 16h30 on 10 February 2023

- [1] The applicant ("defendant") seeks an order for the dismissal of the action instituted against him by the respondent ("plaintiff") in the magistrate's court on the basis of an inordinate delay by the plaintiff in prosecuting the matter.

- [2] The following issues are generally of common cause: the action arises from an accident which took place on 27 January 2012. In the particulars of claim the plaintiff claims payment of the amount of R78 308.32 as damages she sustained when the defendant's vehicle there and then driven by the defendant's employee acting within the course and scope of his employment with the defendant collided with her vehicle. Two years after the accident, on 12 September 2014 the plaintiff issued summons against the defendant and his employee as a co-defendant. The summons was served a year later on 9 January 2015 by way of affixing a copy thereof to the principal door of the defendant's residence. The action was undefended.
- [3] The action went cold until approximately six years later in August 2021 when the plaintiff delivered an application for the amendment of the particulars of claim. The defendant responded by objecting to the proposed amendment. The amendment application was not proceeded with then on 6 July 2022 the defendant was served with a Notice of Bar. This step prompted the defendant to invoke the provisions of Rule 60A of the Magistrates' Court Rules of Court objecting to the regularity of the procedures adopted by the plaintiff. No further steps were taken by the plaintiff since then
- [4] It is the defendant's case there has been an inordinate and unreasonable delay in the prosecution of the action. There is nothing that the defendant could have done to expedite the finalisation of the matter as he was not even aware of the pending action against him until he was served with the amendment application. There has been a further delay since the sought amendment in that, after the defendant delivered the notice to oppose the amendment on 17 August 2021 the plaintiff still did nothing to advance the matter but merely filed a notice of bar a year later on 6 July 2022 without the amendment application being finalized.
- [5] The defendant submits that he would be severely prejudiced in the conduct of his defence if the action is not dismissed because he is not privy to the details of the accident as he was not the driver of his motor vehicle when

the alleged accident occurred. The driver is no longer in his employ and due to the considerate lapse of time, the driver cannot be traced.

[6] The application is opposed. In the heads of argument, the plaintiff raises a point *in limine* objecting to this court's jurisdiction to entertain this action or interfere with the proceedings pending in the magistrate's court. In the answering affidavit the plaintiff's legal representative avers that the defendant is not entitled to the order he seeks because the superannuation procedure has been scrapped, the defendant is responsible for the delay by failing to plead to the summons and to settle the claim and, the defendant has failed to set out the reasons why he did not take further steps to bring this matter to finality instead of bringing this application.

[7] With regard to the plaintiff's defence *in limine*, the applicant's case must appear in her answering affidavit, heads of argument are purely submissions made in favour or against the relief sought they do not constitute evidence. That aside, the court has an inherent jurisdiction to control court proceedings to prevent an abuse of court process including to dismiss an action for want of prosecution if it is satisfied that: there has been an inexcusable delay in the prosecution of the action and that the defendant has been seriously prejudiced thereby.¹

[8] On the facts germane to this matter, the fact that cumulatively, there has been delay of over six years between the date of the institution of the action and these proceedings is indisputable. A delay in prosecuting an action is inexcusable and constitutes an abuse of process warranting a dismissal of the action unless, the plaintiff set outs a credible explanation for the delay.²

[9] The plaintiff's contention that the defendant is responsible for the delay by

¹Section 173 of the Constitution of the Republic of South Africa Act No, 108 of 1996; *Sanford v Haley* NO **2004 (3) SA 296** (CRD) at paras [8] to [9]; *Cassimjee v Minister of Finance* **2014 (3) SA 198** (SCA).

² *Gopaul v Subbamah* **2002 (6) SA 551** (D).

failing to plead or settle the action is sound. Pursuant to the service of the summons the defendant did not defend the action. In terms of rule 12 (1) (a) a plaintiff is entitled to apply for a default judgment where a defendant has failed to deliver a notice of intention to defend the action. There is no Rule which provides for action by the defendant who has not defended an action.

- [10] The plaintiff has not even made an attempt to provide an explanation for the delay in prosecuting the action. Absent a credible excuse, the ineluctable inference is that the delay in prosecuting the action is merely a deliberate abuse of court process and of the defendant's constitutional right to have his trial begin and conclude without unreasonable delay.³
- [11] It is accepted that the defendant is sued on the basis of vicarious liability. The delay is extreme and due to the dormancy of the action, the defendant would be seriously prejudiced in the conduct of his defence if the stale action is allowed to continue as his driver whose evidence is essential in the context of this matter is no longer in his employ and his whereabouts are unknown.
- [12] The prospects of success do not favour the plaintiff and this is based on the plaintiff's failed attempt to amend the particulars of claim.
- [13] I am persuaded that the delay in expediting the action to trial is extreme. The plaintiff has failed to explain fully and reasonably the delay in order to enable the court to interrogate the responsibility and the reasons of her ineptitude. I have consequently arrived at the conclusion that the application ought to succeed. There is no reason why the costs should not follow the result.
- [14] In the circumstances, I grant the following order:

³ S35 supra at fn1.

1. The action instituted against the applicant in the magistrate's court under case number 23811/14 is dismissed with costs.



APPEARANCES:

Counsel on behalf of the applicant:

Instructed by:

Mr NW Phalatsi

NW PHALATSI & PARTNERS

BLOEMFONTEIN

Counsel on behalf of the respondent:

Instructed by:

Adv GC Steenkamp

HONEY ATTORNEYS

BLOEMFONTEIN