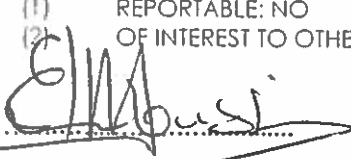
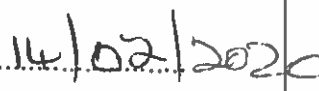


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 57671/2010

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	DATE

In the matter between:

KILLARNEY COUNTRY CLUB

APPLICANT

and

MORRIS F.S

RESPONDENT

In re:

MORRIS F.S

PLAINTIFF

and

KILLARNEY COUNTRY CLUB

DEFENDANT

JUDGMENT

KUBUSHI J,

[1] The applicant seeks an order to dismiss the respondent's action against it (the applicant) for want of prosecution. The action in question pertains to a claim for damages in respect of bodily injuries suffered by the respondent when he was assaulted on 18 October 2007 by Mr Joseph Ndlovu ("Mr Ndlovu"), a security guard who was in the employ of the applicant at the time. Mr Ndlovu is said to have been acting in the course and scope of his employment with the applicant when he assaulted the respondent. Hence, the claim against the applicant is brought on the ground that it (the applicant) is vicariously liable for the conduct of Mr Ndlovu.

[2] On 4 October 2010 the respondent launched an action against the applicant for an amount of approximately R3, 8 million together with interest thereon at the rate of 15, 5% *per annum*. The amount claimed is said to be for compensation for the injuries allegedly suffered by the respondent as a result of the assault. This is the action the applicant seeks to dismiss.

[3] The applicant is defending the action and has raised a two-pronged defence, namely self-defence and provocation. The contention is that when Mr Ndlovu allegedly assaulted the respondent he was acting in self-defence alternatively was provoked by the respondent as a consequence of the respondent's own conduct, the assault on him, verbal abuse and racial slurs.

[4] What occasioned the assault and how it happened is a matter of great dispute between the parties. This, however, is a matter that cannot detain this court as the dispute should be resolved in the action proceedings. What, however, has come to light, which is known to all parties, is that Mr Ndlovu passed away in October 2018.

[5] The factual matrix on which the applicant is basing its claim is that, as earlier stated, the action referred here above was instituted in October 2010 and more than eight years later, in October 2019, when this application was heard, the action had

not been finally prosecuted. The present application is, thus, premised on the delay in prosecuting the action.

[6] The applicant avers that as a result of the delay, it has suffered irreparable trial prejudice which has primarily been occasioned by the death of Mr Ndlovu. The applicant has, consequently, approached court seeking an order dismissing the action of the respondent together with costs, such costs to include the wasted costs occasioned by the postponement of the trial on 19 March 2013, and to include costs of senior counsel.

[7] In opposition to the relief sought by the applicant, the respondent seeks the dismissal of the application with costs. The respondent concedes that there has been an inordinate delay in prosecuting the action but attributes all blame for the delay to his lack of funds to pay his attorneys and the dilatory conducts of his various previous attorneys who failed to heed his instructions and take the matter forward to finality. He suggests that no delay was caused by him personally, and that he did everything in his power to proceed to trial. He also belatedly seeks to blame the applicant for not being proactive in forcing to bring the action to finality.

[8] I am in agreement with the argument by the respondent's counsel in his heads of argument that the application is premised on the fact that the delay in the present matter must be evaluated not as the foundation forming part of the right to have the claim dismissed on account of delay but as an element in determining whether, in all the circumstances, the delay inevitably and irremediably taints the overall substantive fairness of the trial if it were to commence. It is my view that at the heart of the dispute is whether the applicant will, without the *viva voce* evidence of Mr Ndlovu, be afforded a fair trial.

[9] This element of fairness of the trial is what distinguishes the current matter from *Cassimjee*,¹ a judgment of the Supreme Court of Appeal that was extensively quoted by counsel for both parties in support of their respective arguments. In *Cassimjee* the debate centred mainly around whether the inordinate delay of 20 years justified the dismissal of the action for want of prosecution; whereas in this matter the delay occasioned serve only as an element in determining whether, in all the circumstances, the delay has an effect on the overall substantive fairness of the trial if it were to commence.

[10] The principles enunciated in *Cassimjee* relating to the dismissal of the matter for want of prosecution, remain apposite. Therefore, before considering the question of whether the trial will be fair or not, the issue of whether the applicant is entitled to the dismissal of the matter for want of prosecution ought first to be considered because it is what the applicant seeks in the ultimate.

[11] 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. The court's inherent jurisdiction to control its own proceedings includes the power to dismiss an action on account of delay in or want of prosecution.²

[12] The Supreme Court of Appeal in *Cassimjee* when setting out the jurisdictional facts required when dismissing an action for want of prosecution, held that an inordinate or unreasonable delay in prosecuting any action may constitute an abuse of court process and that, in certain narrowly defined circumstances, may justify dismissal of the action. In coming to such a decision the court reasoned as follows:

¹ See *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA).

² *Sanford v Hayley* NO 2004 (3) SA 296 (C) para 8.

"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. . . ."

[13] Therefore the requirements for the dismissal of action for want of prosecution, as enunciated in *Cassimjee*, are simply that:

13.1 Firstly, there should be a delay in the prosecution of the action – the delay must be as unreasonable or inordinate as to constitute an abuse of the process of court;

13.2 Secondly, the delay must be inexcusable; and

13.3 Lastly, the defendant must be seriously prejudiced thereby.

[14] In this instance, the question of whether there was an inordinate delay does not arise as it has been conceded by the respondent. What arise as issues for determination by this court is whether such inordinate delay is inexcusable and whether the applicant has been seriously prejudiced thereby. I deal hereunder with the two questions in turn.

[15] The chronology of events, which is not denied by the respondent, that signal the respondent's inordinate delay, is succinctly summarised in the applicant's heads of arguments as follows: the incident giving rise to the respondent's action took place on 18 October 2007. Summons was only issued nearly three years later on 4 October 2010, a few days before the claim would prescribe. The matter was set down for trial on 19 March 2013 but the respondent was not aware of the scheduled trial and did not prepare for it. The trial was, as a result, postponed at his cost. The

second trial date in this matter is 19 February 2020, seven years after the first trial date.

[16] The next development in the matter took place three years after the postponement of the first trial date when De Meyer De Vries Attorneys were substituted as attorneys of record of the respondent in May 2016. The total of their action related to serving discovery notices in May 2016 and asking for a copy of the applicant's plea in January 2017. Another sixteen months passed before De Broglio Attorneys took over the matter in April 2018. Between April 2018 and July 2018, De Broglio Attorneys took active steps in relation to trial preparation on behalf of the respondent. In October 2018 Mr Ndlovu died.

[17] The applicant's case is that until April 2018, when attorneys De Broglio took over the case, the respondent was culpably supine in bringing his action to trial. The contention is that the respondent's belated effort to bring the matter to trial is too late and the delay is thus inexcusable. It thus appears that the only period where there was actually a delay, which period the applicant is complaining about, is between October 2010 and April 2018.

[18] In his explanation why the inordinate delay should be excused, the respondent has advanced three principal reasons that contributed to the delay. First, that the injuries he suffered and the resultant *sequelae* thereof contributed to the loss of his job and accordingly his income; second, that he was left impecunious because he had no job and had to depend on the attorneys to act for him on a contingency basis and had to borrow money to obtain the medico-legal reports required to institute the action; lastly, the neglect of his attorneys who failed to take the matter forward even when instructed to do so.

[19] The respondent avers in his answering affidavit that he personally did everything in his power to bring the matter to trial. In support of this contention, he has chronicled details of and furnished a paper trail of multiple enquiries made to his attorneys over the period June 2013 to March 2017. The applicant accepts that all the enquiries were made by the respondent to his attorneys. I shall, as a result, not go into each of the said enquiries in detail.

[20] However, the applicant's argument is that the matter could only be moved forward by external outward or objective manifestations by the respondent's attorneys. Consequently, inasmuch as the respondent enquired about progress of his case, and inasmuch as the respondent intended to progress his case, absent communication between his attorneys and the applicant's attorneys or taking steps in the litigation, the matter was not moved forward.

[21] In this regard, the applicant relied for support for this argument in the judgement of the Supreme Court of Appeal in *Mothupi*³ where in the context of waiver the court held that intention to waive like intention generally is to be adjudged by its outward manifestations, and mental reservations not communicated, are of no legal consequence; and that outward manifestations of intention are adjudged from the perspective of the other party concerned.

[22] The contention, therefore, by the applicant is that the respondent's attorneys gave no outward manifestation of the respondent's intentions and desires relating to the conduct of the litigation. As such, so it is argued, the respondent conducted his case through his attorneys. They were his agents. The respondent must therefore accept responsibility, as principal, for what his legal representatives did or did not do.

³ See *The Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 16.

The respondent's attorneys' failures must be attributed to him and bind him. Their lack of diligence is his lack of diligence and offers no valid excuse.

[23] I am however of the view that this current case is not one of those where the respondent must be held liable for the consequences of his attorneys' ineptitude, remissness and lack of diligence. It is apparent from the explanation and reasons furnished by the respondent in his answering affidavit that what mainly constituted the attorney's ineptitude, remissness and lack of diligence was mainly because of his impecuniousness.

[24] The various attorneys had to act on a contingency basis because the respondent was unable to pay their fees due to not being employed. It is also evident that the respondent did not lie supine and did nothing as the applicant wants to suggest. Firstly, it should be accepted that the respondent is a lay person when it comes to matters of law. He had to depend on the advice of his attorneys and accept whatever it is they told him. From what he was told by the attorneys it could not have been easy for him to fathom that his matter was not being attended to. He actually went from one attorneys' firm to another with no real progress being made.

[25] Secondly, the respondent explains in his answering affidavit that from inception of the matter the various attorneys he instructed were unable to make any progress. He had to terminate the mandate of the first attorneys he instructed, Bagraims Attorneys, when he found out that they specialised in labour law. He then consulted with Mr Boshoff of Cornelius Boshoff Attorneys who accepted to represent him on a contingency basis. In order to proceed with the institution of the claim Mr Boshoff required the medical records pertaining to the injuries suffered during the assault. Because of lack of funds he was only able to furnish the said medical

reports within days before the claim could prescribe. Summons was, as a result, issued on 4 October 2010.

[26] From 4 October 2010 until 19 October 2015, when Mr Boshoff withdrew as his attorney of record, the respondent was made to understand that the matter was on track and that it was being dealt with. This is evident from the various email communications filed of record by the respondent, and accepted by the applicant. The matter had even been set down for hearing, even though postponed, on 19 March 2013. There was thus, no way that the respondent could have suspected that the matter was not being carried forward.

[27] New attorneys, De Meyer De Vries Attorneys, came on board on 30 October 2015 and were substituted as attorneys of record in May 2016. The respondent signed a contingency agreement with them. From the time they came on board these attorneys concerned themselves with the discovery process and pre-trial conference but never proceeded to set the matter down for hearing. In preparation for trial the attorneys referred the respondent to Dr Fine for the evaluation of his psychiatric damages. Therefore, from the time De Meyer De Vries Attorneys came on board until in March 2018 when the respondent's file was taken over by De Broglio Attorneys, the respondent was in constant communication with his attorneys and had no reason to believe that they were not advancing his case.

[28] On 29 April 2018, the respondent substituted De Broglio Attorneys as attorneys of record. De Broglio Attorneys sought to advance the matter, by calling for discovery, convening a pre-trial conference, and applying for a trial date. A pre-trial conference was held, a new trial date allocated and discovery documents exchanged.

[29] On 22 February 2019, De Broglio Attorneys withdrew as attorneys of record, as they were no longer prepared to act on contingency. Hamel Attorneys were then appointed as attorneys of record for the respondent. The matter was then set down for trial on 19 February 2020.

[30] During the intermittent periods when the matter made no progress, the respondent is able to show by means of the various emails filed of record, and to explain in detail all the steps he took, together with his brother Marc Morris, to expedite the matter and the numerous enquiries he made to the attorneys. This, in my view, is indicative of the fact that the respondent was not supine but took the necessary steps in bringing the matter to finality. Under the circumstances, the delay is, in my view, excusable.

[31] The approach taken by the court in applying the three requirements was enunciated in the *Gopaul*,⁴ where the court expressed itself like this –

"It appears to me that the proper approach is for the court to weigh up the period of the delay and the reasons therefor, on the one hand and the prejudice, if any, caused to the defendant, on the other. Thus, there may be cases in which the delay is relatively slight but serious prejudice has been caused to the defendant. This will often be so where the plaintiff's cause of action arises from assault or a motor vehicle collision (to mention but two examples) where the events giving rise to the claim occurred in the space of a few seconds and much depends upon the testimony of eye-witnesses, whose memories may become blurred in the course of time."

⁴ See *Gopaul v Subbamah* 2002 (6) SA 551 (D & CLD) at 558A – B.

[32] The approach was adopted with approval in *Cassimjee*.⁵ In that judgment, the court stated as follows:

“Ultimately the inquiry 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.”

[33] Having found the delay excusable I had to weigh it against the prejudice the applicant stand to suffer should the matter proceed to trial. I found, in my view, that the prejudice is material and outweighs the excusable delay. This will become apparent from the reasons I advance hereunder for such findings.

[34] The applicant avers that it has been seriously and adversely prejudiced by the delay in the prosecution of the respondent’s claim. The contention is that since this is a delictual claim based on an alleged assault – involving two individuals – causing injury and damages, the evidence of Mr Ndlovu is critical to prove the applicant’s defences of self-defence and provocation. Mr Ndlovu is the person implicated in the fracas, and upon whom the defences of self-defence and provocation rest. The death of Mr Ndlovu, as such, precludes the applicant from taking instructions from him, and most significantly, calling him as a witness. This, according to the applicant is highly prejudicial to its case.

⁵ At para 11.

[35] I agree with the sentiments expressed by the applicant in the heads of argument to the effect that in order to illustrate the prejudice that the applicant will suffer, if trial is to commence without the evidence of Mr Ndlovu, it is important to assess the issues on the pleadings on the basis of the facts that are in dispute.

[36] In assessing the said issues, the applicant in its heads of argument outlined the common cause factors between the parties and the facts that are in dispute. The issues in dispute are important for this purpose in the sense that they will require determination at the hearing and evidence in respect thereof must be adduced. The common cause facts outlined by the applicant are that: the incident occurred at approximately 5h30 on 18 October 2007, at the entrance of the applicant's premises; Mr Ndlovu was at the time of the incident in the employ of the applicant as a security guard and that at the time of the incident he was stationed at the entrance of the applicant's premises; and that Mr Ndlovu struck the respondent with a wooden implement.

[37] The applicant further delineated the issues in dispute in respect of the two defences raised by the applicant. In regard to the defence of self-defence the facts at issue are:

37.1 Whether the respondent and/or his brother, Mr Marc Morris verbally and physically assaulted Mr Ndlovu;

37.2 Whether, in the course of and as a consequence of such assault, Mr Ndlovu believed he was in physical danger and defended himself against the assault;

- 37.3 Whether Mr Ndlovu had reasonable grounds of defending himself as he did and whether he was entitled to do so;
- 37.4 Whether Mr Ndlovu's conduct in defending himself was justified in the circumstances;
- 37.5 Whether the item that Mr Ndlovu struck the respondent with was a knobkerrie or other wooden implement;
- 37.6 Whether Mr Ndlovu struck the plaintiff on the head or elsewhere;
- 37.7 Whether Mr Ndlovu's striking of the respondent constituted an unlawful and intentional assault; and
- 37.8 Whether Mr Ndlovu was acting in the course and scope of his employment with the applicant.

[38] Insofar as the applicant's *alternative* defence of provocation is concerned, in the event that the trial court finds that Mr Ndlovu was acting in the course and scope of his employment with the applicant, and in the event that it is found that Mr Ndlovu assaulted the respondent and caused him injury, the contention by the applicant is that the following issues will also arise, namely

- 38.1 Whether the assault occurred as a result of Mr Ndlovu being provoked into such assault; and
- 38.2 Whether such provocation is to be taken into account in mitigation of the respondent's damages, as well as any costs to which he might be entitled.

[39] It is quite clear from the above analysis that the issues in dispute are both factual and legal in nature. Firstly, in my view, the factual issues cannot be determined otherwise than with the *viva voce* evidence of Mr Ndlovu. Secondly, the failure to determine the factual issues will result in the legal issues, which would rest upon such findings, not being decided as well. The applicant is, thus, correct in contending that the prejudice is manifest.

[40] With such glaring manifestation of prejudice which the applicant stands to endure, the question is whether it (the applicant) will be afforded a fair hearing at such trial. I do not think so.

[41] The gravamen of the applicant's complaint is that as a result of the delay, it has suffered 'irreparable trial prejudice' which has primarily been occasioned by the death of Mr Ndlovu. In this regard, the applicant relies on the definition of 'irreparable trial prejudice' proffered by the Constitutional Court in the context of criminal trials. In that judgment, the court defined 'irreparable trial prejudice' as the prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of delay, in consequences whereof such accused may be prejudiced in the conduct of her or his trial.⁶

[42] 'Irreparable trial prejudice' in the context of the current matter is said to be occasioned by the death of Mr Ndlovu as his *viva voce* evidence will not be available.

[43] The Constitutional Court in *Bothma*⁷ when dealing with the concept of alleged 'irreparable trial prejudice' remarked as follows:

⁶ See *S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC) para 51.

⁷ See *Bothma v Els and Another* 2010 (2) SA 622 (CC) para 68.

"[68] Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to the source of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained."

[44] Section 34 of the Constitution 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."

[45] The Constitutional Court in its judgment in *Chief Lesapo*,⁸ recognised at least two aspects to this right. The first right is that of 'the right of access to court', that is, the right to have one's case determined by a court or other independent and impartial tribunal. The second component of the section guarantees a right of fair hearing. The second aspect of the section is what is involved in this instance, hence the question whether the applicant will be afforded a fair hearing should the action commence without the evidence of Mr Ndlovu.

⁸ See *Chief Lesapo v Northwest Agricultural Bank* 2000 (1) SA 409 (CC) para 22.

[46] Section 35 (3) of the Constitution also recognises that a litigant (the section refers to an accused) should be afforded the right to adduce and challenge evidence. Further to that, the esteemed author *Erasmus*,⁹ opines as follows:

"In civil proceedings a trial is the judicial investigation of the claim and defence of litigants as disclosed in the summons and plea; and for that purpose, the hearing of such evidence as may be brought forward by the parties; after which the parties or their legal representatives (if they so desire) are heard in argument, and the judgment of the court is given. . . ."

[47] It is trite that all testimony of witnesses at the trial must be given orally. It follows, therefore, that even in this instance the evidence of the litigants must be given orally. One of the rights of a fair trial, therefore, is the ability of a litigant to call witnesses to give oral evidence.

[48] The authors *DT Zefferet* and *AP Paizes*,¹⁰ in the chapter discussing 'The Rules of Trial' set out the order in which evidence is tendered in court. According to the authors

"The chapter is principally concerned with the mechanics of presenting evidence to the court. It deals with the circumstances in which the court may receive evidence given before the trial, the rule governing the order in which parties present their evidence, the swearing or affirmation, examination in chief, cross-examination, re-examination and impeachment of credit of witnesses. . . ."

⁹ Erasmus: *Superior Court Practice* 2ed Vol 2 at D1 521.

¹⁰ *DT Zefferet and AP Paizes: The South African Law of Evidence* 2ed at 883.

[49] In essence this is all what the applicant ought to do when it presents its defence to the court. It must proffer evidence in chief, cross-examine the witnesses of its opponent and re-examine any of its own witnesses. From the aforesaid, it is, thus, apparent that the challenges of the applicant will be insurmountable without the assistance of Mr Ndlovu as a witness.

[50] It is common cause that the versions of the parties as they arise from the pleadings are mutually contradictory. Mr Ndlovu is the applicant's single critical witness, from whom to take instructions to controvert the respondent's version, to call as a witness and give evidence on behalf of the applicant.

[51] Of cardinal importance is that the defences raised by the applicant places the burden of proof on the applicant. Surely, the applicant cannot be expected to discharge the *onus* in the absence of his only witness who would give evidence that would have the effect of discharging that *onus*. Failure of the applicant to adduce evidence goes to the integrity of the proceedings which cannot be sustained under the circumstances.

[52] All the issues arising in paragraphs [37] and [38] of this judgment can be answered by Mr Ndlovu alone. It cannot be expected of the applicant, without Mr Ndlovu, to answer to issues like, for example

52.1 Whether, in the course of and as a consequence of such assault, Mr Ndlovu believed he was in physical danger and defended himself against the assault;

52.2 Whether Mr Ndlovu had reasonable grounds of defending himself as he did and whether he was entitled to do so;

52.3 Whether Mr Ndlovu's conduct in defending himself was justified in the circumstances;

52.4 Whether the assault occurred as a result of Mr Ndlovu being provoked into such assault.

[53] For instance, the writers *Neethling-Potgieter-Visser* opine that although they support the general rule that mere provocation should not justify a physical assault, they, however, believe that this should not be an inflexible principle. The basic norm should still be the legal convictions of the community, and cases may certainly arise where the verbal incitement is of such a nature that in the particular circumstances the resultant physical assault might be considered reasonable.¹¹ In this instance, the reasonableness of the assault can only be determined on the evidence of Mr Ndlovu. Without such evidence, it will be difficult if not impossible, for the applicant to prove its defence of provocation.

[54] It can also not be expected of the applicant to be able to properly cross-examine the respondent and any of his witnesses without a proper consultation with Mr Ndlovu to obtain his version. Nor will the applicant be able to cross-examine properly without the instruction of Mr Ndlovu in court.

[55] The further argument raised by the applicant in the heads of argument is that having regard to the factual disputes, and the nature of the dispute between the parties, it is patent from the fact of Mr Ndlovu's death that the court's ability to resolve the factual dispute will be severely compromised. And, the applicant is correct.

¹¹ See *Neethling-Potgieter-Visser: Law of Delict* 6ed at p100 ft 473.

[56] The respondent, relying on the judgement in *Bothma*¹² submits that it is premature for this court to decide on the issues of irrefutable trial prejudice. According to him, the trial related prejudice must be established by the trial court. This submission, in my view, has not merit. What the respondent fails to consider is that each case must be decided on its own facts. In this instance, the challenges are insurmountable. The applicant's potential witness, Mr Ndlovu has died and cannot be revived. His evidence is gone and can never be retrieved. There is thus no way in which the fairness of the trial can be sustained. By allowing the trial court to decide this issue will be a waste of time and resources when the issue can simply be decided at this stage of the proceedings.

[57] The respondent, in his answering affidavit, further denies any prejudice attributable to the applicant and suggests that the applicant can still run its case by calling or subpoenaing eyewitnesses who were present when the incident occurred.

[58] This argument by the respondent misses the point. The point is, the respondent has already admitted the issues in dispute in the action. The issues in dispute as already said, are such that they can only be resolved by Mr Ndlovu's evidence. In any event, the eyewitnesses, if any, can only testify about what they saw and heard. They would not be able to testify about Mr Ndlovu's state of mind at the time in question – whether he believed he was in danger or the effect the racism and verbal assault alleged to have been perpetrated by the respondent and his brother, had on him. These are all issues that are within the knowledge of Mr Ndlovu and no one else.

¹² See *Bothma v Els and Another* 2010 (2) SA 622 (CC) para 82.

[59] In any event, the incident took place so long ago that it is unlikely that any witness, should any be found, would be able to give any reliable evidence anymore. It will, in any way, be prejudicial to expect the applicant to rely exclusively on evidence not given by its primary witness.

[60] A case in point is that of *Molala*,¹³ where the plaintiff in that case, sued for damages arising, apparently, out of a police assault. Summons was issued on 3 March 1987 thereafter nothing occurred (save for the exchange of attorneys) until the further particulars were delivered on 23 September 1991 – that is, after a lapse of nearly four and half years. An application for an order dismissing the action was granted, the defendant deposing that due to the delay it had become practically impossible to identify and locate records and potential witnesses.

[61] To make matters worse for the respondent, the only eyewitness known to the parties, Mr Ngubane could not be traced. This is on record and remains undisputed. It is common cause that the Mr Ngubane is not a primary witness in the applicant's case. As already stated, the defences raised by the applicant are defences in which the evidence of its primary witness, Mr Ndlovu, would have the effect of discharging that *onus* placed on the applicant. As such this argument cannot be sustained.

[62] The available body of statements and documents which are attributed to Mr Ndlovu will not assist either as they will not have much evidentiary weight and their admissibility might be questioned.

[63] The respondent brings an argument that in considering the prejudice leg of the enquiry the court must also consider if there was any delay on the applicant's part and whether the applicant has availed itself of the remedies which it might

¹³ See *Molala v The Minister of Law and Order and Another* 1993 (1) SA 673 (W).

reasonably have been expected to use in order to bring the action expeditiously to trial.

[64] In an attempt to win this argument, the respondent relied on the approach postulated in the English appeal court case in *Allen*,¹⁴ where the following was stated at 260:

"Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it. Moreover, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay."

[65] It is on record that the applicant has not been responsible for any unnecessary delay in this matter. The respondent's argument in this regard is, thus, flawed.

[66] A further proposition by the respondent, which in my opinion does not take the matter any further, is that the court should take into account the fact that the applicant proffered no explanation for its failure to avail itself of the remedies to bring the matter to trial. The argument is that the applicant should have set the matter

¹⁴ See *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).

down for trial in terms of the rules of court within six weeks after the close of pleadings.

[67] It has been held that when an application for dismissal is considered, the court should have regard to the defendant's inactivity in the matter. There are many procedural devices open to a defendant during the course of an action to force a dilatory plaintiff to bring his action to finality. If a defendant had failed to avail himself of these remedies when he might reasonably have been expected to do so, the court will look askance at an application by him to dismiss the plaintiff's action merely because of a delay in prosecution. What is reasonable will depend on the circumstances.¹⁵

[68] I do align myself with the reasoning of the court as set out above. However, the difference in this matter is that there are exceptional circumstances that warrant the dismissal of the respondent's action for want of prosecution. These exceptional circumstances are that Mr Ndlovu, a cardinal witness of the applicant has died during this inordinate delay. His evidence, as it has been said several times in this judgment, is no longer available. Again, as already indicated earlier in the judgement, the delay in this judgement was evaluated as an element in determining whether, in all circumstances, it will taint the overall substantive fairness of the trial if proceeded with. I find in this regard that it is so.

[69] The prejudice is significant in the circumstances of this case. And on this ground alone the respondent's action ought to be dismissed for want of prosecution.

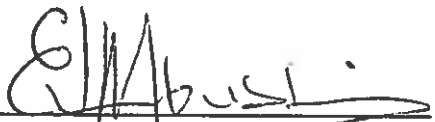
[70] In conclusion, it is my view that the applicant has succeeded to prove its case and is entitled to the relief it seeks. The delay occasioned is unreasonable or

¹⁵ See Gopaul at 558G – I.

inordinate and although I found it to be excusable, the serious prejudice the applicant stands to suffer should the action proceed to trial, outweighs such excuse.

[71] In the premises I make the following order:

1. The respondent's action is dismissed with costs, such costs to include the wasted costs occasioned by the postponement of the trial on 19 March 2013, and to include the costs of senior counsel.
2. This application is granted with costs.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel	: Adv. T. Dalrymple
Applicant's Attorneys	: Everingham, Rogers & Partners
Respondent's Counsel	: Adv. L. Kellermann SC
Respondent's Attorneys	: Hamel Attorneys
Date of hearing	: 22 October 2019
Date of judgment	: 14 February 2020