

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A88/23

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE

SIGNATURE

In the matter between:

KANJANI TRADING (PTY) LTD

Appellant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL:
DEPARTMENT OF AGRICULTURE, RURAL
DEVELOPMENT LAND & ENVIROMENTAL AFFAIRS
(MPUMALANGA PROVINCE)**

Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 15 April 2025.*

Summary: An appeal against an order dismissing an action for want of diligent prosecution. Where the requirements of the dismissal of action are not met, a Court of appeal is entitled to interfere with the exercise of a loose discretion. In dismissing an action for want of prosecution, a court does not exercise a true discretion. Considering and entertaining a settlement of an action is part and parcel of litigation and the Rules purposively interpreted encourages that entertainment and consideration. When such a process happens and other litigation steps are put in abeyance, there is no room for allegations of delay in prosecution, particularly where the other party is unable to demonstrate serious prejudice. The Court below erred when it concluded that (a) there was an inordinate delay occasioned in this litigation; (b) the demonstrated delay, if any, was one that is inexcusable; and (c) that a serious prejudice was shown to have been suffered by the other party.

The Rule 39(11) application, although granted, and the granting thereof had not been challenged, was an unnecessary application, which put a spoke to the litigation. A party may not be forced by a court to amend its pleadings. It remains the wish of a party that can be exercised any time before judgment. Failure to exercise a wish can never be considered as a delay since litigation may still proceed with or without the amendment. The case of the appellant, as pleaded is not a hopeless case. It remains the duty of a court to make such a determination after, in line with section 34 of the Constitution and the application of the common law rule of *audi alteram partem*, hearing evidence for and against. The appellant's case is a simple one of payment for services rendered at the special instance and request of the respondent. On the fair assessment of the pleadings, it is common cause that the appellant performed the services and invoiced for that. The basis of refusal to pay is simple, and it is that the appellant charged for services it was not actually contracted to perform. Such becomes a triable issue to be resolved by evidence and not pleadings. A party is not compelled to plead evidence (*facta probantia*) but only facts (*facta probanda*).

Given the draconian nature of a dismissal of an action order, it must be granted sparingly and only in exceptional circumstances and where the interests of justice so commands. This Court is empowered by section 19 of the Superior Courts Act to direct further litigation of the dispute. Held: (1) The appeal is upheld and the order of the Court below is set aside and replaced with an order dismissing the application to dismiss the action with an appropriate order as to costs. Held: (2) The respondent to pay the costs of the appeal which includes the costs of employing two counsel, to be settled or taxed at scale C. Held: (3) The parties are ordered to apply for judicial case management.

JUDGMENT

CORAM MOSHOANA, J, RETIEF J and TEFFO J (concurring)

Introduction

[1] Litigation is a game in which the Court is umpire¹. Like any other game, it ought to be played in accordance with the rules of the game. Missive dialogue is not a process contemplated in the rules of the game of litigation. The rules instead contemplate the exchange of pleadings (formal court documents setting out parties' respective cases). The present litigation was, for a while, marred by ferocious missive dialogue, which can only suggest that parties busied themselves with something not contemplated in the game of litigation. A fervently held view by one party to the litigation, no matter how eloquently it is displayed in a missive dialogue, does not suggest correctness. In this game of litigation, there is only one umpire, and that is the court.

[2] That said, this is an appeal that arrives at this Court with the leave of two judges of the Supreme Court of Appeal after the Honourable Mr Justice Sardiwalla refused leave to appeal. It is directed to, but, a, part of the litigation

¹ Sir Frederick Pollock, a British jurist and a legal scholar 1845-1937.

that these parties before us are subsumed into. The appeal is opposed by the Member of the Executive Council: Department of Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga Province (“MEC”).

Factual matrix appertaining the present appeal

- [3] It must be pointed out upfront that the record of this appeal runs into some 459 pages contained in five volumes. In this Court’s view, the affidavits filed in support of the application to dismiss were extremely prolix and verbose.² For instance, the founding affidavit, inclusive of the confirmatory affidavits comprised of a solid 88 pages. The answering affidavit inclusive of annexures thereto and confirmatory affidavits comprised of 51 pages. The replying affidavit comprised of 29 pages. It suffices to mention, in passing, that motion proceedings are not designed to deal with disputes of fact. Given the size of the papers in the application to dismiss, a dispute of fact was bound, as it did, to develop.
- [4] Therefore, in this judgment, only the salient facts would be narrated. Kanjani Trading (Pty) Ltd (“Kanjani”) was a service provider to the Department of Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga Province (“DARDLEA”). This, after Kanjani was awarded three contracts. The dispute between Kanjani and the DARDLEA emerged in relation to two contracts, in respect of Gert Sibande and Nkangala. Since the award, Kanjani performed work and invoiced for payment in respect of the performed work. As at the time of the dispute, the DARDLEA had honoured invoices to the tune of about R121,000,000.00.
- [5] Midstride the working relationship, the DARDLEA decided to stop honouring the invoices for work performed by Kanjani. The basis for the refusal to honour the invoices was that there appeared to be *invoicing irregularities* (constituted by wrong hectares charged for, services not contracted for being charged for, and wrong rates per hectares being charged for). The invoices which the DARDLEA

² The poor trees died in vain.

refused to pay amounted to approximately R69,000,000.00. A total of about 452 issued invoices, which of course evidence the work allegedly performed by Kanjani, were disputed and not paid.

- [6] Chagrined by the refusal to pay, on or about 5 August 2014, Kanjani instituted an action against the MEC and demanded payment of an amount of R68,767,767.24. The MEC entered an appearance to defend the action. Since Kanjani held a view that the MEC is bereft of a *bona fide* defence and the appearance to defend was entered solely for the purposes of delay, it applied, in terms of the Rules of this Court, for a summary judgment. Of significance, when the application for summary judgment was resisted, no mention was made that the case of Kanjani was hopeless. Instead, the Head of the Department, in her capacity as an accounting officer, Ms Sindisiwe Prudence Xulu, testified amongst others, as follows:

“The Department denies that the plaintiff is entitled to be paid any amounts as alleged in “A6”, and denies that the plaintiff has rendered services which entitles it to invoice the Department as alleged in “A6”. To the contrary, certain invoices were approved and paid by Departmental officials, in the circumstances where no payment ought to have been made. In certain instances, overpayments were made and invoices were inflated. A proper forensic analysis which will be undertaken in due course will reveal serious shortcomings in the payment system which was implemented by Departmental officials and lack of proper controls which unduly exposed the Department...

The Department’s contention is that the plaintiff has overcharged it. The Department has requested the plaintiff to provide it with credible supporting documentation in substantiation of the invoices that it has submitted which the Department disputes. The plaintiff has failed to provide any credible supporting documentation. The Department is not obliged to pay to the plaintiff invoices which are in dispute in respect of which there is no credible supporting documentation to it.”

- [7] At the time the summary judgment was resisted, the MEC was represented by the State Attorney. For reasons that are not readily apparent from the papers, the State Attorney withdrew as representatives of the respondent. Another set of attorneys came on record for the MEC. Similarly, for reasons not readily apparent, that set of attorneys withdrew as well. The present attorneys of record entered the ongoing litigation space on or about 3 April 2017. For the entire period spanning three years, pleadings were exchanged and various interlocutory applications were launched. The first time that the action was enrolled for trial was on 31 July 2017. I pause to mention that, at that stage, the parties had reached a *litis contestatio* (pleadings were closed).
- [8] Three weeks before the appointed trial date, certain amendments were proposed to the counter-claim (the claim to set aside the contracts on the basis of legality) launched by the MEC. Kanjani proposed a postponement of the trial. This proposal was not met with the approval of the MEC. Such compelled Kanjani to launch a substantive application for a postponement of the oncoming trial. A few days before the commencement of the trial, the MEC relented, as such, by agreement between the parties, the trial was postponed.
- [9] A new trial date was applied for. A date of 11-22 February 2019 was allocated by the Deputy Judge President (“DJP”) of this Court. Owing to the insufficiency of the allocated days for the trial, the DJP was approached again in 2018. Resultantly, the action was enrolled for a six week (11 May to 19 June 2020) trial, which was set to commence on 11 May 2020. Parties were notified of this date on 7 November 2018. Both parties prepared for the trial that was upcoming for a period of about 19 months. On the version of the MEC, the trial preparations continued from his side. I pause to mention that ironically, the MEC was preparing to meet what would later be termed a hopeless case. Howbeit, in late 2019 COVID-19 struck. On or about 26 March 2020, the country was put on hard lockdown.
- [10] On Kanjani’s version, the hard lockdown impeded its trial preparation and it was unable to consult with its witnesses inter-provincially. Due to this impediment, Kanjani, toyed with an idea to apply for a postponement. Such an idea was

overtaken by an application “*supposedly*” launched in terms of Rule 39(11) of the Uniform Rules of this Court. The Rule 39(11) application was argued on 27 May 2020. Ultimately, on or about 8 June 2020, an order which was not supported by any reasons was made by Sardiwalla J. The order was substantial and it comprised of about 5 pages. It suffices, for the purposes of this judgment, to extract a portion of that order, which the MEC argued that it implied that Kanjani was compelled to amend before the action may proceed to trial again. That portion read: -

“The plaintiff is precluded from leading evidence on any type of service allegedly rendered or any type of goods allegedly delivered or any rate allegedly agreed upon, unless services and goods and rate have been pleaded as constituting part of the first or second agreement.”

[11] I pause to mention that this order is consistent with the known and well established principle of procedural law that a party is not entitled at a trial to present an unpleaded case³. It was the granting of the Rule 39(11) application that invited a barrage of missive dialogue. From 22 June 2020 up to and including April 2021, ferocious missive dialogue entered the litigation stage⁴. It ought to be remembered that since the trial did not proceed from 11 May 2020, procedurally, the next step would have been an application for a new trial date. However, it must be mentioned that on or about 9 April 2020, Kanjani effected an amendment to its particulars of claim which saw the quantum claimed being reduced to R65,435, 454.26.

[12] In the ferocious missive dialogue what became apparent was that in the view of the MEC, the Rule 39(11) order foreshadowed the need for various amendments to the particulars of claim. The MEC suggested that such amendments be effected on or about 30 October 2020. Kanjani held a different view and stated that the Rule 39(11) order did not affect all of its claims. This

³ *DHB v CSB* 2024 (8) BCLR 1080 (CC).

⁴ No less than 20 missives were exchanged since January 2020 up to and including May 2020. It appeared that the attorneys were now litigating through correspondence.

difference of opinion on the interpretation of the order continued for a while. At some point, Kanjani toyed with the idea to amend its particulars, but apparently settlement discussions were held, which prevented it from making any amendments to its case. The existence of the alleged settlement discussions was hotly contested by the MEC. Amongst the missives that were exchanged laid a letter to the MEC, which was never responded to, which recorded amongst others, the following:

“Your client being an organ of state which litigates with public funds and which has a constitutional obligation to finalize disputes expeditiously, as you record yourself, may want to reconsider the report issued as far back as 14 April 2014 by ...who recommended that your client pays the amount in terms of the settlement signed by the MEC and which was also recommended by your client’s Acting Chief Director ...

Had the report been acted upon ... your client would have saved millions on interest and legal fees which would have been put to better use in the service of the beneficiaries of the Department.

Our client is still willing to accept as basis for its settlement offer, the amount agreed to between the parties on 28 January 2014, plus interest thereon and a contribution to our client’s legal costs as set out as follows ...

We look forward to your client’s acceptance in compliance with its constitutional obligation to finalize disputes expeditiously and cost effectively.”

- [13] As mentioned, a dispute arose as to whether one Mr Xaba carried any mandate to negotiate a settlement and that he misled Kanjani. However, for the purposes of this judgment, it is obsolete to regurgitate the facts appertaining the disputed settlement allegations. However, it appeared to have been Kanjani’s case that it wished to give those settlement negotiations a chance before it took a further step and which would result in the increase of litigation costs. For that, Kanjani was accused of delaying the progress of the litigation and holding out for a better settlement offer. What was upfront for the MEC was to see Kanjani complying with the Rule 39(11) order and amend its particulars of claim.

Ironically, when in November of 2021, Kanjani sought to amend its particulars, the MEC objected. That forced Kanjani to launch a Rule 28(4) application on or about 30 November 2021.

[14] Withal, on 6 April 2021, the MEC launched an application to dismiss the action. It bares mentioning that as a parting shot, the missive of 2 October 2020 from the MEC's legal team was that if the proposed amendments, the MEC awaited the whole time for, does not arrive, the necessary steps would be taken to bring this farcical litigation to an end as expeditiously as possible. I pause to mention that it was, in my view, inappropriate for the MEC, through his legal team to have labelled the litigation farcical. This Court is unable to observe anything imbecilic or buffoonish about a litigation where payment for services rendered piggy-backed by a legality review (counterclaim) is concerned. That notwithstanding, the application to dismiss the action was launched 10 months after the Rule 39(11) order. Kanjani contends that it was taken by surprise when the application to dismiss was launched.

[15] The application to dismiss the action hearing proceeded on 1 December 2021 and an order, which was not accompanied by reasons, dismissing the action was made on 2 December 2021. That dismissal, put a spoke on the amendment application that was launched on 30 November 2021. This, according to Kanjani. On 14 December 2021, Kanjani requested Sardiwalla J to provide it with reasons for the order of 2 December 2021. Those reasons were only availed in a written judgment dated 22 June 2022. Kanjani launched an application for leave to appeal. On 8 September 2022, an order was made refusing leave to appeal. Kanjani petitioned the Supreme Court of Appeal for leave to appeal. On 30 November 2022, judges of appeal, Honourable Justices Zondi JA and Salie-Hlophe AJA granted leave to appeal.

Applicable legal principles regarding a dismissal of an action

[16] With regard to the law applicable to delay in prosecution of a claim, Lord Denning M.R. in *Allen v Sir Alfred McAlpine and Sons*⁵ had the following to say:

“The principle on which we go is clear, when delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the Plaintiff to his remedy against his own solicitor who has brought him to this plight.”

[17] In *Sanford v Haley*⁶ Moosa J had the following to say:

“...It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of the plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will exercise such power in circumstances where there has been a clear abuse of the process of Court.”

There are three requirements to be demonstrated, for an application to dismiss an action to be granted, namely: (a) there must be a delay in the prosecution of the case; (b) the delay must be inexcusable; and (c) there must be serious prejudice to the defendant⁷. However, the veritable question is whether there is behaviour which oversteps the threshold of legitimacy⁸. This Court is unable to observe such a behaviour in this particular instance. It cannot be said that the conduct of Kanjani was in any manner or shape egregious. On the conspectus of the available evidence, in the view of this Court, the MEC and his legal team employed tactics that derailed the present litigation and made it to be glacial.

⁵ [1968] 1 All E.R 543

⁶ 2004 (3) SA 296 (C).

⁷ *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA)

⁸ See *Molala v Minister of Law and order and Another* 1993 (1) SA 673 (W)

[18] Diplock LJ in *McAlpine*⁹ observed thus:

“It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue...”

[19] Lord Atkin in *Ras Behari and Others v The King Emperor*¹⁰ aptly stated the following: “*Finality is a good thing, but justice is better*”. Dismissing the action even in the absence of grave injustice and serious prejudice will faithfully serve finality but it shall not serve the interests of justice.

[20] In *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others*¹¹, the Labour Court, after placing reliance on the case of *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoer Kommisie en Andere*¹², cited with approval¹³ what was said in *Haley*¹⁴. The Court of Appeal for British Columbia, in *Plaza 500 Hotels Ltd v SRC Engineering Consultants Ltd (Plaza)*¹⁵, felicitously stated the following, which this Court makes common cause with: -

⁹ *Supra* fn 5

¹⁰ [1993] 102 LJ (PC).

¹¹ [2007] 1 BLLR 39 (LC).

¹² 1986 (2) SA 57 (A).

¹³ See *Van Niekerk v Shelfline 139 (Pty) Ltd* (JR1477/11) dated 26 November 2014 as well as *Lebelo and 406 Others v City of Johannesburg* (J2055/15) [2022] ZALCJHB 81 (22 March 2022 at paras [17]-[18] where it was emphasised that grave injustice is the only factor which will propel a Court to exercise its discretionary powers to dismiss a claim.

¹⁴ *Supra* fn 6.

¹⁵ 2024 BCCA 288 (CanLII) at paras 17, 53, 58, 66, 71.

“As to dismissal for want of prosecution, SRC referred to the test set out in *Wiegert v Rogers*, 2019 BCCA 334...

The order sought by the defendants is not readily granted. Dismissal is a “blunt tool” to be used sparingly” in response to procedural delay... The remedy is a “draconian” one “only to be invoked in the most egregious of cases” ... It is to be avoided where it is reasonable to do so...

A dismissal order will not usually be granted on a first application for relief arising from procedural delay, even intentional delay. Injustice might result from such a course of action,

In *Giacomini Consulting*, a five-member division of this Court recently revised the long-standing test for dismissal of an action for want of prosecution described in *Wiegert*. That long-standing test required a judge to be satisfied that there had been inordinate and inexcusable delay in the prosecution of the action; the delay had caused, or was likely to cause a serious prejudice to the defendant and it was in the interest of justice to dismiss the action

In *Kultak Financial Inc v Grewal* 2018 BCCA 94, Justice Wilcock emphasised that the goal of an application to dismiss for want of prosecution is to secure the effective and efficient administration of justice. Accordingly, it relates to the proceeding itself, not the underlying cause of action. For that reason, he stated, it is an error to measure the period of delay from the date the cause of action arose for purposes of determining whether it is inordinate.”

[21] Based on the authority of *Plaza*¹⁶, which this Court does not hesitate to follow, even if it emanates from a foreign jurisdiction, it states a law which is consistent with section 34 of the Constitution of the Republic of South Africa, the dismissal of an action must happen only if the interest of justice would be served thereby. Section 39(1)(c) of the Constitution provides that when interpreting the Bill of Rights, a court may consider foreign law. Dismissal of an action is based on a common law *maxim* of *vigilantibus non dormientibus jura subveniunt* (the law assists those who are vigilant not those who sleep on their rights). Section

¹⁶ *Ibid.*

39(2) of the Constitution enjoins a court, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. Section 34 guarantees everyone a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court. The common law principle of *audi alteram partem* guarantees anyone before being condemned, a hearing. Dismissal of an action before hearing the merits of the action is inconsistent with the *audi alteram partem* rule and section 34 of the Constitution.

[22] This Court agrees with *Plaza*¹⁷ when it said: -

“Under this framework of analysis, the prejudice to the defendant’s ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interest of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.”

[23] Consideration of the interests of justice element entails consideration of (a) the prejudice the defendant will suffer defending the case at trial; (b) the length of the delay; (c) the stage of the litigation; (d) the impact of the delay on the defendant’s professional, business or personal interests; (e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed; (f) the reasons offered for the delay; (g) the role of counsel in causing the delay; and (h) the public interest in having cases that are of genuine public importance heard on their merits¹⁸. In my view, regard being had to any of the above considerations, the interests of justice did not command for a Draconian order of dismissal of Kanjani’s claim, which undoubtedly had reached a trial stage.

Judgment of the Court below

¹⁷ *Ibid* fn 13, at para 72

¹⁸ See *International Capital Corporation v Robinson Twigg & Ketilson* 2010 SKCA 48 at para 45.

[24] It must be stated that from paragraphs 17-19 of the judgment the erudite Sardiwalla J, admirably and with adequate sagacity and perspicacity delineated the legal principles applicable to a dismissal of an action for want of prosecution. However, in this court's view, the learned Judge does not make a definitive finding as to what the delay period is, in this litigation. The first question to be addressed in an application for dismissal for want of prosecution is whether there has been an inordinate delay or not. In *Sternberg & another v Hammond & another*¹⁹, it was confirmed that in order for an application of that nature to succeed, the defendant must show that there is an inordinate delay. Most significantly, the Court remarked that it should not be too difficult to recognise inordinate delay when it occurs. In *Wiegert v Rogers*²⁰, the Court stated that inordinate delay is delay that is immoderate, uncontrolled, and excessive and out of proportion to matters in question.

[25] Regard being had to the finding set out below, this Court must assume that the contended inordinate delay period, is that of eleven months:

[21] ... However, to the contrary the Respondent despite the order of 8 June 2021 blatantly disregarded this Court's directives when called upon for eleven months and did not provide any explanation as to its inability to meet the timeframes set for the filing of the amendments by the Applicant..."

[26] As indicated above, it remained the duty of the MEC to show that there is an inordinate delay. In motion proceedings, a party makes its case in the founding affidavit. Having scoured through the founding affidavit deposed to by Mr Zola Majavu, the MEC's attorney of record, this Court was unable to emerge with any mention of eleven months being alleged as an inordinate delay. Paradoxically, before us, counsel for the MEC, submitted that the inordinate

¹⁹ [1968] 1 All ER 543 (CA)

²⁰ 2019 BCCA 334.

delay was for 19 months. Regretfully, this submission is not bolstered up by the founding papers. Unpleasantly, the Court below does not make mention of it.

[27] In *Director of Hospital Services v Mistry*²¹, the Court, stated the law as follows:

“When, as in this case, the proceedings are launched by way of notice of motion, **it is to the founding affidavit which a Judge will look to determine what the complaint is** ... and as been said in many other cases ... an applicant must stand or fall by his petition and the facts alleged therein and that although sometimes it is permissible to supplement allegations contained in the petition, still **the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.**” [Own emphasis]

[28] In *Minister of Safety and Security v Slabbert*²², the learned Mhlantha JA, as she then was, aptly stated the following:

“The purpose of pleadings is to define the issues for the other party **and the court**. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial. **It is equally not permissible for a trial court to have recourse to issues falling outside the pleadings when deciding the case.**” [Own emphasis]

[29] What this Court could observe from the founding affidavit, under the heading “The delays are highly prejudicial” at paragraph 84, Mr Majavu stated the following:

²¹ 1979 (1) SA 626 (A) at 635H-636B

²² [2010] 2 All SA 474 (SCA) at para 11.

“I have already made the point that Kanjani’s cause of action in relation to its claims in Gert Sibanda arose 9 to 10 years ago, and in Nkangala it was 8 to 10 years ago.”

[30] This allegation seems to make a case of a delay of about 10 years. Of course, this cannot be correct. A delay cannot be reckoned from the date of the cause of action. Nevertheless, Mr Majavu, stated, amongst others, as follows:

“4.32 Sardiwalla J’s order clearly contemplated that Kanjani must amend its pleadings before the matter can proceed to trial again;

4.33 Although almost a year has passed since Sardiwalla J made his order, Kanjani has still not amended (despite me writing to Mr Van Strijp on three separate occasions over the past year practically begging him to finalise Kanjani’s particulars of claim);

4.34 Kanjani continues to refuse to amend its patently deficient pleadings, in fact it refuses to do anything at all to advance the litigation...

4.35 It has become abundantly clear that Kanjani simply cannot advance the litigation. But even if I am wrong on this, it is clear that Kanjani has no interest in advancing the litigation;

4.36 Kanjani is quite obviously holding out for a better settlement offer.”

[31] What this Court can decipher from the above allegations, is that, the supposed inordinate delay was firstly caused by the refusal to amend the particulars of claim, since in Mr Majavu’s interpretation of the court order of 8 June 2020, Kanjani was ordered to amend. That delay, occasioned by the failure to amend, continued for a period of a year. Resultantly, his conclusion, which he acknowledged may be wrong, was that: (a) Kanjani simply cannot advance the litigation (obviously by succumbing to his ebulliently held view that Kanjani was ordered to amend before the matter can proceed to trial again); and (b) Kanjani had no interest in advancing, by complying with the order to amend, the particulars of claim.

[32] It bears mentioning that a pleading must only contain the material facts and not evidence. Evidence is a matter for trial, where the pleaded material facts are substantiated. For example in an action for payment of money for services rendered at a special instance and request, a party is compelled to plead that services were rendered, but never how the services were rendered. Such is a matter for evidence and not pleadings. It is only in motion proceedings that a party is permitted to plead and give evidence symbiotically, but never in action proceedings. Pleadings define issues and not evidence. Hence a party is not permitted to lead evidence on an unpleaded issue. To the extent that Kanjani was expected to plead evidence, such an expectation or compulsion for that matter is not lawful and deserves to be rebuffed or ignored. Put differently, evidentiary issues are triable while material facts are pleadable.

[33] Although it can be said that the learned Judge was not far off the mark, when he stated 11 months as opposed to a year, the veritable question is, where in the pleadings the MEC alleged that there was an inordinate delay of 11 months. Clearly, nowhere. Better still, other than mentioning the 11 months, the learned Judge did not find that the 11 months' delay is inordinate in the sense of it being immoderate, uncontrolled and excessive and out of proportion to the matter in question. This Court is acutely aware that the parties had waited for a period of about three years for a trial date to be allocated. The question then becomes, if waiting for 11 months' amounts to an inordinate delay, why the waiting for three years was not considered an inordinate delay.

[34] This Court agrees with a submission by counsel for the appellant that the 10 months' period, being reckoned from the date of the Rule 39(11) order to the date when the application to dismiss was launched, does not amount to an inordinate delay. In the absence of inordinate delay being shown, *cadit quaesto*. The application for dismissal could not move out of the starting blocks and ought to have been dismissed outright.

[35] With considerable regret, it is noted by this Court, that the learned Judge also suggested in his judgment that Kanjani was ordered to amend its particulars of claim. Regrettably, such is not apparent from the text of the order of 8 June

2020. The SCA in *Martrade Shipping and Transport GmbH v United Enterprise Corporation and MV Unity*²³, stated, after affirming what Trollip JA observed in *Firestone South Africa (Pty) Ltd v Gentiruco AG*²⁴, the following, with regard to the interpretation of a Court order: -

“The starting point ... is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court ... This Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, described the process of interpretation as involving a unitary exercise where, in the face of ambiguity, a sensible interpretation is to be preferred to one which undermines the purpose of the document or order.”

[36] Regard being had to the purpose of Rule 39(11), which shall be discussed later in this judgment, it is perspicuous that the purpose of the order made in terms of it is to deal with issues of where the onus should lie. The order correctly stated a party is not allowed to advance an unpleaded case. Such an order speaks to the issue of an instance of onus contemplated in Rule 39(11). It is not sensible to interpret paragraph 1.4 of the order to mean that Kanjani was compelled to amend. Such an interpretation is at odds with Rule 28 of the Uniform Rules. In terms of Rule 28(1) it takes a desire of a party to amend a pleading. A desire is a strong feeling of wanting to have something or wishing for something to happen. It is incongruent with the literal meaning of the word desire for a Court of law to compel a party to have a wish to amend. The rule outlines the procedure to adopt once a desire to amend is made. In that part of the litigation game, pertaining to the amendment of pleadings, a Court only enters the fray as an umpire if there is an objection to the desired amendment. Until then, the rules of the litigation game do not allow a Court to play any role. What will ignite the involvement of a court is a Rule 28(4) application. Rule 39(11) is not designed to deal with pre-trial stage issues after pleadings are considered to be closed within the contemplation of Rule 29.

²³ [2020] ZASCA 120 at para 3.

²⁴ 1977 (4) SA 298 (A) at 304.

[37] It appears to be the case that the MEC conflated the purpose of Rule 39(11) with the situations catered for in Rules 21 and 23 of the Uniform Rules. It was contended by the MEC that the Rules 21 and 23 processes were swallowed by the Rule 39(11) application. It cannot be. For instance, Rule 21(2) lucidly provides that after the close of pleadings any party may deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. It must be stated that the strictures of the Rule cannot be bypassed through a bastardized Rule 39(11) application. If the requested particulars are not strictly necessary to enable preparation, such particulars may not be requested. Rule 21(4) provides a remedy for failure to deliver the strictly necessary particulars. An application for (a) order for the delivery; (b) dismissal of the action or striking of the defence; or (c) an order a Court deems meet, may be made.

[38] Rule 23 provides a remedy for taking an exception, which if upheld will for instance obliterate particulars that do not disclose a cause of action. Again, it bears mentioning that a bastardized Rule 39(11) application cannot be used to achieve an exception.

[39] It must be remembered that the right to amend is available to a party right up to before judgment. Rule 28(10) specifically provides that at any stage before judgment, a Court may grant leave to amend any pleading²⁵. Accordingly, it cannot be correct, as ardently submitted, that Kanjani had lost its right to amend, nor can it be said that its failure to make a desire to amend constitutes an inordinate delay. The trial could have, as it did in the previous occasion, been enrolled without any amendment being desired or made. Rule 29(2)(b) of the Uniform Rules contemplates that any party may apply for a trial date. As such, once the overt manifestation to desire an amendment does not materialise, the MEC could have applied for a trial date. This step could have saved the MEC from the misery of surmising whether Kanjani has or has not

²⁵ See for general discussion of the principles *JMS v MMAN in re MMAN v JMS* (40230/2020) Gauteng Division, Pretoria High Court dated 21 June 2023, per Retief J.

lost interest. Particularly in a situation where its counterclaim also requires determination.

[40] Accordingly, the conclusion this Court had reached is that the learned Judge erred when he found that Kanjani was compelled to amend. Ordinarily, where a Court upholds an exception, it will only afford a party an opportunity to amend so as to regularise an offending pleading. There is no way that a Court would compel a party to amend. Any order to that effect will definitely be a nullity since it offends the principle of legality. A Court does not have such powers to compel a party to amend. Additionally, to the extent that the learned Judge impliedly found that the period of not desiring to amend amounts to an inordinate delay, the Judge misdirected himself in that regard.

[41] Since this Court finds that there was no inordinate delay demonstrated, it is obsolete to deal with what the learned Judge refers to as an inexcusable explanation. There was simply nothing to be explained and or excused. This Court shall in due course discuss the issue of settlement negotiations used to explain the delay of 10 months. For now, this Court takes a firm view that a delay of 10 months can never be considered inordinate in the context of this case. An incorrect impression was created by Mr Majavu that there was possibly a delay of ten years. A comment in passing is not altogether out of place. In all the interlocutory applications, (Rule 39(11) and the application to dismiss the action), Mr Majavu is the main deponent. Of course, there is nothing wrong, if Mr Majavu had knowledge of all the facts he deposed to. As confirmed in *Ganes and another v Telecom Namibia Ltd*²⁶, he requires no authority to testify. It is just peculiar, if consideration is given to the fact that he joined the litigation only in 2017.

[42] Turning to the most significant requirement of serious prejudice. In this Court's view, counsel for the appellant is correct when he submits that the MEC has failed to demonstrate serious prejudice. At paragraph 20 of the judgment, the learned judge correctly held that the onus of proving what he termed real

²⁶ 2004 (3) SA 615 (SCA).

prejudice, which is no different from serious prejudice, remains with the defendant. Howbeit, such prejudice must be pleaded by the applicant for a dismissal of an action. The MEC pleaded prejudice in the following manner: -

“4.37 This “never ending” litigation is causing serious prejudice to the Department caused by it having to carry a contingent liability of approx. R140 million in its books (a capital of approx. R65 million and in duplum interest of another R65 million and costs estimated at approx. R10 million)

[43] Additionally, the MEC pleaded the following:

“Summary of the prejudice caused by the delays

90. Kanjani is plainly dragging its heels.
91. The undue delays animating the manner in which Kanjani is conducting the prosecution of this case has resulted in serious prejudice of the type characterised in this affidavit by me as “*evidentiary prejudice*”, but there is also the prejudice associated with having to carry liability in accounting records, to which I have made reference in the attached correspondence.
92. If the litigation is allowed to continue, the prejudice will increase as the matter drags on. At this stage there is no end in sight.
93. Moreover, sound policy reasons exist to justify the court bringing this litigation to an end by dismissing Kanjani’s action.”

[44] In the founding affidavit, the so-called evidentiary prejudice was stated by way of examples and not fact, and was stated as, memories of witnesses fading; evidence becoming stale and sometimes lost; and the inability to prove allegations. Speculative evidence of staff turnover and the death of a staff member was also mentioned. The difficulty with this evidence is that the deponent does not state when this “highly prejudicial” situation set in. Ironically, for the trial of 11 May 2020, the MEC and the department’s legal team prepared in earnest for the upcoming trial; attempted to obtain agreement on some of the “big issues”; limit the areas of dispute; and various procedural aspects as to

who bears the onus of proof and the sequence of how evidence in the trial would be produced. The department's preparation for trial was extensive. As a sign of how ready the MEC was for trial, he opposed a request for postponement to a point of compelling Kanjani to launch a substantive application for postponement. Days leading to the trial commencement, the MEC did not behave like a litigant who was highly prejudiced by any delays. In the Court's view, this alleged evidentiary prejudice is nothing but a facade, and an afterthought which was aimed at *oomphing* the application to dismiss. The question remains, why not bring the application to dismiss before 11 May 2020 and only lurk Kanjani by launching a Rule 39(11) application. This Court is far from being convinced about the *bona fides* of the MEC in launching the application to dismiss the action. This will be illuminated when the necessity of the Rule 39(11) application is considered later in this judgment.

[45] The biggest issue for the MEC in the litigation was to have the action of Kanjani, in a rather truncated manner, dismissed because it is a hopeless one in the MEC's ebulliently held view. Unfortunately, for the MEC, it is a Court, as an umpire, that must make that call, after affording litigants an *audi alteram partem*. The issue that Kanjani had a hopeless case, was, as it did, bound to create a genuine dispute of fact, which is incapable of being resolved on the affidavits. Despite, it being pertinently raised by Kanjani, the learned judge did not invoke the provisions of Rule 6(5)(g) of the Uniform Rules. Neither did the learned Judge resort to the *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd*²⁷ rule to justify the order granted in the midst of genuine dispute of facts.

[46] Howbeit, regrettably, nowhere in the judgment, is it apparent that the learned Judge dealt with the alleged highly prejudicial situation. It is unclear as to why that was the case. Instead, the judgment only reflects the following at paragraph 25, which regrettably does not deal with the pleaded case: -

²⁷ 1984 (3) SA 620 (A).

“... In my view the Respondent should have recognized what was at stake when the order of 8 June 2021 was granted and that there was real prejudice to the Applicant by refusing to agree on a date for the amended particulars of claim to be submitted. This is undisputed as the Applicant could adequately prepare its defence and not informing the Applicant of the alleged settlement talks and allowing it to proceed to believe that it would file an amended particulars of claim at some stage, while and holding the Applicant to its bargaining with the Respondent, which the Respondent cannot approve (prove) with confirmatory affidavits or any documentary evidence of its existence is inexcusable. Fairness dictates that the Respondent should not have been allowed to take advantage of the situation.”

[47] With considerable regret, the above finding stands paradoxical to the pleaded prejudice. It is clear that what the learned judge considered to be real prejudice is the refusal to agree on a date for the amendment of the particulars of claim. In this Court’s view, such is far from being considered a serious prejudice. As already held by this Court, the trial could have proceeded without the amendments and the order of 8 June 2020, did not on any benign interpretation compel Kanjani to amend its particulars of claim. Madam Justice Dickson confirmed in *Wiegert*²⁸ that the prejudice, contemplated in an application to dismiss an action, is one concerned with the prejudice a defendant will suffer in mounting and presenting a defence if the matter goes to trial. Such a prejudice is perspicuously absent in this matter. It is indeed so, that in an instance where an inordinate and inexcusable delay is established, a rebuttable prejudice is presumed.²⁹ In this matter no inordinate and an inexcusable delay was demonstrated. As held in *McAlpine*³⁰, a grave injustice must be established. No such grave injustice has been demonstrated on the facts of this case. Regard being had to the issues in this matter, this is likely to be a paper trial. For instance, if it can be shown on an invoice that a wrong rate has been used; a

²⁸²⁸ *Supra* fn 20.

²⁹ *Busse v Chertkow* 1999 BCCA 313.

³⁰ *Supra* fn 5.

wrong hectare has been used; a service not contracted for has been charged for, Kanjani is bound to fail. Interpretation of contracts is a matter of law as opposed to evidence. On application of the *parol* evidence rule, the views of parties prior to the conclusion of a written agreement, may not be admissible. On any interpretation of a document, a Court is bound to consider symbiotically, the text, context and purpose³¹.

[48] The Court in *Lebelo and 406 others v City of Johannesburg*³² had the following to say: -

“[20] The two claims presented by Lebelo and others are to a large degree predicated on the terms of a collective agreement. It is apparent that this will be a paper trial as opposed to strictly viva voce evidence, in relation to the non-payment of the bonus, the COJ relies on the provisions of the collective agreement to justify the non-payment of the bonus. Similarly, in relation to the wage increment claim, the COJ relies on the provisions of the ‘sunset clause’ in the collective agreement. Regard being had to the above, it is difficult to observe any serious prejudice, which the interests of justice would propel this Court to a draconian exercise of discretion.”

[49] Since no serious prejudice was demonstrated, the learned judge erred in dismissing the action, which is simply one of services rendered at the special instance and request of the MEC. On a fair assessment of the pleadings, the parties seem to have enlarged the dispute unnecessarily. Involved herein is not necessarily a breach of contract claim. The two pleaded contracts have been admitted. Both parties quibble about the interpretation of clauses 7 and 8 of the agreements. This is nothing the rules of interpretation cannot resolve. Unless fee farming is the propelling force, there seem to be no logical basis for weeks

³¹ See *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (8) BCLR 607 (CC).

³² (J2055/14) [2022] ZALCJHB 81 at para 20.

of trial. Nevertheless, these are issues that may arrest the attention of the trial Court in due course.

Was a rule 39(11) application necessary or not?

[50] Although a determination on this issue may not necessarily affect the upholding or dismissal of this appeal, since it was raised and argued, it is incumbent for this Court to deal with it. It becomes particularly important because counsel for the respondent audaciously submitted that the action was partly-heard before Sardiwalla J. It was actually not partly-heard.

[51] In considering this question, the best place to start is the text of the rule and where it is located in the Rules. The MEC had taken a wrong view that that which could not be done under Rules 21 and 23 could be done under this Rule. This Court disagrees with that view. The rule reads as follows:

“ 39(11) Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument, may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice.”

[52] As a departure point, this Rule is located in the place where trial procedures are regulated. Such must imply that its invocation is suitable at the stage where pleadings are closed within the contemplation of Rule 29. It could not have been the intention of the drafters of the Rule that re-opening of the closed pleadings must happen at this stage. The Rule is specific as to upon what it must apply. The ruling to be made is also confined to what it must apply to. This is the rule of onus and nothing else. It cannot be bastardized to rule on issues outside the *onus* issue. This Court is acutely aware that the order made in terms of this Rule is not under appeal. This Court will depart from the premise that Kanjani harbours no intentions to impugn the order.

[53] This Rule was interpreted by Claassen J and this Court agrees with that interpretation in *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd*³³. Claassen J acknowledged that interpretation of the Rule was *res nova* at that time and in order to decide whether the ruling sought before him was competent. In doing so, he said:

“Upon mere reading of Rule 39(11) it seems abundantly clear to me that the term ‘onus of adducing evidence’ has two meanings. It refers firstly to the duty to commence leading of evidence but secondly to the incidence of onus. This construction of the subrule follows logically from the proviso to the subrule....In my view, the express inclusion of the proviso in subrule (11), indicates that the Legislature intended to opt for a more liberal approach, such as that adopted by the Cape Provincial Courts, i.e. to allow a Court to rule at the commencement of the trial on both the duty to begin as well as the initial onus of proof on the various issues which might arise from the pleadings as they stand at that point...Thus the sequence in which evidence is called is expressly linked to the onus of proof derived from the pleaded issues.

In my view it makes good sense that the onus of adducing evidence should also include a ruling regarding the incidence of the burden of proof. Trials such as this where enormous amounts of money are at stake, are not regarded as a tactical game. In my view it would be in the interest of justice that a litigant should be entitled to apply for a ruling pursuant to the express provisions of Rule 39(11) regarding both the order in which evidence is to be adduced as well as a provisional ruling regarding the onus of proof on various issues...

It is now necessary for me to analyse the pleadings in order to establish the duty to begin leading of evidence as determined by the incidence of the onus of proof.”

[54] It is beyond perspicuous that the Rule is there to deal only with (a) duty to begin and (b) the incidence of onus as guided by the pleadings as they stand at that

³³ 2004 (6) 252 (W)

time³⁴. Conspicuously absent from the text of this Rule is a possible order for a party to amend its pleaded case. A typical order that should arise from the application of this Rule is one along the following lines. The plaintiff has a duty to begin and the onus to prove this and that issue. To my mind the rule does not contemplate a substantive formal application, as it was, for some inexplicable reasons, done in this case. The Rule contemplates an informal request for a ruling intra trial proceedings, hence provision for an alteration of a ruling should the interests of justice demand. To my mind, the bringing of a formal and substantive application in this *lis* was like killing an ant with a sledge hammer.

[55] Turning to the question raised and debated. Did, leading to the trial, based on the pleadings as they stood at that time, parties quibbled about the duty to begin and the onus issue? On the facts of this case there was no quibble that Kanjani attracted the duty to begin and the onus of proof on its pleaded case. The pleadings remained practically the same even at the first trial in 2017. The question must be, why was the Rule 39(11) application not necessary at that time? The MEC was ready to proceed to trial, with the same pleaded case. When summary judgment was resisted by the MEC, phrases like '*patently deficient pleadings*'; '*hopeless case*'; and '*never be able to plead a proper cause of action to legitimise the 452 invoices*', had ostensibly not yet reached the vocabulary of the MEC. More importantly, the HOD stated in no uncertain terms that it has a *bona fide* defence. A *bona fide* defence can only be mounted against a claim in law. No suggestion was made by the HOD that the combined summons was excipiable on any basis. A hopeless case does not call for a demonstration of a *bona fide* defence. Simply put, the hopeless case narrative is, in this Court's fervently but respectfully held view, an afterthought and a product of legal machinations. The case of Kanjani is not hopeless and never was. Reaching such a conclusion without hearing evidence is not only a dangerous tactical manoeuvre but a reckless conclusion.

[56] It seems quite obvious that the Rule 39(11) application was truly not necessary. It is beyond doubt that its launching put a spoke on a potential six weeks trial.

³⁴ See *Merryweather v Scholtz and another* 2020 (3) SA 230 (WCC) at 255 G-H

In order to observe the reason why it was launched, one needs to look no further than the missive dialogue. Before the relevant excerpts of the missive dialogue are set out, it is important to make reference to the formal court documents. In preparation of the July 2017 trial, a revised special trial note was filed which recorded the following important aspect, which relates to Rule 39(11):

“Disputed facts in respect of first claim

7.2 On which party the duty rests to demonstrate that the work detailed in the invoices was performed or not, inclusive of the extent of the hectares referred to in the invoices.”

[57] In preparation of the 11 May 2020 trial, another note was prepared by the MEC’s legal team on or about 11 March 2020. That note recorded, amongst other things, the following relevant aspects: -

“Main issues between the parties

18 What is the contract?

18.1 The plaintiff bears the onus.

19 What work had to be done under the contract?

19.1 The plaintiff bears the onus

19.2 The plaintiff will need to establish that it actually did the work that it invoiced for and that such work was done in accordance with the contract.”

[58] Regard being had to the above, the issue of onus, which encapsulates the duty to begin contemplated in Rule 39(11), would have been resolved and an application for a ruling was obviated thereby. However, in the self-same note, the following intimation was made: -

“Interlocutory application if any

21 There are no interlocutory applications at this stage. To this we add only that for approximately 5 years since the summons was first served, the defendant has been telling the plaintiff that its invoices are incorrect

inter alia because they do not conform to the tariff in the contract. The plaintiff has steadfastly denied it and refused to revisit its invoices. Then, as the attached letters make plain, three months before the trial the plaintiff conceded that its invoices are incorrect in as much as they do not conform to the tariff. Now, with only two months to go to the trial, we see no application from the plaintiff to amend its self-confessed incorrect claim based on incorrect invoices. This, despite its stated intention to do so. We raise this point because, without an amendment, we simply cannot understand how the trial can proceed. However, we do not know whether or when the plaintiff will eventually bring this much needed amendment and how the trial will be affected by it.”

[59] It is crystal clear that the MEC held a view that the invoices were incorrect. The MEC also held a view that the only permissible manner to resolve that conundrum is to effect an amendment. In its ebulliently held view, a trial was incapable of proceeding without an amendment being effected. Just to digress a bit, procedurally, if a party holds a view that a pleading is vague and embarrassing or does not disclose a cause of action, a Rule 23 procedure becomes available for use. Should the other party accept the alleged deficiency in an impugned pleading, it may resort to a Rule 28 procedure to regularise the offending pleading. With considerable regret, I find myself being unable to share the ebulliently held view that a continuation of a trial would be handicapped in any manner whatsoever.

[60] That said, I now turn to the missive dialogue. On 28 January 2020, a letter was directed to Kanjani’s legal team. Pertinently, a view was expressed that Kanjani relies on invoices where it claims for items that are seemingly not covered by the agreements pleaded by it. Owing to that view, Kanjani was asked how it plans to prove the invoices. Regard being had to the view held and the question raised, the MEC took a view that the trial should be removed from the roll to enable Kanjani to deal with the view and the question, which the MEC labelled “*shortcomings*”.

[61] On 30 January 2020, Kanjani's legal team responded to the view and the question posed. Of significance, the following was recorded:

- "14.1 We hold the view that the matter should proceed since it is ripe for trial.
- 14.2 We do not view any of the alleged shortcomings raised in your letter to exist or to justify the removal of the matter from the roll.
- 14.3 There is no obligation on our client to indicate how it intends utilising the allotted court time or which witnesses it intends calling. At this stage all issues that are in dispute on the pleadings will unfortunately have to proceed to trial. Our client is again under no obligation to explain why all these issues should proceed to trial..."³⁵

[62] In the correspondence of 14 April 2020, the legal team of the MEC pinned their colours to the mast in so far as the necessity of the Rule 39(11) application is concerned. The following was stated:

"4 ... We believe this is an important issue that the parties should resolve, if possible, before the trial commences. If the plaintiff is not at first to deal with why the invoices are correct and why the defendant should pay same, when will it do so?

5 The problem is compounded by your refusal to explain how you intend to prove the invoices, the sequence of and which witnesses you will call, as well as the topics of their evidence. This is recorded in your letter of 30 January 2020. We need this information to prepare. If we cannot immediately commence with cross-examination, the matter might have to stand down. Furthermore, we want our forensic auditor to be in court when witnesses testify about the invoices, so that he can provide us with his input. We request that you reconsider your stance in this regard."

³⁵ It must be mentioned these views are pitch-perfectly correct. Pleadings define the issues for the parties and for the Court.

[63] On 16 April 2020, the legal team of Kanjani responded. The following, which is apt in my view, was stated: -

“7 Furthermore, the request in paragraph 5 of your letter is quite remarkable, for the following reasons:

7.1 As you should no doubt be aware, your client is not entitled to the information, be it for preparation or otherwise;

7.2 Our client’s stance in this regard has been clear throughout and our client is in any event entitled to conduct the trial in the manner it wishes to do. Your client is not entitled beforehand to be availed of each and every step our client intends taking nor the witnesses it intends calling. “

[64] It was shortly after the above response that the MEC launched the rule 39(11) application on 25 April 2020. For reasons outlined above, this Court takes a firm view that the rule 39(11) was unnecessary and it was used to effectively harass Kanjani, since it did not share the views expressed by the MEC and refused to reconsider its stance. The issue of onus, both as who bears the onus and as to who is to begin, was long resolved, at the time when the application was launched. It is also apparent to this Court that the MEC was attempting to strong-arm Kanjani into an amendment. This Court has already indicated that an amendment is something a party may not be forced to do. In a litigation game, the views of the one party, eloquently or ineloquently expressed, do not constitute the gospel truth. The final arbiter is the Court of law. Section 165 of the Constitution makes it plain, the judicial authority lies with the Courts. A Court of law exercises that judicial authority with due regard to section 34 of the Constitution.

Did Sardiwalla J exercise a true discretion when he dismissed the action?

[65] Counsel for the MEC passionately argued before us that when the action was dismissed, the Court below exercised a true discretion, as such the interference on appeal is limited. With considerable regret, this Court disagrees with that argument. In a true discretion situation, any one of a number of permissible

courses is open to the lower Court. In *Government Printing Works v Public Service Association and another (Government Printing)*³⁶, the learned Govindjee AJA, writing for the majority, with sufficient perspicacity stated the law as follows:

“... Firstly, a discretion in the ‘*true*’ sense is such that any one of a number of equally permissible courses is open to the lower court. That court makes an election, for an example in respect of whether to grant a postponement or costs, and whichever option is selected is entirely permissible and can never be said to be *wrong*. Secondly, a ‘*loose*’ discretion, for an example whether or not to grant an interim interdict, does not necessarily involve a choice between equally permissible options. The court is simply at liberty to have regard to a number of ‘*disparate and incommensurable features*’ in coming to its decision.

... Where the lower court’s discretion is ‘*loose*’, interference is permissible on a broader basis, whenever the appellate court decides its own outcome is more appropriate based on the various factors it has considered. This is typically because the appellate court is in equally good position as the court of first instance to assess the matter.”

[66] In order to grant a dismissal of an action, incommensurably, the three requirements discussed above must be present. A Court below has no luxury to ignore them and still emerge with an unimpeachable decision. Therefore, the discretion to be exercised is a loose one and does not involve an option to select equally permissible options. Dismissing an action where the delay is not inordinate; is excusable and does not inflict serious prejudice, is impermissible in law.

[67] For all the above reasons, this Court concludes that Sardiwalla J had exercised a loose discretion and this Court is entitled, on a broader basis, to interfere and reach its own conclusion as to whether there was (a) an inordinate delay; (b) it

³⁶ [2025] 2 BLLR 112 (LAC) at paras 15-16.

was inexcusable; (c) it caused a serious prejudice, which the interests of justice demands a draconian action of dismissal.

Delay and the settlement issue

[68] A finding has already been made that there is no inordinate delay. It has already been stated what an inordinate delay entails. Nevertheless, the delay of 10 or 11 months, although in this Court's view is not inordinate, it has been explained. Settlement of litigation is a process anticipated in the rules of the game of litigation. Generally, when the litigating parties explore it, it cannot be said that a delay is occasioned thereby. Rule 34 of the Uniform Rules encourages such to happen. In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills of Produce Co (Pty) Ltd and others (Gollach)*³⁷, it was confirmed that it is practice, which practice is encouraged, for parties to settle their dispute out of Court where possible.³⁸ Rule 29(6)(c) provides that every party claiming relief has requested such party's opponent to make a settlement proposal and that such opponent has reacted thereto. This must mean that in the course of litigation, parties must explore settlement of the dispute. Rule 37A(11)(a) encourages a management Judge to explore settlement on all or some of the issues. Accordingly, this Court takes a view that exploring a settlement is part and parcel of the litigation game. Its exploration cannot be equated to a delay in prosecution. Put differently, settlement is inextricably interwoven into a game of litigation to a point that its exploration undoubtedly equates prosecution of an action.

[69] Settlement indeed avoids accumulation of litigation costs. Inasmuch as the MEC disputes any settlement discussions, regard being had to the letter from Kanjani's legal team proposing a settlement, it cannot be found to be improbable that Kanjani attempted to settle the matter for a certain period during the litigation stage. The fact that it may have been misled in the process does not detract from the fact that Kanjani hoped for settlement of the dispute.

³⁷ 1978 (1) SA 914 (A) at 921D and 922B.

³⁸ See *Maswanganyi v Road Accident Fund* (HCAA02/2016) 19 May 2017 at para 4.

Kanjani has been criticised by the Court below for holding out for a better settlement offer. This Court fails to understand the criticism. There is nothing wrong for Kanjani to hold out for a better settlement. It is an everyday occurrence in the game of litigation. In this Court's view the criticism is, with respect, ill-founded. Had Kanjani managed to obtain a better settlement offer, litigation costs would have been obviated.

[70] Before this Court reaches its conclusions, it must deal with the belated argument, by all accounts, of unclean hands, by placing reliance on the judgment of the Constitutional Court in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH (Villa)*³⁹. The issue of unclean hands was not raised before Sardiwalla J. As a Court of appeal, this Court is not empowered to deal with an issue that was never raised at the Court below⁴⁰. It was impermissible for this argument to have been raised. In this Court's view this issue ought to have been pleaded and was not⁴¹.

Conclusions

[71] In summary, this Court concludes that in dismissing the action of Kanjani, the Court below exercised a loose discretion. This Court is entitled to interfere with that exercise of discretion. The requirements for the dismissal of an action has not been demonstrated. As such, the action of Kanjani ought not to have been dismissed. Accordingly, the appeal must be upheld. This Court takes a view that section 19 of the Superior Court Act empowers it to render any decision which the circumstances may require. The litigation in this matter has not been altogether smooth. It is apparent that the legal team of both parties were involved, perhaps unconsciously, in a charade of attempting to demonstrate superior knowledge to each other. Such a charade did not serve the best interests of this litigation. In such circumstances, this Court must order judicial

³⁹ 2024 (1) SA 331 (CC).

⁴⁰ See *Tau Roller Meule (Pty) Ltd v Marcus M Farming CC* (A191/2023) [2024] ZAGPPHC 154 (21 February 2024) at para 14

⁴¹ See *Allcopy Publishers (Pty) Ltd and others v Phillips* (00001/24) [2025] ZAGPPHC 209 (7 March 2025) at para 14.

case management of this litigation within the contemplation of Rule 37A of the Uniform Rules. Such will effectively manage issues like strict time lines for certain actions which will ensure finality of the dispute.

[72] On account of all the above reasons, I propose to make the following order:

Order

1. The appeal is upheld.
2. The order of the Court below is set aside and it is replaced with the following orders:
 - 2.1 The application to dismiss the action is dismissed with costs on a party and party scale, which costs include the costs of employing two counsel to be settled or taxed at scale C
 - 2.2 The respondent must pay the costs of this appeal on a party and party scale, which costs include the costs of employing two counsel to be settled or taxed at scale C.
3. The parties are directed to forthwith apply for judicial case management in terms of Rule 37A(1) of the Uniform Rules in respect of this litigation.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

L RETIEF
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

(I agree and it is so ordered)

APPEARANCES:

For the Appellant: Mr JH Dreyer SC and Mr JW Schabort
Instructed by: Noltes Attorneys, Ermelo

For the Respondent: Mr HC Van Eden SC and Mr K Hopkins
Instructed by: Majavu Inc, Johannesburg

Date of the hearing: 19 March 2025

Date of judgment: 15 April 2025