



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

Case No: **048348/2024**

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: ✓
 SIGNATURE 31 October 2025 DATE	

In the matter between:

ANDRÉ JOHANNES JACOBS

Applicant

and

TELKOM SA LIMITED

First Respondent

TELKOM RETIREMENT FUND

Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 31 October 2025.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant [Mr Jacobs] seeks a declaratory order that the time taken by the first respondent [Telkom] to finalise an action it instituted against him under case 10516/2014 [main action] is unreasonable and following this, an order dismissing the main action with costs, payment of pension benefits and ancillary relief. Such ancillary relief includes an upliftment of an interim interdict granted against the second respondent [retirement fund].

[2] Mr Jacobs relief in this application must be seen against the common cause fact that the board of the retirement fund exercised its discretion to withhold Mr Jacob's pension benefits pending the outcome of the main action.¹ In this way, the enforcement of Telkom's civil claim against Mr Jacobs as his employer, at the material time, is protected should the claim in the main action succeed.

[3] In the main action, Telkom seeks the payment of contractual damages of R 203,539,510.00 as a result of breach of contract. Telkom alleges that Mr Jacobs, at the material time during the period of 2006 to 2012 whilst in its employ, accessed Telkom's Supreme Core Data and sold it to its competitors [Telkom's claim].

[4] Absent a final determination of the Telkom's claim, Mr Jacobs in 2021 before Tolmay J unsuccessfully sought interdictory relief against the retirement fund seeking to compel the fund to pay his pension benefits on the basis, *inter alia*, that the board did not exercise its discretion judicially and fairly when it decided to withhold his pension benefits [first application]². The papers, save for the judgment penned by Tolmay J [Judgment], in the first application did not form part of the papers in this application. However, on the request by this Court, to assist it be in a

¹ Section 37D(1)(b) of the Pensions Fund Act 24 of 1965

² *Jacobs v Telkom and Others* (17342/2021) [2022] ZAGPPHC 551; (2022) 43 ILJ 1902 GP (1 April 2022).

position to consider all the facts and circumstances, was granted access to the filed papers in the first application and the main application.

[5] By way of introduction, in the first application and, in support of the contention that the retirement fund failed to exercise its discretion judicially and fairly, Mr Jacobs, *inter alia*, relied on the fact that Telkom's unreasonable delay in finalising the main action demonstrated its lack of possessing a *prima facie* case against him. The first application was met with Telkom intervening and by way of a counter application, successfully obtaining an interim interdict against the retirement fund. On the 1 April 2022, Telkom's counter application was granted and the relevant prayer 2 of the order stated the following:

"2. *The counter-application is granted and the respondent (retirement fund-own emphasis) is interdicted from making payment to the applicant (Mr Jacobs-own emphasis) pending the adjudication of the action instituted by the first interested party (Telkom – own emphasis) under case number 10516/2014*".

[6] Flowing from prayer 2, Mr Jacob's dismissal and ancillary relief in this application comes into focus.

[7] Telkom opposes the relief sought. Notwithstanding such opposition and a filed answering affidavit, Mr Jacobs elected not to file a reply thereto. Instead, he caused rule 30 notice to be served based on Telkom's failure to file its answering affidavit in time. This became opposed [rule 30 application].

[8] Telkom then filed a substantive condonation application seeking an order to condone the late filing of its answering affidavit. It contended that it was 3 (three) days late and that it had on the last day for filing sought but was refused an indulgence to file late [condonation application].

[9] On the date of the hearing Mr Jacobs Counsel confirmed that he will not be proceeding with the rule 30 application and by agreement, condonation was granted. The costs relating to both these preliminary issues will be dealt with below.

[10] The application proceeded on that basis and on the papers filed. Now to the respective arguments.

ARGUMENTS

Mr Jacobs

[11] The basis for the relief sought by Mr Jacobs is Telkom's delay to prosecute the main action without a credible reason. Counsel in written and oral argument contended that Telkom clearly had no desire to prosecute the claim in that, since the institution of the claim in 2014 it had not even enrolled the main action for trial let alone finalised it. To bolster the argument, reference and reliance was made to the outcome of the first application with reference to the judgment. Such reference notably was that Tolmay J found an inordinate delay to finalise the main action.³ The reliance of an inordinate delay was to demonstrate the fulfilment of the first recognised requirement set out by the Supreme Court of Appeal [SCA] in the Cassimjee matter.⁴ The SCA in the Cassimjee matter set out certain requirements a Court should consider when exercising its discretion to dismiss an action for want of prosecution. The requirements for consideration over and above all other facts and circumstances germane to each matter, being that;

- 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.

[12] Furthermore, as the argument unfolded, because Tolmay J in her judgment⁵ remarked that "*The civil action will in all probability not be determined this year (2022-own emphasis) but should be determined at least next year (2023-own emphasis),*" and that this was the reason why the Learned Judge was persuaded to

³ Ibid para [21].

⁴ Cassimjee v Minister of Finance 2014 (3) SA 198 (SCA) at para [11].

⁵ Footnote 3 para [25].

grant Telkom a further opportunity to finalise the matter. However, Mr Jacobs in his founding papers considered the opportunity as a type and shadow of a 'time bar' when he, with reference to steps taken after the judgment, stated that: " *The time period granted by court had now lapsed...* ". Absent using the opportunity or compliance by Telkom supported the demonstration of an inexcusable delay. In this way the second requirement in the Cassimjee matter demonstrated. The third requirement of serious prejudice to Mr Jacobs as a result of such inexcusable delay was apparent from the common cause facts.

Telkom

[13] Telkom also relying on the Cassimjee matter, argues that to determine the remaining requirements set out by the SCA namely, that of an inexcusable delay and serious prejudice stands to be determined by applying the Plascon-Evans rule⁶ where dispute of facts arise, as in this case. If so, the inordinate delay having persisted is excusable on the facts as explained by Telkom. Furthermore according to the expert summary filed there is overwhelming evidence of Mr Jacob's breach of his contractual obligations and as such,

[14] Furthermore, that any consideration of delay should be viewed over the period after the judgment in that, *inter alia*, Tolmay J found that the inordinate delay was excusable and therefore the finding that the delay over that period is not unreasonable must stand.⁷

[15] Furthermore according to the expert summary filed by Telkom in 2024, there is overwhelming evidence of Mr Jacob's breach of his contractual obligations and as such any serious prejudice suffered by Mr Jacobs not receiving the payment of his pension benefit must be viewed through that lens too.

DISCUSSION OF ARGUMENTS

⁶ Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 at 634 C-635C.

⁷ Footnote 3 para [21].

[16] It is inescapable on the facts and, as echoed in the judgment that the time taken from 2014 to 2022 to finalise the main action translated into an long delay. In context, Tolmay J when setting out her reasons when dealing with the requirement of the balance of convenience, in support of Mr Jacob's final interdictory relief found, found that despite the delay, it was reasonable and as such, the balance favoured Telkom at that stage. The main action has still not been finalised and as such, the long delay persists.

[17] The question which now arises is whether the persisted delay still remains excusable. To answer this question, Counsel for Mr Jacobs advanced the notion of inexcusable delay with specific reference to paragraph [25] of the judgment.⁸

[18] In paragraph [25] of the judgment Tolmay J states that:

“[25] In considering the balance of convenience despite the long delay Mr Jacobs, has already stated, only filed this application during April 2021. The civil action will in all probability not be determined this year. But should be determined at the latest next year. If the interdict is not granted Telkom will lose any change of obtaining an effective judgment, while Mr Jacobs’ hopes of receiving his pension benefit will only be delayed a little longer.”

[19] Reliance must be considered in context. In the preceding paragraph of the judgment, paragraph 24 the following is said:

“[24] The disputed evidence against Mr Jacobs is serious and potentially criminal. As a result, I am of the view that it will be in the interests of justice to grant an interim interdict (in favour of Telkom -own emphasis), especially in light of the fact that a preferential trial date can be obtained from the DJP. Any one of the parties or both can approach the DJP in this regard. (own emphasis)”

⁸ Footnote 2 para [25].

[20] It was then on this basis that a probability of the finalisation of the matter could take place. This was reasoned considering the ability of both parties who both had it within their grasp to obtain a preferential court date. If not applying for a preferential trial date no party, let alone Telkom could have satisfied any perceived 'time bar' in order to ensure a final determination of the main action in 2023. Therefore, Mr Jacob's contention in his founding papers with reference to paragraph [25] when he states that "*The time period granted by the court which had now lapsed-*" is incorrect and any argument premised on this basis is misleading. Furthermore Counsel for Mr Jacobs did not make reference to paragraph 25.

[21] It is common cause on the papers that neither Mr Jacobs nor Telkom, as at the date of the hearing of this application applied to the DJP for a preferential trial date. Mr Jacobs simply states that Telkom has not done anything realistically to advance the main application nor apply for a trial date and in consequence the further delay is inexcusable, and on this basis, his relief should succeed.

[22] Against the backdrop of para 24 and 25 of the Judgment and applying the SCA's guidance in the Cassimjee matter, all circumstances are to be considered when this Court exercises its discretion. Both parties' action and inactions are under the looking glass and that is why this Court was granted access to the filed papers of the first application and main action. In this way, this Court can give context to the Judgment and to the procedural arguments raised in respect of the prosecution of the main action by Telkom to Mr Jacobs prejudice.

What steps were taken by both parties which require consideration in the exercise of the Court's discretion?

[23] It is common cause that the date of the hearing of the first application coincided with the date of the first arranged pre-trial conference. The purpose of the first pre-trial conference was to determine whether the parties could apply to the Registrar for a trial date. Due to the fact on the dates overlapped, the parties agreed that the pre-trial conference would be cancelled and that the Mr Jacobs would file a written response to Telkom's proposed pre-trial agenda and minutes before close of business on the 11 February 2022. Mr Jacobs complied and responded. Telkom

argued that the response was defective in that it could not, based on Mr Jacobs response, apply for a trial date.

[24] From the pre-trial minute it is clear that Telkom indicated its readiness for the allocation of the trial in the third term of 2022. Mr Jacobs conversely stated that he was not ready. His inability to be ready was because he was waiting for trial bundles (with reference to paragraph 5.2), he still intended to amend his plea and, he was unsure at this time whether he would lead expert evidence in that he needed the trial bundle to ascertain his position. Both parties were in agreement that a further second pre-trial meeting would be arranged and that at that meeting separation of issues and duration would be finalised.

[25] Both parties then, as at February 2022 could not have applied for a trial date let alone a preferential trial date. Mr Jacobs does not indicate whether he filed an amendment to his plea, and none appears apparent from the pleading on caselines in the main action at the time of the hearing.

[26] Be that as it may, Telkom argues that as a result of his response, in particular to paragraphs 5.2 and 5.3 of the agenda, that the pre-trial minute could not be finalised to apply for a trial date. Telkom contends that in terms of the applicable Directive a parties' expert reports had to be filed, Joint minutes in respect of such experts and a pre-trial minute signed by all the parties of a pre-trial meeting which was not held earlier than 90 (ninety) days before the date on which a trial date was applied for. This contention on the facts must be accepted.

[27] In an attempt to compile a suitable trial bundle and in trial preparation, Telkom, 7 (seven) months later, on the 8 September 2022, sought copies of certain documents discovered by Mr Jacobs. Mr Jacobs provided the copies on the 30 September 2022. Certain issues arose regarding the clarification of the documents which were made available and such issues were finalised on the 14 November 2022.

[28] As at the 14 November 2022, Telkom argued that it now was in a position to identify the witnesses and to prepare its expert report in terms of rule 36(9)(b) having

now had insight to all the documents. No further pre-trial meeting was called for by either party at this stage.

[29] Telkom served its expert notice in terms of rule 36(9)(a) on the 6 July 2023. Mr Jacobs does not bemoan the possible lateness of the filed notice in terms of rule 36 (9)(a)(i) nor does he take any further procedural steps.

[30] Telkom on the 27 November 2023 *via* correspondence tried to convene a second pre-trial meeting by ascertaining availability of Counsel. Mr Jacob's attorney undertakes to revert by the 15 January 2024 with Counsel's availability. No letter of confirmation followed. A further request *via* correspondence was made which was not met with a reply. Telkom then filed a formal notice in terms of rule 37(2) of a scheduled pre-trial conference to be held on the 7 May 2024.

[31] On receipt of this notice Mr Jacobs attorney becomes aware that preparation for the pre-trial and trial readiness is again the objective. Telkom in preparation for trial readiness and in an attempt to cure the outstanding requirements, on the 29 April 2024 now serves its expert summary in terms of rule 36(9)(b), its pre-trial agenda and its proposed pre-trial bundle.

[32] Mr Jacobs founding papers deal with the receipt of served documents on the 29 April 2024. In other words he had no intention of ensuring trial readiness on his side because he, after the delivery of the document on the 29 April 2024, now having insight to Telkom's case on the merits, by virtue the expert summary rather states under oath that, he is unsure why Telkom served the documents at this late stage as '*-the horse had already bolted*'. It is unclear which horse had bolted but from his founding papers that horse may have been the 'time bar' which he erroneously thought operated against Telkom. In other words, with reference to paragraph [24] of the Judgment '*by the end of 2023*' had come and gone.

[33] Be that as it may, on the 6 May 2024 after this application had been launched, Mr Jacob's attorney finally responded to the call for a further pre-trial meeting by informing Telkom that no purpose would be served by such a meeting as this application had already been filed on the 3 May 2024. On the 7 May 2024 Mr Jacob's

Counsel recorded that the scheduling of the pre-trial meeting was premature in light of the service of the application.

[34] Curiously the prematurity referred to has, despite this application, not prevented the parties from holding, filing and signing a pre-trial minute after the service of this application. This much is clear from the papers filed in the main application.

[35] In consideration of all the facts, the circumstances and the procedural steps taken, both parties' actions and inactions contributed to the further delay. Furthermore, Mr Jacobs and his legal team took no further procedural steps to finally ensure that Telkom too could apply for a trial date. The DJP was not approached as a case manager to limit prejudice caused by any delay.

[36] In as much as Telkom moved slowly, which the Court finds it did, it took further steps. Mr Jacobs conversely possibly belabouring under the incorrect impression that a 'time bar' existed just sat back waiting for the time to tick away. When the opportune moment presented itself, he brought this application. All of this is to be considered in context.

[37] In consequence, this Court finds that there was yet a further delay but that such too, as the previous delay is excusable for the reasons set out herein. Considering all the facts and considering the nature of the dismissal relief this Court is not inclined to exercise its discretion in favour of Mr Jacobs. This matter requires a case manager as envisaged in terms of rule 37A to bring it to finality to safeguard any further delays and prejudice. Both parties are urged to take steps in this regard.

[38] There is no reason why cost should not follow the result, none was argued. Furthermore, regarding the costs associated with the preliminary relief, each party should bear their own costs in respect of the postponement application and, Mr Jacobs should bear the costs for initiating and not persisting with the opposed rule 30 application, due to the fact that he only made his intention known not to proceed at the date of the hearing and during argument.

[39] In consequence, the following order:

1. The First Respondent is granted condonation for the late filing of its answering affidavit.
2. The Applicant's application is dismissed.
3. Each party is to bear their own costs occasioned by the First Respondent's condonation application.
4. The Applicant is to pay the First Respondent's costs, such costs to include the costs associated with the Rule 30 application. Furthermore, all costs awarded are to include the cost of two Counsel so employed, the one being a Senior Counsel taxed on scale C and Junior Counsel on scale B.



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Judge of the High Court
Gauteng Division

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