

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-093687

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
23 February 2026.	_____
DATE	SIGNATURE

In the matter between:

EFN INVESTMENTS (PTY) LTD

Applicant

(formerly CADAC (PTY) LTD)

and

MITTAL STEEL SOUTH AFRICA LIMITED

Respondent

In re:

MITTAL STEEL SOUTH AFRICA LIMITED

Plaintiff

and

CADAC (PTY) LTD

Defendant

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CaseLines. The date of delivery of the judgment is deemed to be 23 February 2026.

JUDGMENT

SOUTHWOOD, AJ:

Introduction

- [1] This is an application by EFN Investments (Pty) Ltd (formerly Cadac (Pty) Ltd) ('the applicant') for an order that the action instituted by Mittal Steel South Africa Limited ('the respondent') under case number 17144/2007 be dismissed for want of prosecution. The application is opposed by the respondent.
- [2] The applicant contends that the respondent's delay in prosecuting the action is inordinate, inexcusable and has caused serious prejudice to the applicant, rendering a fair trial impossible. The respondent opposes the application on several grounds, including that the application is moot in light of an allocated trial date of 4 May 2026, that the delay was not solely attributable to it, that the applicant failed to set out all relevant facts in its founding affidavit, and that the applicant has failed to establish that the alleged prejudice is manifest and incurable.
- [3] The applicant also sought condonation for the late filing of its replying affidavit. There was no objection in this regard. Accordingly, there being no objection and no prejudice, condonation will be granted for the late delivery of the replying affidavit. In addition, on the day before the hearing, 6 February 2026, a confirmatory affidavit deposed to by the applicant's attorney, Mr Jonosky, was uploaded onto CaseLines. The applicant did not seek the court's permission to upload the document nor was there an application for leave to admit an affidavit out of time and out of sequence. Accordingly, this affidavit will not be admitted.
- [4] The joint practice note indicates that the respondent wishes the court to consider the record in the action. The applicant did not object and I have had regard to the trial record.

Background

- [5] The respondent's action against the applicant was instituted in 2007, claiming payment for goods sold and delivered during the period October to November 2006.
- [6] The applicant avers that it purchased the respondent's products during the period 1948 to 2003. In 2006, the applicant avers that it ordered various products which would have come from Mittal but were supplied via steel processors who slit the steel coils to smaller sizes which were then supplied to another processor which blanked it into discs. Thereafter a dispute arose between the parties when the respondent complained that the applicant had short-paid it.
- [7] The applicant's defence to the claim is that the individuals who allegedly concluded the agreement on the applicant's behalf did not have the requisite authority to do so and that the delivery of the goods is in dispute.
- [8] The pleadings were only finalised after numerous amendments, notices of exception, discovery requests and pre-trial conferences over a period of several years.
- [9] The applicant served this application on 10 October 2024, seeking dismissal of the action.
- [10] The respondent contends that the matter has been actively prosecuted, that trial dates were set and later postponed for various reasons (some attributable to the applicant), and that a trial date has now been secured for May 2026.
- [11] The founding affidavit is deposed to by Simon Nash who describes himself as a director of the applicant. The answering affidavit is deposed to by the respondent's attorney, Jaun Jan Albert Lombard, of Pagel Schulenburg Incorporated, which came on record for the respondent on 18 March 2011. However, it is unclear from his affidavit when Mr Lombard commenced his engagement with this matter. I was informed from the Bar that Mr Lombard became involved in this matter in 2015. This is supported by the trial record

which contains a notice dated 12 August 2015, referring to Mr Lombard. Mr Lombard's affidavit contains a chronology of events. This is admitted insofar as it accords with the documents filed in the action.

Applicant's case

[12] The applicant contends that the respondent has failed to prosecute its action with reasonable expedition, resulting in a delay of almost two decades since the institution of the action. The applicant states that whilst there have been many delays in prosecuting the action, there are three periods of significant delay:

- a. the period of two years and nine months between the delivery of the applicant's Rule 23(1) and 30A notices (March 2010) and the respondent's notice of intention to amend (December 2012);
- b. the ten-month period between the applicant's objection to the respondent's notice of intention to amend (May 2015) and the respondent's further notice of intention to amend (March 2016);
- c. the period between November 2017 (application for trial date) and January 2022 (request for pre-trial conference).¹

[13] The applicant submits that these delays are unexplained and inexcusable, and that the cumulative effect of the various delays has caused it substantial and irreparable prejudice, including the loss of contact with key witnesses, fading memories, and the inability to properly mount a defence. The applicant further contends that the respondent's conduct demonstrates a lack of interest in pursuing the action and that the interests of justice require the dismissal of the action.

¹ The applicant's counsel identified three different periods of delay: from the close of pleadings in March 2009 until the amendment of the respondent's claim in 2013; the period between 2013 and 2022 when no substantive steps were taken to set the matter down for hearing or to finalise trial preparations; the period between 2022 and into 2024 where the respondent failed to generate meaningful momentum toward a trial date.

Respondent's case

[14] The respondent, in a more detailed answering affidavit and chronology, disputes that the delays are solely or even primarily attributable to it. The respondent points to the following:

- a. the applicant's own delays, including a five-year period before delivering its plea and repeated changes of attorneys;
- b. the applicant's use of multiple interlocutory procedures, including repeated Rule 35(3) notices and amendments;
- c. the fact that the matter has been enrolled for trial on several occasions but was removed for reasons not solely attributable to the respondent;
- d. the parties' agreement in January 2023 that the matter was trial-ready, with no prejudice recorded at that time.

[15] The respondent further contends that the applicant's claim of prejudice is opportunistic and belated, and that the applicant has not demonstrated that it cannot receive a fair trial. The respondent submits that the delays are explained by the conduct of both parties, including the applicant, indicating that it wished to engage experts but never did so.

Mootness

[16] The respondent, referring to a trial date of 4 May 2026, contends that the fact that the matter has been set down for hearing, renders the matter moot.

[17] Mootness, however, arises when a matter no longer presents an existing or live controversy. The respondent does not contend that there is no existing or live controversy. I find that this application raises a live controversy.

[18] As such, this application is not moot.

[19] My finding accords with the respondent's counsel's concession that my decision would have an effect. But, he submitted, it would have been more appropriate for the trial court to determine this matter. In this regard, I was invited to

exercise my inherent discretion and refer the matter to the trial court as being the most appropriate forum for determining this application. Whilst the invitation had some merit, I am exercising my discretion to hear the matter as both parties' counsel had prepared to argue this application and I have read the papers.

Legal Framework

- [20] The high court has the inherent power, both at common law and in terms of section 173 of the Constitution to regulate its own process and to prevent an abuse of its process. As such, whilst section 34 of the Constitution provides that everyone has a right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing, this right may be limited provided that the limitation is reasonable and justifiable.²
- [21] An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of the action.³
- [22] In order for the court to be able to exercise its discretion to dismiss an action for want of prosecution, the applicant must show:
- a. an inordinate delay;
 - b. that the delay is inexcusable; and
 - c. that the delay has caused serious prejudice to the defendant.⁴
- [23] The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of the remedies which it might reasonably have been expected to use in order to bring the action expeditiously to trial.⁵
- [24] The question which the court must determine is whether the delay is so unreasonable or inordinate as to constitute an abuse of the process of court.⁶

2 *Cassimjee v Minister of Finance* [2012] ZASCA 101; [2014] 3 All SA 213 (SCA) at [8] - [9].

3 *Id* at [10].

4 *Id* at [11].

5 *Id* at [11].

6 *Id* at [13]. This contrasts with the applicant's counsel's submission that it is not necessary for me to find an abuse of process – presumably on the basis of the judgment in *Sasria SOC v TUHF Limited* 2025 JDR 0069 (GJ) at [5].

Courts have also dismissed claims where it is in the interests of justice to do so.⁷

[25] In *Cassimjee*, the Supreme Court of Appeal, stated that the following remarks by the court in *Allen*⁸ are apposite:

‘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. But also, 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. For the reasons already mentioned, however, mere non-activity on the part of the defendant where no procedural step on his part is called for by the rules of court is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible.’⁹

Analysis

Delay

[26] The chronology of this matter spans nearly two decades. While there were periods of inactivity, the respondent has provided a detailed account of steps taken to advance the litigation, including multiple applications for trial dates,

7 *Sasria SOC v TUHF Limited* 2025 JDR 0069 (GJ) at [5].

8 *Allen v Sir Alfred McAlpine & Sons Ltd; Bostik v Bermondsey and Southwark Group Hospital Management Committee; Sternberg and another v Hammond and another* [1968] 1 All ER 543 (CA) at 556c-g.

9 *Cassimjee* (supra) at [21].

pre-trial conferences, discovery processes and amendments by both parties of their pleadings. Several postponements were agreed upon between the parties, often at the instance of the applicant. In January 2023, the parties expressly agreed that the matter was trial-ready.

- [27] The applicant's founding affidavit selectively presents the history of the litigation and omits several material events, including the setting of trial dates and the applicant's own role in causing delays (such as the late filing of pleadings and numerous Rule 35(3) notices and that fact that the trial was removed from the roll as a result of steps taken shortly before trial by the applicant or at the instance of the applicant, for example, amending its plea, indicating that its counsel was unavailable and that it wished to engage experts).
- [28] The respondent's chronology, which is largely undisputed, paints a more comprehensive picture of a contested matter that progressed, albeit slowly, toward trial. Insofar as Mr Lombard's affidavit is concerned, in most instances, Mr Nash admits Mr Lombard's allegations insofar as they are consistent with the trial record and the correspondence between the parties' legal representatives.
- [29] It is so that the matter has taken an unusually long time from summons being issued in 2007 to being heard in 2026.

Inexcusable delay

- [30] Whilst the overall duration of the litigation is lengthy and many periods of inactivity are not explained, alternatively, where the lengthy time taken for a particular step is not explained, Mr Lombard's affidavit does provide evidence of ongoing conduct by the applicant which would induce a reasonable belief in the respondent that it intended to proceed to trial.
- [31] As I indicate hereafter, whilst many of the delays are inexcusable, the applicant failed to establish how the delay resulted in the prejudice allegedly suffered. Also, for the reasons indicated below, the applicant is unable to obtain a dismissal of the action as a result of the delays referred to.

- [32] What is pertinent is the number of trial dates obtained and the number of pre-trial conferences held indicating that both parties intended to proceed to trial.
- [33] Mr Lombard avers that the respondent applied for a trial date during October to November 2013 but that the application was misplaced by the court. He avers, further, that, at this stage, the court file went missing, a lost document affidavit was compiled and a copy of the summons was sought from the defendant's attorney. He alleges further that once a duplicate court file had been opened, a further application for a trial date was made on 27 March 2014.
- [34] Save for the application for a trial date, dated 24 March 2014, in the trial record, all of these allegations are inadmissible hearsay which are not supported by the trial record or correspondence between the parties. The internal memoranda attached to Mr Lombard's affidavit have not been authenticated and are also inadmissible. Neither Mr Lombard in his affidavit nor the respondent's counsel in argument, requested the admission of hearsay evidence.
- [35] Mr Lombard avers that the date allocated was 5 May 2015. This is confirmed by a notice of set down in the trial record dated 20 October 2014. Mr Lombard goes on to state that during July and August 2014, the parties arranged and attended a pre-trial conference on 14 August 2014. This accords with the correspondence between the parties, unsigned minutes attached to the answering affidavit and the plaintiff's pre-trial agenda in the trial record.
- [36] Both Mr Nash and Mr Lombard aver that on 13 March 2015, a pre-trial conference was held. This is supported by the pre-trial minutes in the trial record which record that the applicant feels prejudiced by the respondent's inadequate discovery and its failure to respond to the applicant's Rule 35(3) notice. However, it was recorded that the applicant would not apply for a postponement in this regard.
- [37] Mr Lombard also avers that the applicant served a second and a third Rule 35(3) notice on 24 April 2015. In this regard, the trial record contains the defendant's Rule 35(3) notice dated 23 April 2015 and the plaintiff's reply to the defendant's Rule 35(3) notice dated 22 April 2015, as well as the plaintiff's reply

to the defendant's Rule 35(3) notice dated 23 April 2015. These replies are not identical.

- [38] As a result, avers Mr Lombard, the parties agreed to remove the trial from the roll. Mr Nash confirms that the trial was removed by agreement between the parties. The trial record contains a notice of removal from the trial roll with each party to pay its own costs, dated 28 April 2015.
- [39] Mr Lombard avers that the next application for a trial date was made on 20 May 2015. This is supported by the trial record. Mr Lombard avers that a further attendance at court was necessary as the original application went missing. This is not supported by the trial record nor correspondence between the parties.
- [40] In fact, the trial record contains a notice of withdrawal of application for a trial date dated 4 June 2015. Neither party refers to this notice although it appears shortly after the applicant's objection to the respondent's proposed amendment of its declaration dated 26 May 2015. The trial record contains a new application for a trial date dated 12 August 2015 and a notice of set down of the trial for 28 February 2017, dated 1 April 2016.
- [41] Mr Lombard avers that a further pre-trial conference was held on 9 December 2016. This is confirmed by the pre-trial minutes in the trial record which indicate that the applicant was still of the view that the respondent's discovery was inadequate. The minutes record, further, that the applicant may apply for a postponement depending on the respondent's responses to its latest two 2015 Rule 35(3) notices. The minutes also record that the respondent had filed its amended pages on 7 April 2016 and that the applicant had not made a consequential amendment to its plea. The applicant undertook to do so by 25 January 2017.
- [42] Mr Nash avers in his founding affidavit that a pre-trial conference was held on 9 February 2017 and attaches the minutes of such conference to his replying affidavit. Mr Lombard does not dispute this. Mr Lombard avers that the applicant indicated that it would be amending its plea. The minutes record that the applicant would deliver its amended plea within 'the next few days' so that

the respondent could file a replication, if required. The minutes record that the parties are agreed that the matter is not ripe for hearing and both parties recorded their prejudice regarding the status of the pleadings and the respondent's inadequate responses to the Rule 35(3) notices.

[43] Mr Lombard avers that a further pre-trial conference was held on 24 February 2017 during which it was agreed that the matter was not ready to proceed to trial as a result of the amended plea. Mr Nash admits that the matter was not ready to proceed to trial but denies that the parties agreed that this was due to the amended plea.

[44] Unfortunately, I was unable to find minutes of the pre-trial conference of 24 February 2017 in the trial record. Instead, the correspondence attached to the answering affidavit indicates that the amended plea was served by email on 23 February 2017. The reply to this email on 27 February 2017 indicates that the trial should be removed from the roll with costs to be reserved. I was unable to find a notice of removal in the trial record.

[45] Mr Nash avers that on 27 March 2017, the respondent served its replication. The trial record contains an amended replication dated 27 March 2017.

[46] Mr Lombard avers that the next application for a trial date occurred on 8 November 2017 and that the date allocated for trial was 10 June 2019. The trial record indicates an application with a court stamp of 9 November 2017 which contains a hearing date of 10 June 2019. The notice of set down was served on 26 April 2019.

[47] Mr Lombard avers that the applicant's attorneys indicated that its counsel was not available on the date allocated to the trial and that it wished to appoint experts. This is supported by a letter attached to the answering affidavit written by the applicant's attorneys in which it suggested that the matter be removed from the roll.

[48] Mr Lombard's response, also attached to the answering affidavit, indicates that reference to experts is nothing more than a delaying tactic and that the applicant does not agree to remove the matter from the roll. Mr Lombard then alleges that

the respondent agreed that the matter could be removed from the roll. This is not disputed.

- [49] Both Mr Nash and Mr Lombard aver that the next pre-trial conference was held on 31 January 2022. The minutes appear in the trial record. The applicant subsequently provided a response to issues raised at pre-trial, dated 11 February 2022. The response recorded that the applicant does not note any prejudice at this stage.
- [50] Mr Nash avers that the next pre-trial conference was held in January 2023. Mr Lombard refers to the precise date of 17 January 2023 and that no prejudice was recorded by the applicant. The relevant minutes, which record the conference date as 17 January 2023, are contained in the trial record. The minutes record that the parties suffered no prejudice at this juncture but reserve their rights to raise any further prejudice they may suffer in future. The minutes also record that the parties are in agreement that they are satisfied that the admissions supplied render the matter trial ready.
- [51] The final pre-trial conference referred to by both Mr Nash and Mr Lombard occurred on 25 April 2024. Mr Nash avers that the applicant attended under protest and advised that it intended to institute the present application. Mr Lombard denies any protest or that any mention was made of this application. Mr Lombard alleges further that the reason for holding this pre-trial conference was for the purpose of obtaining a trial date, the previous pre-trial conference having become stale for the purposes of applying for a trial date.
- [52] The trial record contains the minutes of this pre-trial. The minutes do not record that the applicant attended under protest nor that it indicated that it intended to launch this application. The minutes do record that the attendees included Mr Lombard but not Mr Nash. As such, I accept Mr Lombard's version which is supported by the minutes, Mr Nash's version being inadmissible hearsay or speculation.
- [53] The minutes also record that the applicant has suffered prejudice because of the respondent's failure to prosecute its claim and that it reserved its rights. The minutes record that the respondent noted that the applicant had never taken

any steps to further the matter and cannot be prejudiced. The minutes record further that the issues of merits and quantum must be separated and that the merits portion would proceed first. Also, that the trial bundle is not to be supplemented and is ready for hearing. The trial duration is indicated in the minutes to be between 3 - 4 days. In addition, the minutes also record that the parties agree that there are currently no further aspects to be addressed or to be added.

[54] Mr Lombard avers that on 5 June 2024, application was made for a trial date. The trial record does not contain the application but the CaseLines audit confirms that such application was made. Furthermore, both Mr Nash and Mr Lombard aver that on 4 July 2024, the applicant's attorneys were advised that the trial would be heard on 4 May 2026.

[55] The trial record contains a notice of set down, dated 9 October 2024, indicating a trial date of 4 May 2026. Mr Lombard avers that it was served on the same date. This is admitted by Mr Nash.

[56] It is common cause that the current application was served on 10 October 2024 despite the notice of motion being dated 20 August 2024.

[57] Whilst it is clear that there have been delays, much of it not properly explained, what I conclude from the above facts is that the applicant conducted itself so as to induce the respondent to incur further costs in the reasonable belief that the applicant intends to exercise his right to proceed to trial, notwithstanding, the respondent's delay. In particular, in 2023, the applicant records no prejudice and indicates that the matter is trial ready. The 2024 pre-trial minutes, whilst recording the applicant's prejudice, indicate that the trial is to proceed. The applicant cannot, without further more, rely on any delay prior to the pre-trial conference held on 25 April 2024.

[58] As indicated above, only if the respondent has, after 25 April 2024, been guilty of an unreasonable delay, can the action be dismissed.

[59] Mr Lombard's chronology indicates that on 2 May 2024, the plaintiff finalised and signed the pre-trial minutes and on 3 May 2024, the defendant signed the

pre-trial minutes. This is confirmed by the minutes in the trial record. The chronology indicates that the minutes were uploaded on 14 May 2024, which is confirmed by the CaseLines audit. The chronology also indicates that on 5 June 2024, on the same date on which application was made for a trial date, various documents were uploaded onto CaseLines, which is also confirmed by the CaseLines audit.

- [60] The applicant does not suggest, correctly, that the respondent was guilty of an unreasonable delay after the pre-trial conference of 25 April 2024. Accordingly, the applicant cannot obtain dismissal of the action in these circumstances.

Prejudice

- [61] The applicant alleges serious prejudice due to the unavailability of witnesses and possible fading memories.
- [62] Mr Nash refers to a core issue as being whether Kevin Grant Kromhout and Milos Despotovitch had the requisite authority to conclude the main agreement with the respondent on behalf of the applicant. Mr Nash indicates that Mr Cromhout was retrenched between 2003 and 2005, prior to the institution of the action, and that he is not in contact with Mr Cromhout and cannot now contact or interview him. Insofar as Mr Despotovich is concerned, Mr Nash alleges that he has emigrated to Serbia and that he is not in contact with him and would not know how to find him.
- [63] However, given that Mr Nash who deposed to the affidavit resisting summary judgment as the Executive Chairman of the board of directors of the applicant, and who has been involved throughout, remains available, it is not clear why he would not be able to give evidence regarding whether or not these individuals had authority to represent the applicant. Furthermore, Mr Nash has failed to indicate when these potential witnesses became unavailable nor the efforts made to contact them.
- [64] Mr Nash alleges, further, that the goods received storemen (which he does not identify) and others will not be able to 'testify acceptably', and implies that it will be difficult to locate them. However, he also implies that the goods-receiving

staff, employed by the applicant, were retrenched between the period 2003 - 2005, before the action was instituted. The impression created is that the applicant lost contact with these people prior to the action.

[65] Mr Nash further refers to witnesses at the slitting company and Pabar who will be required at trial and it cannot be expected of persons at these companies or who were employed at the time to recall the facts making up the subject matter of these proceedings. Mr Nash does not identify these witnesses nor does he furnish evidence that these potential witnesses cannot remember the relevant events. The impression created is that there have been no attempts by the applicant to contact the relevant witnesses.

[66] Mr Nash concludes that the applicant cannot run its trial as it would have done more than a decade ago. He alleges that its witnesses, even if they can still be located, cannot be expected to recall the facts which are the subject matter of these proceedings.

[67] Mr Nash's allegations are characterised by an absence of details. He appears to be the person instructing the applicant's legal representatives. He has not indicated that he has relied on any particular witness in preparation of the applicant's plea. He does not link the three periods of delay (or any other delays) other than in the vaguest terms with the prejudice which he alleges the applicant has suffered. He fails to indicate how the prejudice arose, particularly given the indications of trial readiness in the minutes of the pre-trial conferences held in 2023 and 2024.

[68] Accordingly, the applicant has failed to establish its prejudice caused by the delays in this matter, in particular, prejudice suffered after the pre-trial conference in April 2024.

Conclusion

[69] The applicant has not met the stringent test for dismissal of an action for want of prosecution. While the delay has been considerable, it is not wholly attributable to the respondent, and, given the applicant's conduct, referred to above, the applicant cannot obtain dismissal of the action.

[70] The interests of justice favour allowing the matter to proceed to trial, where the merits can be fully ventilated. The applicant's application must accordingly fail.

Costs

[71] In this matter, there is no reason why costs should not follow the result. The respondent sought counsel's costs on scale C. The applicant sought costs on scales B or C. Given the unusualness of the application and the importance thereof to the parties, costs on scale C is justified.

Order

[72] In the result, I make the following order:

1. Condonation is granted for the late delivery of the replying affidavit.
2. The confirmatory affidavit deposed to by Brent Jonosky on 5 February 2026 is not admitted and the applicant is directed to remove this affidavit from CaseLines.
3. The application is dismissed.
4. The applicant is ordered to pay the respondent's costs, including the costs consequent on the employment of counsel, on scale C.



F SOUTHWOOD
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 6 February 2026

Date of judgment: 23 February 2026

Appearance:

For the Applicant: M De Oliveira
Instructed by KWA Attorneys

For the Respondent: I Posthumus
Instructed by Pagel Schulenberg Inc