

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Case Number: 2024-093687

25 March 2026

DATE

SIGNATURE

In the matter between:

EFN INVESTMENTS (PTY) LTD
(formerly CADAC (PTY) LTD)

Applicant

and

MITTAL STEEL SOUTH AFRICA LIMITED

Respondent

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 25 March 2026.

JUDGMENT

SOUTHWOOD, AJ:

Introduction

- [1] This is an application by EFN Investments (Pty) Ltd, formerly Cadac (Pty) Ltd, for leave to appeal against the whole of my judgment and order delivered on 23 February 2026, in terms of which the application to dismiss the action for want of prosecution was refused.
- [2] The applicant seeks leave to appeal to the Supreme Court of Appeal although its counsel, Mr *De Oliveira*, indicated that if leave is given in terms of section 17(1)(a)(i) of the Superior Courts Act¹, it would be in order to grant leave to the full court whereas if leave is granted in terms of section 17(1)(a)(ii) of the Superior Courts Act, leave should be granted to the Supreme Court of Appeal.
- [3] The principal issue is whether the applicant has demonstrated that leave to appeal ought to be granted under section 17(1)(a) of the Superior Courts.

Applicable legal principles

- [4] Section 17(1)(a)(i) provides that leave to appeal may only be given where the court is of the opinion that the appeal would have a reasonable prospect of success.
- [5] In *Smith*,² the Supreme Court of Appeal held that:

1 Act 10 of 2013

2 *Smith v S* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) (15 March 2011) at [7]

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a different conclusion to that of the trial court and that those prospects are not remote but have a realistic chance of succeeding. More is required than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal’.

- [6] In the judgment, which is the subject of this application, the principles stated in *Cassimjee*³ were applied, namely that a court considering dismissal for want of prosecution must consider whether there was an inordinate delay, whether the delay was inexcusable, whether serious prejudice was established, and whether the delay constituted an abuse of process.
- [7] It must also be borne in mind that the decision whether to dismiss an action for want of prosecution is quintessentially a discretionary one. An appellate court is therefore not entitled to interfere merely because it may have come to a different conclusion on the same facts. Interference is justified only where the discretion was not exercised judicially or was influenced by a wrong principle of law or a material misdirection on the facts.⁴
- [8] Section 17(1)(a)(ii) provides that leave to appeal may only be given where the court is of the opinion that there is some other compelling reason why

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

4 *Cassimjee* fn 3 at [23]

the appeal should be heard, including conflicting judgments on the matter under consideration.

- [9] In *SALC*,⁵ the Supreme Court of Appeal found that the jurisprudence in relation to mootness is a useful guide. The usual ground for exercising a discretion in favour of leave is that the case raises a discrete issue of public importance that will have an effect on future matters. However, the Court indicated that merely because a High Court determines an issue of public importance this does not mean that it must grant leave to appeal. The merits of the appeal remain vitally important and will be decisive. If the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given as to whether the interests of justice favour the grant of leave to appeal although it is undesirable that an appeal court is asked to decide legal issues as a court of both first and last instance. However, if a point of law emerges from the papers, it is undesirable that the case be determined without considering that point.

Grounds advanced and evaluation

- [10] The grounds for leave to appeal, in essence, are the following:

- a. there was no or insufficient regard to the principle that inactivity on the part of the defendant, where no procedural step is called for is not to be regarded as conduct inducing the plaintiff to believe that

5 *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) at [23]-[24]

the defendant intends to proceed to trial, with particular reference to the period between the two pre-trial conferences held on 17 January 2023 and 25 April 2024, respectively; and that anterior delay is not irrelevant if the plaintiff is subsequently guilty of further unreasonable delay;

- b. there was no or insufficient regard for the fact that delay may be slight but the prejudice may be serious and cases where delay is inordinate but prejudice is slight;
- c. there was no or insufficient regard to the fact that the most egregious delays were not explained;
- d. the court erred in refusing to admit the confirmatory affidavit of Mr Jonosky;
- e. the allegations in regard to the applicant's prejudice was met with bare denials.

[11] Mr *De Oliveira*, for the applicant, clarified that the applicant did not rely on any error of fact in the judgment. He indicated, further, that he was not contending that the court did not apply the traditional requirements or consider these requirements but, rather, that the approach was '*one-dimensional*'.

[12] In my view, the grounds do not indicate that the court did not exercise its discretion in a judicial manner or that the discretion was exercised on a wrong principle of law or a misdirection of the facts. In the absence of these factors, the applicant does not have reasonable prospects of success.

[13] The applicant's principal contention is that I erred in treating the period prior to the pre-trial conference of 25 April 2024 as not, without more, decisive in its favour.

[14] That contention cannot be sustained when regard is had to the full procedural history and to the principle, recognised in *Cassimjee*, that the conduct of the defendant is always relevant when dismissal for want of prosecution is sought.

[15] In the principal judgment I did not hold that the earlier history was irrelevant for all purposes. What I found was that, on the facts before me, the applicant could not rely on that earlier delay (as well as others) in isolation when it had, subsequently, participated in the litigation, including the pre-trial processes, in such a way that it induced a reasonable belief that it was continuing with the trial. If it did not establish that the respondent was thereafter guilty of such further unreasonable delay, it could not obtain dismissal of the action.

[16] The applicant now wishes to focus on the period between the two pre-trial consultations of 2023 and 2024 despite this not being a period highlighted in the founding affidavit. The judgment found that the applicant had on many occasions, including at the pre-trial conference held on 25 April 2024, conducted itself so as to indicate that it was going to proceed with the trial. Accordingly, any delays prior to 25 April 2024, in the absence of the respondent's delay, thereafter, cannot serve as a basis for dismissing the action.

[17] The applicant does not take issues with these findings. This ground does not indicate that the court did not exercise its discretion judicially or was influenced by a wrong principle of law or a material misdirection on the facts. At most, the applicant advances an argument that another court might weigh the facts differently. That is insufficient, especially where the impugned conclusion formed part of the exercise of a judicial discretion.

[18] The same applies to the second ground. There is nothing to indicate that the court's discretion was not exercised judicially or was influenced by a wrong principle of law or a material misdirection on the facts.

[19] As to the complaint concerning the personal knowledge of Mr Lombard, the respondent's witness, and his failure to explain certain delays, the analysis of the first ground is applicable here.

[20] Again, this ground fails to establish that the court did not exercise its discretion judicially or was influenced by a wrong principle of law or a material misdirection on the facts.

[21] The applicant also attacks my refusal to admit the confirmatory affidavit deposed to by Mr Jonosky which was delivered the day before the hearing. That ruling too involved the exercise of a discretion. The affidavit was delivered out of time and out of sequence, without an application for leave that it be admitted. The applicant has not shown that the court's discretion was exercised capriciously, upon a wrong principle, or because of a misdirection of fact.

[22] The challenge directed at my findings on prejudice also does not indicate that the court's discretion was not exercised judicially or was influenced by a wrong principle of law or a material misdirection on the facts.

[23] In the principal judgment I held that the applicant's allegations of prejudice lacked the necessary detail to establish serious and irreparable prejudice rendering a fair trial impossible. Mr *De Oliveira* contended that the court should simply accept the vague allegations of the applicant's witness in the face of bare denials. Mr *Posthumus* contended, correctly, that the applicant must make out its case in the founding affidavit. The judgment found that the applicant had failed to establish its prejudice caused by the delays in this matter, particularly given the indications of trial readiness at the pre-trial conferences held in 2023 and 2024.

[24] The applicant has not shown any material misdirection in that evaluation. This is pertinent given the concession by Mr *De Oliveira* that the applicant was not contending that the judgment was wrong on the facts.

Discretion and appellate restraint

[25] The relief sought in the main application was not one to which the applicant was entitled as of right upon proof of any single factor. The court was required to undertake a composite evaluation of delay, explanation, prejudice, the parties' conduct, and the interests of justice, and then to determine whether dismissal of a long-standing action was justified.

[26] That evaluative judgment involved the exercise of a true discretion.

[27] In those circumstances, an appeal court cannot simply interfere because it may itself have attached greater weight to the age of the litigation, or lesser weight to the significance of the April 2024 pre-trial conference, or because it may have been more receptive to the applicant's allegations of prejudice. The question is not whether another court could have reached a different conclusion, but whether there are reasonable prospects that it would do so on a proper basis for appellate interference.

[28] In my view, the applicant has not crossed that threshold. The grounds of appeal reveal dissatisfaction with the outcome, but they do not identify a demonstrable error of principle or material misdirection sufficient to justify appellate intervention in a discretionary decision of this kind.

[29] Accordingly, leave to appeal cannot be granted in terms of section 17(1)(a)(i) of the Superior Courts Act.

[30] The basis for seeking leave in terms of section 17(1)(a)(ii) is that the Supreme Court of Appeal has not pronounced on the question of whether an action may be dismissed for want of prosecution in circumstances where an inordinate or unreasonable delay does not, in and of itself, amount to an abuse of court process.

[31] In my view, *Cassimjee*,⁶ has dealt with this proposition authoritatively.

[32] *Cassimjee* found that the source of a court's power to dismiss an action for want of prosecution is its inherent power to regulate its own process

6 *Cassimjee* fn 3

including the right to prevent an abuse of its process in the form of frivolous or vexatious litigation.⁷

[33] *Cassimjee* went on to find that there are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution should be exercised but indicated three requirements, namely whether there was a delay in the prosecution of the action, whether the delay was excusable and whether the defendant was seriously prejudiced thereby.⁸ *Cassimjee* held that the question to be determined is whether the delay is so unreasonable or inordinate as to constitute an abuse of the process of court.⁹ *Cassimjee* also held that the defendant's conduct must also be taken into account.¹⁰

[34] Ultimately, held *Cassimjee*, the enquiry involves a close and careful examination of all the relevant circumstances, including the period of delay, the reasons therefor and the prejudice, if any, caused to the defendant.¹¹

[35] The applicant seeks leave to the Supreme Court of Appeal to persuade it that relevant facts in addition to an inordinate delay, such as its own conduct or the absence of prejudice, do not need to be considered in order for a court to determine whether it is in the interests of justice to dismiss the

7 *Cassimjee* fn 3 at [8]

8 *Cassimjee* fn 3 at [11]

9 *Cassimjee* fn 3 at [13]

10 *Cassimjee* fn 3 at [21]

11 *Cassimjee* fn 3 at [11]

action. In my view, given the principles enunciated in *Cassimjee*, this argument is unlikely to find favour with the Supreme Court of Appeal.

[36] Furthermore, this ground does fall within the circumstances contemplated by *SALC*.

[37] Accordingly, in my view, there is no other compelling reason to grant leave to appeal per section 17(1)(a)(ii) of the Superior Courts Act.

Order

[38] Accordingly, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the respondent's costs of the application for leave to appeal, including the costs consequent upon the employment of counsel, on scale C.

████████████████████

F SOUTHWOOD

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 24 March 2026

Date of judgment: 25 March 2026

For the Applicant: M De Oliveira
instructed by KWA Attorneys

For the Respondent: I Posthumus
instructed by Pagel Schulenberg Inc