REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

3/11/2016.

CASE NO.: 37718/2006

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

3/11/2016
DATE SIGNATURE

In the matter between:

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|---|---|
| **PIERRE DE VILLIERS BERRANGE N.O.** | **FIRST PLAINTIFF** |
| **RANJITH CHOONILAL N.O.** | **SECOND PLAINTIFF** |
| **PREETHA DABIDEEN N.O.** | **THIRD PLAINTIFF** |
| **NICOLA CRONJE N.O.** | **FOURTH PLAINTIFF** |

and

| | |
|---|---|
| **HENRY VOSSIE VORSTER** | **FIRST DEFENDANT** |
| **DALLAS GOULDEN MASON-JONES** | **SECOND DEFENDANT** |
| **MICHAEL GLEN BURRELL** | **THIRD DEFENDANT** |
| **JONATHAN GILBERT SCOTT** | **FOURTH DEFENDANT** |
| **VORSTER PEREIRA INC** | **FIFTH DEFENDANT** |
| **LAURENCE FRANCISCO PEREIRA** | **SIXTH DEFENDANT** |
| **VPM INVESTMENTS (PTY) LTD** | **SEVENTH DEFENDANT** |
| **ROZAN INVESTMENTS (PTY) LTD** | **EIGHT DEFENDANT** |

**Heard:** **4 August 2015**

**Delivered** **3 November 2016**

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**JUDGMENT**

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A.A.LOUW J

**Introduction**

[1] The defendants ask that the plaintiffs' action be dismissed for want of prosecution. The plaintiffs' alleged cause of action arose in 1999, some seven years prior to the issue of summons. Pleadings closed during the first half of 2007 and in August 2008 the defendants served a request for further particulars for trial. The plaintiffs never answered the request and did not take a single step to advance the litigation, until March 2014 when the defendants were advised that the plaintiffs would be "*resuming*" the action and when they filed their reply to the request for further particulars.

[2] They further argue that the delay in advancing the action is inexcusable and constitutes an abuse of process. They contend that on Mr Berrange's own version the plaintiffs elected years ago not to proceed with the action and that they cannot go back on that election now.

[3] It is further the argued that the merits of the claim do not enter the picture now but the relief sought is on the ground of want of prosecution only.

[4] The plaintiff is Pierre de Villiers Berrangé who: -

4.1. is cited in his capacity as the liquidator of NRB Holdings Limited (formerly The New Republic Bank Limited) ("Holdings" or "NRBH");

4.2. is an attorney of the High Court of South Africa (Natal Provincial Division) and a professional liquidator and practises as such as a director of Berrangé & Wood Inc at Suite 1, The Mews, Redlands Estate, 1 George Macfarlane Lane, Pietermaritzburg;

4.3. was appointed as the provisional liquidator of Holdings on 18 November 2003 and its liquidator on 12 February 2004.

[5] This was the position when summons was issued. Three further liquidators have since been appointed.

[6] The first defendant is Henry Vossie Vorster ("Vorster"), a male attorney who practises as such with the firm Vorster Pereira from 6 Sandown Valley Crescent, Sandton, Gauteng.

[7] The second defendant is Dallas Goulden Mason-Jones ("Mason-Jones"), a male attorney who practises as such with the firm Vorster Pereira from 6 Sandown Valley Crescent, Sandton, Gauteng.

[8] The third defendant is Michael Glen Burrell ("Burrell"), a businessman who resides at 72 Rutland Road, Parkwood.

[9] The fourth defendant is Jonathan Gilbert Scott ("Scott"), a businessman who resides at 12 Portland Place, Durban North, KwaZulu-Natal.

[10] The fifth defendant is Vorster Pereira Inc, a company duly incorporated according to law and in terms of sub-sections 49(4) and 53(b) of the Companies Act No. 61 of 1973 which has its registered office at 6 Sandown Valley Crescent, Sandton, Gauteng.

[11] The sixth defendant is Laurence Francisco Pereira ("Pereira"), a male attorney, who practises as such with the firm Vorster Pereira from 6 Sandown Valley Crescent, Sandton, Gauteng, who is joined in these proceedings by virtue of the fact that he was a director of the fifth defendant and is liable jointly and severally with the fifth defendant for its debts and liabilities.

[12] The seventh defendant is VPM Investments (Pty) Limited, ("VPM") a company duly registered and incorporated according to law which has its registered office at 2 Eglin Road, Sunninghill, Gauteng.

[13] The eight defendant is Rozan Investments (Pty) Limited, ("Rozan") a company duly registered and incorporated according to law which has its registered office at Second Floor, 72 Grayston Drive, Sandton, Gauteng.

[14] The defendants save for the sixth defendant formed a consortium for the purpose of the execution of a scheme in relation to New Republic Bank ("The Bank" or "NRB").

[15] The plaintiff's claim is for the recovery of R15 million plus VAT. This sum is the price Saambou Bank Limited ("Saambou") was prepared to pay for the shares in New Republic Bank ("the Bank" or "NRB") owned by Holdings, which price was paid not to Holdings but to the consortium as a result of a scheme devised and implemented by the consortium.

[16] In respect of the sixth defendant, the plaintiff's claim is based on sub-section 53(b) of the Companies Act, No 61 of 1973 ("the Companies Act") by virtue of his directorship of Vorster Pereira Inc.

[17] The bank was placed under curatorship on 29 January 1999.

[18] At the date of curatorship of the bank: -

18.1. Dato's Samsudin ("Samsudin") held 100% of the issued share capital of Redbridge assets Limited ("Redbridge") a company registered in the British Virgin Islands;

18.2. Redbridge held 73.4% of the issued share capital of SMG Holdings Limited ("SMG"), a public company registered and incorporated in South Africa;

18.3. SMG held 74% of the issued share capital of Holdings, a company registered and incorporated in South Africa;

18.4. Holdings held 100% of the issued share capital of the Bank.

[19] In paragraphs 20 – 22 hereunder I set out the plaintiffs' allegations.

[20] At all times material hereto: -

20.1. Samsudin: -

20.1.1 was the Chairman, a director, and controlled the affairs of Holdings by virtue of his shareholding set out in paragraph 17.1 above; and

20.1.2 was also a director of the Bank until 23 February 1999 and of SMG;

20.2. Scott: -

20.2.1 had been the Chief Executive Officer of the Bank until date of curatorship; and

20.2.2 was a director and the Executive Deputy Chairman of Holdings; and

20.2.3 had been a director of SMG until 22 January 1999;

20.3 Burrell: -

20.3.1 was employed by Holdings and the Bank as Executive Director responsible for corporate and merchant banking until 31 August 1999;

20.3.2 had been a director of SMG until 22 January 1999;

20.3.3 had been a director of Holdings until 14 May 1999;

20.3.4 was a director of Rozan and Brenston;

20.4 Vorster, Mason-Jones and Pereira were attorneys and directors of Vorster Pereira Inc and are liable jointly and severally, together with Vorster Pereira Inc for the debts and liabilities of Vorster Pereira Inc in terms of sub-section 53(b) of the Companies Act.

20.5 Vorster, Mason-Jones and Vorster Pereira Inc represented as attorneys Holdings, the Bank (until curatorship), Brenston, Rozan, VPM, Samsudin, SMG, and Saambou;

20.6 the controlling mind and the directors of Brenston Trading (Pty) Limited ("Brenston") were Scott, Burrell, Vorster and Mason-Jones;

20.7 the controlling mind and the directors of VPM were Vorster, Mason-Jones and Pereira;

20.8 the controlling mind and directors of Rozan were Scott and Burrell;

20.9 Scott, Burrell, Mason-Jones and Samsudin were directors of SMG.

[21] In the period between 29 January 1999 (the date of curatorship) and 28 June 1999, the date upon which Saambou resolved to propose a scheme of arrangement in terms of section 311 of the Companies Act, Vorster, Mason-Jones, Scott and Burrell knew that: -

21.1 a proposal in terms of section 311 of the Companies Act was likely;

21.2 in order to gain control of the Bank any proposer would need to acquire the issued share capital of the Bank ("the shares") from Holdings before a scheme of arrangement was sanctioned;

[22] In order to give effect to the abovementioned scheme, Brenston which was incorporated on 18 March 1999 and is now in the process of being deregistered, was utilised for the sole purpose of purchasing the shares from Holdings at a nominal price and disposing of those shares for the benefit of the consortium.

[23] The Brenston scheme was duly executed and the R15 million divided.

[24] It is not necessary for this judgment to refer to the number of agreements in terms of which it was done.

[25] Suffice it to say in a series of complicated agreements the Brenston object was achieved.

**The law of dismissal for want of prosecution**

[26] It is well settled at common law that the court has an inherent power to prevent an abuse of its process by frivolous or vexatious litigation.[1] An action may be held to be vexatious if it is "*obviously unsustainable*"[2] or "*frivolous, improper, instituted without*

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[1] *Western Assurance Co v Caldwells's Trustee* 1918 AD 262 at 271; *Corderoy v Union Government (Minister of Finance)* 1918 (512) at 519; *Fisheries Development Corporation of SA Limited v Jorgensen and Another; Fisheries Development Corporation of SA v AWJ Investments (Pty) Limited and Others* 1979 (3) SA 1331 (W) at 1338F to G; *Beinash and Another v Ernst and Young and Others* 1999 (2) SA 116 (CC) at paras 10 and 17; *Cassimjee v Minister of Finance* 2014 (3) SA 198 at para 8

[2] *Ravden v Beeten* 1935 (CPD) 269 at 276; *African Farms and Townships Limited v Cape Town Municipality* 1963 (2) SA 555A at 565D to D; *Golden International Navigation SA v Zeba Maritime* 2008 (3) SA 10 at para 9

*sufficient ground, to serve solely as an annoyance to the defendant*".[3] In terms of section 173 of the Constitution the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice.

[27] In *Cassimjee*[4] the SCA said that an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of the action.[5] The court's inherent jurisdiction to control its own proceedings includes the power to dismiss an action on account of delay in or want of prosecution.[6] The SCA held that,

> "*there are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and third, the defendant must be seriously prejudiced thereby. Ultimately, the enquiry will involve a close and careful examination of all the relevant circumstances, including the period of delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's*

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[3] *Fisheries Development Corporation v Jorgensen and Another 1979 (3) SA 1331 (W)* at 1339E to F; *Bisset and Others v Boland Bank Limited and Others* 1991 (4) SA 603 (D) at 608D to E

[4] *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) at para 10

[5] See in this regard *Verkouteren v Savage* 1918 AD 143 at 144; *Schoeman en Andere v Van Tonder* 1979 (1) SA 301 (O) at 305C to E; *Kuiper and Others v Benson* 1984 (1) SA 474 (W) at 476H to 477B; *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W) at 676B to 679I; *Bisset and Others v Boland Bank Limited and Others* 1991 (4) SA 603 (D) at 608C to E; *Sanford v Haley NO* 2004 (3) SA 296C at para 8; *Gopaul v Subbamah* 2002 (6) SA 551D at 558F to J; *Golden International Navigation SA v Zeba Maritime Co Limited; Zeba Maritime Co Limited v MV Visvliet* 2008 (3) SA 10 (C); Zakade v Government of the RSA [2010] JOL 25868 (ECB)

[6] *Sanford v Hayley NO* 2004 (3) SA 296 at para 8

*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."* [7]

[28] The SCA[8] also commended the approach of Salmon J in the English case of *Allen v Sir Alfred McAlpine and Sons Limited: Bostick v Bermondsey and Southwark Group Hospital Management Committee; Sternberg v Hammond*[9] where the Court of Appeal said:

"*A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: in order for such an application to succeed, the defendant must show:*

*(i)* *that there has been an inordinate delay. It would be highly undesirable indeed impossible to lay down a tariff – so many years or more on one side of the line and a lessor period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.*

*(ii)* *that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.*

*(iii)* *that the defendants are likely to be seriously prejudiced by the delay. This may be prejudiced at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the*

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[7] 2014 (3) SA 198 (SCA) at para 11

[8] In *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) at para 12

[9] [1968] 1 All ER 543 (CA) at 561E to H

*third parties. In addition to any inference that may properly be drawn from the delay itself; prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."*

[29] In a separate judgment in *Allen*[10] Diplock LJ said:

"*What then are the principles which the Court should apply in exercising its discretion to dismiss an action for want of prosecution on a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. 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 intention 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. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend on the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend on the recollection of witnesses of events which happened long ago. Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant his*

[10] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 ALL ER 543 (CA) at 555 in fine – to 556D

*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...*"

[30] The House of Lords approved the principles laid down by the Court of Appeal in *Allen* in *Birkett v James*[11] and again in *Department of Transport v Chris Smaller.*[12]

**The delay**

[31] The plaintiffs' delay in prosecuting the action is extreme. After the proceedings had closed during the first half of 2007 it took from August 2008 until March 2014 for the plaintiffs to answer the defendants' request for further particulars for trial. This is a period of five and a half years. Not only was the request not answered during that period but literally nothing happened in that period. There was no communication of any kind between the attorneys acting for the parties.

[32] In such circumstances the defendants had good reason to believe that the action against them was not going to proceed with at all but had died a natural death.

[33] Mr Berrangé must partially have held the same view for in March 2014 he advised the defendants that the plaintiffs would be "resuming" the action. This statement must be seen in the context thereof that there is no evidence that there ever was any agreement to "hold over" this litigation between the parties.

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[11] [1978] AC 297 (HL)
[12] (1989) 1 AC 1197 (HL) 1203

[34] What Mr Berrangé and the other liquidators actually did in the meantime was to pursue the other debtors of NRB in an attempt to restore NRB to solvency. There were claims of hundreds of millions of rand against auditors as well as newspaper publishers and owners who as, it seems, spread rumours that NRB did not have sufficient reserves and thus caused a run on the deposits that NRB held.

[35] Prior to instituting the Brenston action, the receivers of NRB and liquidators of Holdings instituted legal proceedings against Dato' Samsudin and others, Mr Seabrooke and others, and the auditors of NRB and Holdings which have since been settled as follows:

35.1 the Samsudin matters on the basis that NRB and Holdings were paid R191,5 million in June 2007;

35.2 the Seabrooke matters on the basis that NRB and Holdings were paid R28,5 million in August 2008; and

35.3 the auditors matters on the basis that NRB was paid R20 million in June 2013.

[36] The picture is clear – the receivers of NRB and the plaintiffs first litigated against the entities in the above paragraph and had the recovery been successful, the litigation against the defendants would not have been resumed.

**The plaintiff's inordinate delay**

[37] The plaintiffs' inordinate delay is apparent from the following chronology:

37.1 5 August 1999: conclusion of Brenston Agreement;

37.2 9 November 1999: Brenston Agreement amended;

37.3 22 November 1999: Consideration and Nomination Agreements entered into;

37.4 14 November 2003: NRBH placed in provisional liquidation;

37.5 18 November 2003: Mr Berrange appointed as provisional liquidator;

37.6 12 February 2004: Mr Berrange appointed as liquidator of NRBH;

37.7 August 2004: interrogation of Mr Vorster and Mr Mason-Jones (first and second defendants);

37.8 14 November 2006: action against the defendants instituted by Mr Berrange (only);

37.9 first half 2007: pleadings close in action;

37.10 16 August 2007: second to fifth plaintiffs are added as co-plaintiffs;

37.11 7 December 2007: Mr Berrange serves requests for further particulars to the third defendant's plea and to the first, second, fifth, sixth and seventh defendants' pleas and to fourth and eighth defendants' pleas;

37.12 25 March 2008: second to fifth plaintiffs serve a notice in terms of Rule 15(2) adding themselves as co-plaintiffs in the proceedings;

37.13 8 August 2008: first, second, fifth, sixth and seventh defendants deliver their further particulars and a request for further particulars for trial on the plaintiff;

37.14 18 March 2014: letter received from the plaintiffs' attorneys advising that they had "*been instructed to resume proceedings*";

37.15 24 March 2014: the plaintiffs file their reply to the request for further particulars for trial served on 8 August 2008;

37.16 4 April 2014: the defendants' attorneys write to the plaintiffs' attorneys advising them that the action has superannuated;

37.17 23 April 2014: the plaintiffs' attorneys advise the defendants' attorneys that they would apply for a declarator that the plaintiffs' conduct in delaying prosecution of the action would not constitute an abuse of process;

37.18 24 April 2014: the plaintiff's discovery affidavit filed;

37.19 7 July 2014: defendants launch current application.

[38] The chronology reveals that there was a very substantial period – i.e. that between 8 August 2008 and 18 March 2014, a period of almost six years, during which Mr Berrange took no steps whatsoever to advance the action against any of the defendants. It subsequently emerged that this was as a result of a clear and reasoned choice not to proceed with the action because its prospects and recovery was uncertain, and the merits of the action against the auditors far better.

[39] Mr Berrange subsequently however changed his mind, apparently because the recovery against NRB's auditors was far less than he had anticipated.

[40] In the plaintiffs' attorneys' letter to the defendants' attorneys dated 23 April 2014, Mr Berrange says that NRB was paid R20 million in June 2013. There was another ten month delay before Mr Berrange decided to resume the action. This delay is not explained either.

[41] Mr Berrange does not deny that there has been an inordinate delay in the prosecution of the action and does not contend that the delay is not lengthy nor reasonable or acceptable. On the contrary, he accepted in his attorney's letter of 23 April 2014 (annexure "HV4") that the plaintiffs had been "*inactive*" and even threatened to apply to court for an order declaring that the plaintiffs' conduct in delaying prosecution of the action did not amount to an abuse of process. His explanation in his affidavit under the heading "*Approach of the Liquidators*" is premised on an acceptance of delay.

[42] No steps in the action against the Messrs Vorster, Mason-Jones, VPI and VPM were taken for six years – almost double the ordinary prescription period in respect of debts being extinguished. In respect of Messrs Burrell and Scott the period of inactivity is over six years – they filed their replies to the plaintiffs' request for further particulars in January and March 2008.

[43] In *Krakauer v Katz*[13] the English Court of Appeal held as follows:

> "*There was no difficulty in proceeding with the action. The defendant's solicitors were on the record all the time. Even if the plaintiff could not proceed with the claim during the war owing to various difficulties, there was no reason why he should not have pursued it during the 8 years since that time. I am disposed to agree with what counsel for the defendant suggested, namely that, by analogy with the Limitation Act 1939, if a plaintiff allows an action to go to sleep for 6 years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it. In this case, it is not 6 years, but 12 years, and I am quite clear that after this length of time the plaintiff ought not to be allowed to go on with the action.*"

[44] In *Hunt v Engers*[14] the cause of action was based on a money claim. The summons was six years old. The court dismissed the action. In *Commercial Bank of South Africa v Schreiner*[15] the court dismissed the claim for money because the summons was five years. In *Golden International Navigation SA v Zeba Maritime Co Limited; Zeba Maritime Co*

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[13] [1954] 1 All ER 244 at 246
[14] 1921 CPD 754
[15] 1929 SWA 38

*Limited v MV Visvliet*[16] the plaintiff's cause of action had arisen more than a decade earlier, but for five years the plaintiff had not taken any steps to bring the matter to finality. The court ordered that the plaintiff's action be struck out.

[45] In *Molala v Minister of Law and Order and Another,*[17] summons had been issued in March 1987 and a request for further particulars delivered a month later. Nothing then happened until further particulars were delivered in September 1991 – a delay of four and a half years. The plaintiff's action was dismissed pursuant to a hearing held in November 1991.

[46] The lengthy delay in prosecuting the action in the current matter is exacerbated by the fact that the plaintiffs' alleged cause of action arose in 1999, some fifteen years ago and seven years prior to the issue of summons.

[47] Even after his appointment as provisional liquidator on 18 November 2003 and his appointment as liquidator on 24 February 2004, Mr Berrange waited just less than three years before issuing summons against the defendants on 14 November 2006.

[48] The plaintiffs' concession of inordinate delay aside, we submit that it is clear that the delay has been inordinate and unreasonable and falls on the wrong side of the line referred to by Salmon LJ in *Allen.*[18]

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[16] 2008 (3) SA 10 (C)
[17] 1993 (1) SA 673 (W) at 676B to 679I;
[18] *Allen v Sir Alfred McAlpine and Sons Ltd* [1968] 1 All ER 543 (CA) at 561E

**Prejudice to the defendants**

**Their right to a fair trial has been compromised**

[49] In their founding affidavit the defendants set out in detail the prejudice they will suffer if the plaintiffs were allowed to continue with their action. Save limited arguments (dealt with below), Mr Berrange and the other defendants do not deny and cannot gainsay the prejudice the defendants have suffered and will suffer.

[50] The sixth defendant, VPI, no longer conducts a legal practice with three directors. Mr Vorster is the only director and occasionally receives instructions he is able to accept. The defendants are of advanced age and in differing states of health. Mr Mason-Jones is 67 years of age, semi-retired and of fragile disposition. Mr Pereira is 84 years of age, frail and in recent years underwent open-heart surgery. The rigours of conducting a trial can only be adverse to the health of elderly men, in particular where they will be required to be tested on events that took place many many years ago. It is grossly unreasonable and untenable after such an excessive delay to subject the defendants to a trial at this stage – no fair trial can take place.

[51] Mr Scott is 60 years of age, is no longer in full time employment and does not have a regular income. Mr Burrell is 50 years old, has a modest income, which is not sufficient to fund litigation against the plaintiffs. The extensive passage of time has resulted in the financial position of most of the defendants changing adversely. None of them still have the income they had fifteen years ago when the Brenston Agreement was concluded, or eight years ago when the action was instituted, or seven years ago when pleadings closed, to fund commercial litigation against a liquidator not personally liable for funding litigation costs. The plethora of issues in dispute between the parties, the serious allegations of fraud, the number of defendants with differing defences and different facts

applicable to them make it likely that a trial (if the plaintiffs are permitted to proceed with it) will be a lengthy one. Just to answer the request for further particulars, the plaintiffs say that they had to review "*hundreds of thousands of pages of documents*". Self-evidently, the costs of running such a trial will be enormous. The prejudice to those defendants who will not have resources to fund such a long trial are manifest.

[52] It is common knowledge amongst practitioners that trial dates in this division are only being allocated twelve to eighteen months hence. A trial of the magnitude of the current one will be designated a special trial as contemplated in the practice manual of this division. That requires a written application for a special trial date to be made to the office of the Judge President. A special trial is likely to be allocated even further into the future then the current twelve to eighteen month delay. Thus to compound the delay already experienced, it is anticipated that the defendants would have to wait a further two years before a trial date might be allocated. The prejudice referred to will be exacerbated to a great extent.

[53] The inordinate and inexcusable delay by Mr Berrange in pursuing his alleged claims has resulted in all relevant documents in the possession of VPI no longer being available to the defendants. When the agreement which is the subject matter of the action was concluded VPI was located in offices in Fredman Drive, Sandton. Prior to the issue of summons seven years later, VPI had relocated to premises in Sandown Valley Crescent. In that move, many of the documents relating to matters initiated during or prior to 1999 were destroyed. In 2011 VPI again moved offices from Sandown Valley Crescent to Bryanston and in that process all files and documents older than five years were destroyed. The result is that all files and documents that might be or become relevant to the defendants in the action are not available – they have been destroyed. It would be

extremely prejudicial to force the defendants into a trial after such a lengthy hiatus (without warning that the hiatus might one day end) when all of their documents which are relevant or could possibly be relevant have been destroyed: it is difficult to conceive of greater prejudice to a defendant.

[54] When the Brenston Agreement was concluded Mr Scott and Mr Burrell had ready access to the books and records of NRBH. NRBH has since then been liquidated and as a consequence neither Messrs Scott nor Burrell have access to the books and records of NRBH relevant to the Brenston transaction.

[55] Neither of Messrs Scott nor Burrell has maintained contact with the erstwhile directors of NRBH or the erstwhile management team of NRB which benefited from the transaction with Saambou. Two of the directors with whom Mr Scott had personally discussed all the details of the Brenston transaction have died. Mr Scott does not know the whereabouts of any of all the other erstwhile directors of NRBH. Material witnesses who would have been available to the defendants are by reason of the inordinate delay no longer available. Thus the long passage of time prejudices the defendants even further: leaving aside the notorious inability of witnesses to recollect detail (in particular after such a long period of time), and also leaving aside whether or not witnesses might be able to located, witnesses who would have been able to assist the defendants are dead.

[56] Mr Berrange must, at the time of issue of summons, having regard to the (already at that stage) seven year delay, been aware that the defendants would be increasingly prejudiced as time went by in relation to the availability of documents and witnesses – he was reckless as to the ability of the defendants to one day be in a position to fairly conduct a trial far in the future.

**Preservation of documents and evidence**

[57] Mr Berrange contends that the defendants will not be prejudiced by the unavailability of documents because they will have access to all the relevant documents which his attorney has carefully preserved. He relies in this regard on Mr Vorster's letter of 5 July 2004, annexure R to the founding affidavit, which said that Mr Vorster was preparing a bundle of "*all such documents*".

[58] The defendants are most certainly prejudiced by the unavailability of documents. Reliance on Mr Vorster's letter of 5 July 2004 is misguided and the conclusion reached unjustified. Mr Vorster did not suggest that the documents in his possession were the only documents relevant to the issues and in other parts of the letter (not quoted in Mr Berrange's answering affidavit), Mr Vorster specifically recorded that he was not in possession of all relevant documents and suggested he search for them elsewhere.

[59] When Mr Vorster prepared the bundle of documents mentioned in his letter of 5 July 2004, he was unaware of the causes of action being plotted; he and Mr Mason-Jones were summonsed to an interrogation in August 2004 in the belief that their evidence was required to assist Mr Berrange in some or other cause unrelated to potential claims against the defendants. They were not aware that Mr Berrange was in fact contemplating serious allegations of fraud, unethical conduct and dishonest conspiracies based solely on his *ex post facto* interpretation of the transactions referred to in the particulars of claim. Consequently he only searched for and disclosed documents relevant to the Brenston transaction. He did not search for, disclose or retain any documents relevant to the refutation of the claims Mr Berrange advanced much later.

[60] None of the defendants was aware that Mr Berrange was being selective in the witnesses called for interrogation at the enquiry.

60.1 He did not call all of the Brenston directors for interrogation in his investigation of the Brenston transaction and did not ask all of them for the disclosure of relevant documents. Although Mr Scott had told Mr Vorster that he had discussed the Brenston transaction individually with each of the directors of NRBH he did not attempt to secure copies of documents in possession of Mr Burrell or Mr Scott relevant to the discussions which Mr Scott had with the directors of NRBH. Mr Scott did not keep copies of his contemporaneous notes of discussions with his fellow NRBH directors, nor did he make any effort to secure copies of the notes and records which might in 1999, some fifteen years ago, have been maintained by him or any of those directors.

60.2 To the best of the defendants' knowledge, Mr Berrange did not call any of the directors of NRBH for interrogation, nor seek the disclosure of relevant documents from any of them, nor did he ask any of them, when he had the opportunity to do so ten years ago, why they approved and authorised the execution of the Brenston agreement Similarly, Mr Berrange did not seek disclosure of relevant documents from Saambou nor did he call any of the directors of Saambou for interrogation when he had the opportunity to do so ten years ago.

60.3 Mr Berrange did not interrogate the Registrar of Banks (the person who occupied that post in 1999) on any topics mentioned in the replying affidavit.

60.4 In addition, Mr Berrange did not interrogate the erstwhile Curator of NRB ten years ago when he had the opportunity to do so in the course of his Inquiry.

[61] It is clear that Mr Berrange's collection of evidence and documents was purposely selective, self-serving and woefully incomplete. Fifteen years after the event, the defendants can no longer obtain all the relevant documents from the erstwhile directors of NRBH (liquidated in 2003) or from any of the directors of Saambou (liquidated over ten years ago in November 2003) or from the Registrar of Banks in office in 1999 or from the erstwhile Curator of NRB. This prejudice is overwhelming. No fair trial can ever take place where one party is precluded by the other's admitted gross inaction from presenting all relevant documents and evidence.

[62] In addition, the majority of the directors of NRBH and Saambou at the time of the Brenston transaction in 1999, have either passed away or are no longer capable of attesting to the allegations now made by Mr Berrange. It is a matter of public knowledge that the Registrar of Banks in 1999, the then curator of NRB, and even the Receivers who first took office in November 1999, have all long since retired. The defendants would thus be irremediably prejudice in the presentation and conduct of their defence.

**Mr Berrange's excuses**

[63] The defendants annexed a letter from plaintiffs' attorneys dated 23 April 2014 wherein it argues that the delay does not amount to abuse of the process of the court.

[64] To me, from the reading of the excuses as a whole, it is clear that the real reason is that the plaintiffs first wanted to pursue other claims where it had good prospects of success. I quote that part of the letter, annexure "HV4" to the founding affidavit:

> *"Prospects of success*
>
> *3. It is, in our view, unconscionable for a firm of attorneys (Vorster Pereira Inc) who has acted for a client (Holdings) and other*

*companies in a group ( the Samsudin group) over a period of many years and for which they charged millions of rands in fees to conceal the fact that it was involved in a fraudulent scheme where the purchase price of R17,3 million for the NRB shares was diverted to a consortium comprising its own partners and the former senior management of NRB"*

4. *The defences advanced by your client and others include:*

   4.1. *they did not act for Holdings (Plea – para 12.2) whereas the documents demonstrate otherwise;*

   4.2. *they owed no duty to disclose the scheme (Plea – para 41.2) whereas the documents demonstrate and the law requires otherwise.*

5. *Mason-Jones and Vorster gave evidence at the s 417 enquiry. They made it plain that they owed no fiduciary duty to Holdings in regard to the Brenston transaction.*

6. *Your clients' lengthy request for further particulars necessitated our having to review documentation in regard to a wide range of issue, including:*

   6.1. *"when, in relation to what matters and what purpose" your clients represented Holdings, NRB, Brenston, Rozan, VPM, Samsudin, SMG and Saambou, facts perculiarly within your clients' knowledge (request for further particulars – para 13); and*

   6.2. *requiring details of the remaining liabilities of Holdings which included the R207 million claim (request for further particulars – paras 71 & 72).*

7. *The approach adopted by your clients, which is legitimate, resulted in our having to review hundreds of thousands of pages of documents.*

8. *The documents have exposed the true substance of the relationship between Vorster and Mason-Jason and their clients.*

9. *Despite the fact that cases against professional men, particularly for fraud or breach of a fiduciary duty, are notoriously difficult to prove and are notoriously expensive to run, we have advised the receivers that the liquidators of Holdings have good prospects of success against your clients and, as a consequence, NRB should continue to fund the Brenston action."*

[65] The "wait and see" approach by the plaintiffs is best set out in paragraph 14 of that same letter where it is stated that *"if the action against the auditors had proceeded to trial and been successful, then the claim by NRB against Holdings would have been extinguished. In that event, there would have been no reason for the receivers of NRB to fund the Brenston action".*

[66] Whilst the plaintiffs had these other claims to pursue and elected to do so this case was purely put on the back-burner without any communication about that to the opposing attorneys. I cannot think of two more important considerations in deciding to pursue litigation than the merits and the costs of litigation i.e. proving the case against the would-be defendants. That the plaintiff went through this exercise is clear from paragraph 9 of "HV4":

"9. *Despite the fact that cases against professional men, particularly for fraud or breach of a fiduciary duty, are notoriously difficult to prove and are notoriously expensive to run, we have advised the receivers*

*that the liquidators of Holdings have good prospects of success against your clients and, as a consequences, NRB should continue to fund the Brenston action."*

[67] The other excuses offered by Mr Berrangé are so weak that I do not deem it necessary to discuss these.

**The role of the courts**

[68] It is important to bear in mind that a decision about undue delay not only involves the interests of the litigating parties but also that of the court and in a broader sense, the general public.

[69] The rule about undue delay is not only a rule of practice but a rule of law especially in the field of reviews and in a case like the present.

[70] The following is stated in Hiemstra & Gonin *Trilingual Legal Dictionary*, 2nd edition, (1986):

> "**interest reipublicae ut sit finis litium** (cf. Dig. 4I.I0.5; et infra **ne dominia**) dit is in die staatsbelang dat daar 'n einde aan gedingvoering kom // it is in the interest of the state that litigation be finalized."[19]

[71] As it appears in the Digesta it has been part of our legal system for over 1000 years.

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[19] At p216

[72] In the context of a review it was referred to by the Appellate Division as follows:

> *"Dit is wenslik en van belang dat finaliteit in verband met geregtelike en administratiewe beslissings of handelinge binne redelike tyd bereik word. Dit kan teen die regspleging en die openbare belang strek om toe te laat dat sodanige beslissings of handelinge na tydsverloop van onredelike lang duur tersyde gestel word* - interest reipublicae ut sit finis litium, *(Sien* Sampson v SA Railways & Harbours, *1933 K.P.A. 335 op bl. 338.) Oorwegings van hierdie aard vorm ongetwyfeld 'n deel van die onderliggende redes vir die bestaan van die reel."*[20]

[73] Indications are that this rule will be much more strictly enforced in future. There is a judicial case flow management committee under the leadership of the Chief Justice. This committee has drafted a rule about superannuation. It is to be inserted in either the Uniform Rules of Court or in the Superior Courts Act. The full text reads as follows:

> ***"DRAFT RULE RE SUPERANNUATION FOR INSERTION IN UNIFORN RULES OF COURT; ALTERNATIVELY, IN THE SUPERIOR COURTS ACT 10 OF 2013***
>
> *(1) Subject to the further provisions of this rule, if an application in writing has not been made to the registrar by any party to a case within two years of the date of the issue of the summons or notice of motion for the setdown of the case for hearing, or if the matter is not ready at the expiry of that period for reference by the registrar to case management in terms of rule 37A, as the case might be -*
>
> *(i) the initiating process in the action or the application shall be deemed to have become superannuated; and*

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[20] *Wolfgroeiers Afslaers vMunisipaliteit van Kaapstad* 1978(1) SA 13 (AA) at p 41 E-F

*(ii) the registrar shall, after giving the parties 15 days' written notice, archive the court file and remove the case from the administrative record of pending matters.*

*(2) Any party to a case in which notice has been given by the registrar in terms of sub-rule (1) may apply to a judge in chambers on notice to the other parties to the case, within 15 days of the date [of] the notice by the registrar, and on good cause shown, for an extension of time within which to render the matter ready for an application to be made to the registrar for the setdown of the case for hearing*

*(3) A judge seized of an application in terms of sub-rule (2) may –*

*(a) grant the application on such terms as he or she may consider meet, or*

*(b) refer the application for argument in open court on appropriate directions, or*

*(c) refuse the application, and*

*(d) make such order as to costs as may be meet.*

*(4) Any order made in terms of sub-rule (3)(a) granting an application in terms of sub-rule (2) must incorporate a timetable for the further conduct of the matter that must include provisions for a date by which application must have been made in writing to the registrar for the setdown of the case for hearing.*

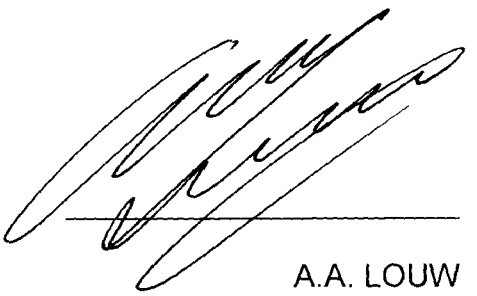
*(5) Any matter in which an application in terms of sub-rule (2) has been granted must be referred by the registrar to a judge for case management, in which event the provisions of rule 37A shall apply* mutatis mutandis."

[74] I emphasise that it is a draft rule subject to further debate but refer to it to show the tendency to regulate delay in an even stricter and, importantly, a formal fashion.

[75] Earlier in the judgment I described the delay as "extreme". Other synonyms that will do are "very great", "exceptional", "very severe", "serious" and "far from moderate". Litigation in this fashion cannot be tolerated. The defendants are entitled to dismissal of the action on account of the serious and inexcusable delay of prosecution.

**Order**

1. The defendants' stay application is upheld.
2. The plaintiffs' action is dismissed with costs.
3. All costs include costs of two counsel.



A.A. LOUW

Judge of the High Court