REPORTABLE

CASE NO.:SA25/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between

RAINIER ARANGIES t/a AUTO TECH	**Appellant**
and	
QUICK BUILD	**Respondent**

CORAM: SHIVUTE CJ, STRYDOM AJA and O'REGAN AJA

Heard on: **06 November 2012**

Delivered on: **18 June 2013**

APPEAL JUDGMENT

O'REGAN AJA (SHIVUTE CJ and STRYDOM AJA CONCURRING):

[1] The respondent, QuickBuild, issued a summons against the appellant, Mr R Arangies, who trades as Auto Tech, in October 1998 claiming payment of approximately N$415 000 in relation to building work allegedly performed by the respondent for the appellant in Tsumeb. The exchange of pleadings and preparation for trial that followed were interrupted by several long periods of delay.Nearly twelve years later in September 2009, Mr Arangies launched an application in terms of Rule 33(4) for an order dismissing the action on the ground that Quick Buildhad failed to prosecute its action within a reasonable time. Mr

Arangies'application was dismissed by the High Court and he now appeals against that decision.

Preliminary issue on appeal: late filing of the appeal record

[2] The first issue that arises on appeal is the late filing of the appeal record. In terms of Rule 5(5)(b) the appeal record shouldbe lodged within three months of the delivery of the judgment against which the appeal is being brought. The judgment in this matter was delivered on 22 January 2010 and the appeal was noted on 12 February 2010. The appeal record should therefore have been lodged before 22 April 2010. The record was lodged more than a year later on 28 June 2011. The failure to lodge the appeal record timeously had the effect that the appeal lapsed.[1] On 20 January 2012, more than six months after the late filing of the appeal record, and almost to the day, two years after judgment had been handed down by the High Court, the appellant applied for condonation for the late filing of the appeal record and for the reinstatement of the appeal. In his affidavit supporting the application for condonation, the appellant explained that he had entrusted the timeous prosecution of his appeal to his legal representative, Mr Roets. Appellant explains further that in June or July 2011, his legal representative informed him that although the appeal record had not been lodged timeously, it had been lodged on 28 June 2011.

[3] In his affidavit, the appellant also informed the Court that Mr Roets had informed him that the delay in filing the appeal record had occurred because Mr Roets had initially instructed Shatech, then the official transcribers of court

[1] See, for example, *Beukes and Another v SWABOU and Others* [2010] NASC 14 (5 November 2010) at para 10.

proceedings, to attend to the preparation of the record. Shatech advised Mr Roets that it could not locate the court file. Because Mr Roets practised from Grootfontein it was not possible for him to assist in the search for the file. Mr Roets did travel to Windhoek to seek to find the file, but could only find portions of it, and the file had to be reconstructed from Mr Roets' own office records, which unfortunately were in disarray because of a series of misadventures, including a flood and a burglary. The appellant also explains that in addition to his practice as a legal representative, Mr Roets also conducted several other businesses, including farming and a hunting business that caused him to be absent from his legal practice for substantial periods. When the appellant discovered the delays that had affected the prosecution of the appeal, he decided it would be appropriate to appoint new legal representatives to prosecute the appeal, which he did in October 2011. Yet the new legal representatives only lodged the application for condonation for the late filing of the appeal record and for reinstatement of the appeal in January 2012. The appellant argues that his former legal representative caused the delays in the appeal and that he should not be penalised for the delays caused by the inaction of his legal representative.

[4] As this Court has recently held:

> 'An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. The jurisprudence of both the Republic of Namibia and South Africa indicate that a litigant is required to apply for condonation and to comply with the Rules as soon as he or she realises there has been a failure to comply.'[2]

[2] Id. at para 12. See also *Fr GP Petrus v Roman Catholic Archdiocese* [2011] NASC 24 at para 9 and *S v S* [2012] NASC 24, delivered on 15 November 2012 at paras 16 - 18.

[5] The application for condonation must thus be lodged without delay, and must provide a 'full, detailed and accurate'explanation for it.[3] This Court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –

> 'the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.'[4]

These factors are not individually determinative, but must be weighed, one against the other.[5]Nor will all the factors necessarily be considered in each case. There are times, for example, where this Court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been 'glaring', 'flagrant' and 'inexplicable'[6]

[6] In this case, the appeal record was finally lodged seventeen months after the judgment was handed down and the application for condonation for the late filing and for reinstatement was launched a further seven months later, that is two

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[3] *Beukes*, cited above n1, at para 13.
[4] See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* [2012] NASC 21 (25 October 2012) at para 68.
[5] Id.
[6] See *Beukes*, cited above n 1, at para 20; see also *Fr JG Petrus*, cited above n 2, at para 10.

years, almost exactly, after the judgment in the High Court was handed down. This is a substantive delay that could only be excused with weighty and persuasive explanation.

[7] By way of comparison, it is useful to compare this period of delay to other applications for condonation in appeal matters considered by this Court in the last few years. In *Beukes*, the delay between the judgment of the High Court (7 March 2006) and the application for condonation was three years (16 March 2009). The Court found the delay to be inexcusable. In *Fr Petrus*, the delay between the judgment of the High Court (14 January 2008) and the application for condonation (15 November 2010) was 2 years and 10 months and again this Court found the delay to be inexcusable. In *S v S,*too,the appeal record was filed two and a half months late, and condonation was refused in view of the fact that the explanation for the delay was not cogent and the appeal lacked prospects of success.[7]In *Rally for Democracy*, on the other hand, the delay in filing the appeal record was only five days and was excused.[8]

[8] This jurisprudence illustrates that the delay of two years in this case is a long delay for which the appellant must furnish a cogent explanation. The explanation given by the appellant is that he was not aware of the rules of Court and so left the prosecution of the appeal to his legal representative. More than a year after the notice of appeal was lodged, appellant heard from his legal representative that the record had been filed, albeit late. As set out above, his legal representative told the appellant that he had appointed a transcription firm to

[7] Cited above n 2.
[8] See n 4 above.

attend to the lodging of the record but that they had failed to do so because the court file was lost. It is not clear on the record why a transcription firm should have been appointed to prepare the record. There has been no oral evidence in these proceedings so the compilation of the record did not involve transcription, as the respondent pointed out. All that was needed was a compilation of the court pleadings and documents together with the judgments and orders of the High Court. Moreover, appellant's legal representative appears to have made very little effort to locate the missing file or to take steps to collate a substituted record. He explains that his office archiving system was in disarray because of a burglary and a flood, but the Court is given no detail as to what steps were taken to surmount these obstacles. The absence of any sense of diligence or attention to compliance with the Court's rules renders the explanation for the delay in filing the court record weak and unpersuasive.

[9] There are circumstances where a litigant should not be held to account for his or her legal representative's failure.[9] Yet a litigant would only be absolved of a legal representative's lack of diligence if, once the litigant becomes aware of the default, the litigant takes steps to cure it.[10] Here although appellant became aware of the default in June or July 2011, he did not take steps to appoint new legal representatives till October 2011 and then his new legal representatives did not file an application for condonation for the late filing of the appeal record for three months. As mentioned above by the time the application for condonation was lodged two years had passed since the judgment had been handed down. So the appellant has not shown that he acted with alacrity to remedy the delays

[9] See *Rally for Democracy,* cited above n 4, at para 35.
[10] See *S v S,* cited above n 2, at para 18.

occasioned by his legal representative's lax attitude to compliance with this Court's rules.

[10] Accordingly, the explanation provided for the substantial delay in this case is neither cogent nor persuasive. Before determining whether the application for condonation should be granted, it is appropriate to consider briefly the prospects of success.

Prospects of Success in respect of the Rule 33(4) Application

[11] The appellant is appealing against the High Court's decision refusing his applicationfor an order dismissing the respondent's action on the basis that the respondent had failed to prosecute the action to finality within a reasonable time. In order to consider the merits of the appeal, it is necessary to set out the history of this litigation briefly. The respondent, Quick Build,issued summons on 7 October 1998, and Mr Arangies, the appellant, entered an Appearance to Defend on 19 October 1998. Mr Arangies then lodged a Request for Further Particulars on 9 November 1998. Nearly two years passed until Quick Build furnished Further Particularson 21 August 2000. In December 2000, Quick Build called upon Mr Arangies to lodge a Plea within five days and Mr Arangies then lodged his Plea and Counter-claim on 15 January 2001. Quick Buildthen lodged a Request for Further Particulars to the Plea and Counter-claim on 29 January 2001. In May 2001, Quick Build's legal practitioners successfully applied to Court to compel the provision of Further Particulars and on 4 July 2001 Mr Arangies furnished Further Particulars. On 11 September 2001, after giving notice, he lodged an Amended Plea and Counter-claimand on 19 September 2001 a further Amended Plea and

Counter-claim. On 1 November 2001 Quick Buildlodged its Plea to the Amended Counter-claim.

[12] Then on 13 May 2005, three and a half years later, Quick Buildamended its Particulars of Claim and on 17 May 2005, Mr Arangies lodged his Plea to the Amended Particulars of Claim. Then more than four years later on 23 July 2009, Quick Build issued a Request for Trial Particulars, which Mr Arangies furnished on 27 August 2009, on the same date requesting Trial Particulars of Quick Build. Those particulars were furnished by Quick Build on 15 September 2009. Finally, on 27 August 2010, Mr Arangies lodged an Amended Plea to the amended Particulars of Claim.

[13] On 27 September 2009, the appellant lodged the application that is the subject of this appeal. In terms of that application, appellant requested that the question 'whether plaintiff failed to prosecute its action to finality within a reasonable time' be decided, in terms of Rule 33 (4) before any evidence is led, or alternatively separately from any of the other questions arising. Rule 33(4) provides that:

> 'If it appears to the court *mero motu* or on the application of any party that there is, in any pending action, a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of…'.

[14] The events outlined above show that the respondent's prosecution of his action was dilatory as evidencedparticularlyby three very long periods of delay: a period of nearly two years to respond to appellant's Request for Further Particulars; a period of three and a half years to amend its Particulars of Claim after lodging its Plea to the Counterclaim; and a further period of four years from the lodging of its amended Particulars of Claimuntil the matter was finally enrolled for trial in June 2009. Delays of this sort in litigation are harmful, costly and inappropriate. They impair 'the inexpensive and expeditious institution, prosecution and completion of litigation',[11]and at times also threaten the fair adjudication of civil proceedings. It is to avoid the harm caused by such delays that the High Court recently introduced a system of judicial case management in civil matters in the High Court.[12] The goals of that system are to ensure that the adjudication of civil disputes is expeditious and fair, and the timely and diligent compliance with the Rules of the Courts will facilitate the achievement of those goals.

[15] The High Court dismissed the application on the ground that the appellant had failed to show that the respondent had intended to abuse the process of court. In reaching that conclusion, Heathcote AJ relied on a judgment of the South African High Court in *Molola v Minister of Law and Order and Another*.[13] In that case, the defendant had sought an order dismissing an action on the grounds that the plaintiff had taken four and a half years to furnish further particulars. There the Court held that the question is not simply whether a reasonable time has elapsed,

[11] See the remarks in *Rally for Democracy*, cited above n 4, at para 66.
[12] See the discussion in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* [2012] NASC 15, delivered on 13 August 2012, at paras 86 – 91.
[13] 1993 (1) SA 673 (W).

'the issue is whether there is behaviour which oversteps the threshold of legitimacy',[14] that prejudice to the defendant is relevant but not determinative of the matter,[15] and that the enquiry remains 'what plaintiff intended, albeit in part by way of *dolus eventualis*.'[16] The High Court concluded that, on the basis of these principles, in order to succeed an applicant would have to allege and prove that a dilatory plaintiff was guilty of an abuse of process caused intentionally (albeit through *dolus eventualis*). The judge found that the appellant had not made this allegation and that therefore his application could not succeed.

[16] The South African Supreme Court of Appeal has considered the question of the circumstances in which an action will be dismissed for want of timely prosecution since the High Court decision in these proceedings was handed down. In *Cassimjee v Minister of Finance*, the Supreme Court of Appeal 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 the delay, the reasons therefor and the prejudice, if any, caused to the defendant.'[17]

[17] The facts in *Cassimjee* disclosed excessive delay. More than 32 years had elapsed between the date the action had been instituted and the date of the

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[14] Id. at 677 D.
[15] Id.
[16] Id. at 677 E.
[17] [2012] ZASCA 101, delivered on 1 June 2012, at para 11.

judgment in the High Court on appeal to the Supreme Court of Appeal. The appellant had taken no steps between 1981 and 2001.[18] The Supreme Court of Appeal held that there was no basis to interfere with the exercise of the discretion by the High Court below, which had dismissed the action for inordinate delay. The Supreme Court of Appeal held that the discretion exercised by the High Court was a discretion in the strict sense.[19] The approach adopted by the South African Supreme Court of Appeal, focussing on the explanation for the delay given by the dilatory litigant and the consequential prejudice to the other parties,rather than on the intention of the dilatory party, is consistent with the weight of recent High Court authority in South Africa.[20] The approach adopted in *Molala,* to the extent that it focussed on the intention of the plaintiff, is different to the approach adopted by the Supreme Court of Appeal. That Court identified three inter-locking considerations: the extent of the delay, the reason for it, and the prejudice that it has caused.

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[18] Id. at para 16.
[19] Id, at para 23.
[20] See, for example, *Golden International Navigation SA v Zeba Maritime* 2008 (3) SA 10 (C) at paras 21 – 25, where Griessel J cited the decision in *Molala,* but focussed on the explanation given by the plaintiff for its failure to prosecute an action ('No good reason has been shown by the plaintiff why it should now – more than ten years after the cause of action arose – be allowed, at great expense, to proceed with a claim that appears doomed to fail.' (at para 25)); *Gopaul v Subbamah* 2002 (6) SA 551 (D & CLD) at 558 A – B ('…the proper approach is for the Court to weigh up the period of the delay and the reasons therefor, on the one hand and the prejudice, if any, caused to the defendant on the other.' (per Richings AJ)); *Sanford v Haley NO* 2004 (3) SA 296 (C) at para 9 ('the prerequisites for the exercise of such discretion are, first, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and thirdly that the deceased is seriously prejudiced by such delay.' (per Moosa J)); and *Giant Concerts v Minister of Local Government, KZN* 2011 (4) SA 164 (KZP) at paras 34 – 5. And see also the earlier decisions of *Schoeman en Andere v Van Tonder* 1979 (1) SA 305 (O) at 305 305 D – E (discretion to be exercised in highly exceptional circumstances 'hoogs uitsonderlike omstandighede'); and *Kuiper and Others v Benson* 1984 (1) SA 474 (W) at 476 G – 477 C ('. . . the power to strike out the claim will be used only in exceptional cases . . . and then only where there has been a clear abuse of the process of Court'.)

[18] Since judgment was handed down in this matter by the High Court, this Court has also considered when an action should be dismissed on the grounds of unreasonable delay.In *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd,*[21] summons had been issued some eight years before the appeal was heard in this Court. After summary judgment had been dismissed, the plaintiff had delayed for three and a half years before responding to the Request for Further Particulars to the claim. The plaintiff subsequently also delayed for nine months in lodging an amended set of Particulars of Claim when the time to object the proposed amendment had elapsed. These delays led the defendant to launch, amongst other things, an application for dismissal of the action on the grounds of inordinate delay. The High Court dismissed the application on this ground as well as on the others, and the defendant appealed to this Court.

[19] This Court dismissed the appeal on the ground that it could not 'find fault with the conclusion of the High Court.'[22] In reaching its conclusion, this Court found the courts have an inherent power to protect themselves against abuse of process.[23] It continuedas follows:

> 'Whether the court process has been used for improper purpose and therefore constitutes an abuse of process of the court is a question of fact that must be determined by the circumstances of each case. The circumstances in which abuse of process can arise are varied. It is therefore neither possible nor desirable to attempt to list exhaustively the circumstances under which the inherent power will be exercised. Inordinate delay in the prosecution or finalisation of litigation and

[21]Cited above n 12.
[22] Id. at para 102.
[23] Id. at para 18.

> the institution of a groundless action are among the grounds frequently relied upon as evidence of the abuse of the process of the court.'[24]

[20] This Court, per Ngcobo AJA, continued by noting that the power of a court summarily to dismiss an action on account of abuse of process is a departure from the ordinary rule that courts should be accessible to all and so a court 'should be slow' to exercise this power and it should be used 'sparingly' and 'only in very exceptional cases'.[25] After a consideration of case law in both South Africa and the United Kingdom, this Court concluded that '[i]nordinate and inexcusable delay can amount to abuse of the process of court';[26]that the question whether the delay constitutes an abuse of process is a question of fact that 'may be inferred from the circumstances of the case'[27] and that relevant factors will include, amongst other things, 'the length of the delay; any explanation put forward for the delay; the prejudice caused to the defendant by the delay; the effect of the delay on the conduct of trial, . . . the extent, if any, to which the defendant can be said to have contributed to the delay"'[28]

[21] The Court also confirmed that even where abuse has been established, it remains a matter of discretion for the Court as to whether or not to dismiss the action.[29]

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[24] Id. at para 25.
[25] Id. at para 26.
[26] Id. At para 80, subpara 1.
[27] Id. At para 80, subpara 2.
[28] Id. At para 80, subpara 4.
[29] Id. At para 80, subpara 7

[22] Respondent argued that, properly construed, the judgment of this Court in *Aussenkehr* affirmed that to succeed in an application to dismiss an action for want of prosecution, an applicant must show, in addition to inordinate and inexcusable delay, that the dilatory litigant had intended to abuse the process of the Court. Although there may be passages in the judgment, which if taken out of their context might be understood to support this assertion, there are other passages that do not.An example of a passage which if not carefully read may be misconstrued is the passage in paragraph 21 of the judgment where the Court held that:

> 'Abuse connotes improper use, that is, use for ulterior motives. And the term "abuse of process" connotes that "the process is employed for some purpose other than the attainment of the claim in action".'

Yet a sentence further on in the same paragraph, the judgement continues:

> 'What amounts to abuse of process is insusceptible to precise definition of formulation comprising closed categories. Courts have understandably refrained from attempting to restrict abuse of process to defined and closed categories.'

[23] One of the reasons for the apparent misunderstanding arises fromthe fact that the Court in *Aussenkehr* was dealing not only with an application for the dismissal of an action on the grounds of a failure to diligently prosecute an action, but also with an application for a dismissal on the basis that the plaintiff had conducted its litigation in a vexatious manner, and for a dismissal on the basis that the plaintiff's action was devoid of any merit. These other two applications were thus concerned with different categories of abuse of the court's process. In the

introductory portion of the judgment,[30] the Court was thus dealing with the broad range of grounds upon which it can be asserted that a litigant is engaged in the abuse of the court's process. These other grounds may require intent to be established in some form.[31]

[24] In this case, of course, we are concerned only with the failure to prosecute an action with reasonable diligence. In the Court's summary of the principles applicable to such applications, it does not state that it is necessary to establish intention, although it indicates that there are circumstances where intention will be relevant.[32]And there are several passages that make it plain that such applications may succeed even if an intention to abuse is not separately averred and established. For example, in the summary of the applicable rules, the Court states that --

> '. . . where the delay is inordinate and inexcusable and is such that it will give rise to a substantial risk that a fair trial of issues will no longer be possible or where it is such that it is likely to cause serious prejudice to the defendant, this can amount to abuse.'[33]

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[30] Id. At paras 18 – 26.
[31] See, for example, the South African case of *Price Waterhouse Coopers Inc v National Potato Co-op Ltd* 2004 (6) SA 66 (SCA) at paras 50 – 2 (a case cited by the High Court). That case concerned an agreement in terms of which one person agreed to provide a litigant with funds to prosecute an action in return for a share in the proceeds of the litigation. The Court held that litigation pursuant to such an agreement might constitute an abuse of the court's process depending on the motives of the parties. It is clear that this case was concerned with a very different category of abuse of process to the one with which we are concerned in these proceedings.
[32]*Aussenkehr,* cited above n12: see, the statement at para 80, subpara 2: 'The enquiry must be directed towards what the plaintiff intended by the delay or to put differently, what were the reasons for the delay; why did plaintiff act in the way he or she did.'
[33]Id. at para 80, subpara 6.

[25] This statement is not consistent with an overarching requirement that a litigant must establish an intention to abuse. The Court makes plain that an abuse can arise where there has been an inordinate and inexcusable delay together with a risk that the issues may not be fairly tried, or where serious prejudice is likely. The approach adopted by this Court in *Aussenkehr* is therefore better understood to require a court to consider whether,in all the circumstances,the dilatory conduct amounts to abuse. This a court will do by considering the extent of the delay, the reasons for it, and thus whether it is inordinate and inexcusable, and also the question of prejudice to the other litigants, and the administration of justice generally.[34] Of course, if it can be shown that the dilatory litigant intended to delay to prejudice the other litigants,[35] or never to prosecute the action to finality,[36] then an abuse of process will have been established. But it is not necessary for an applicant to show such intention in order to succeed.

[26] There isan important reason why the question whether an application to dismiss an action for want of its reasonably diligent prosecution should not turn on the question of the subjective intention of the dilatory litigant. As Ngcobo AJA mentioned '[i]nordinate delays have become a blot on the administration of justice.'[37] In seeking to avoid the harm caused by inordinate delays, it is important that the exercise of the Court's inherent jurisdiction to regulate the proceedings before it encourages the timely and diligent pursuit of litigation, rather than permitting a litigant to assert that, because the intention to abuse has not been

[34] Id. at para 80 subpara 4.
[35] As was stated in *Aussenkehr*, id. at para 80, subparas 3 and 5.
[36] Id.
[37] Id. At para 85.

established, an inordinate, inexcusable and prejudicial delaycannot result in the dismissal of the action.

[27] If the courts were to require that a litigant seeking the dismissal of an action for want of its reasonably diligent prosecution must establish not only inordinate and inexcusable delay, but also intentional abuse of the courts' process, the effect would not encourage efficient and expeditious litigation. It is notoriously difficult to establish intent to harm circumstantially (andit will be rare that a dilatory litigant will admit such an intent). A litigant will thus rarely be able to establish that even an inordinate and inexcusable delay was motivated by an improper purpose. The result will be to afford dilatory litigants, even in circumstances where the delay is shown to be inordinate, inexcusable and prejudicial, to persist with their action because it has not been established that they 'intended' to abuse the process of the court.

[28] Given that, as this Court found in *Aussenkehr,*'[i]nordinate and inexcusable delay can amount to abuse of the process of court'.[38] Acourt considering an application for the dismissal of an action on the grounds of excessive delay will consider the following factors: the length of the delay, any explanation put forward for the delay, any prejudice caused to the defendant by the delay and the effect of the delay on the conduct of trial, as well as the extent, if any, to which the defendant can be said to have contributed to the delay.[39] It is not necessary for it to be established that the dilatory litigant intended never to prosecute the action to finality, or to cause prejudice to the other parties, but, of course, if such intention is

[38] Id. At para 80, subpara 1.
[39] Id. At para 80, subpara 4.

established, it will amount to abuse of process. Moreover, as the Supreme Court of Appeal noted in *Cassimjee,* a court should bear in mind that the relationship between the delay and prejudice caused will often have a bearing on the outcome of an application for dismiss, for '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.'[40]

[29] In this case, the High Court held that because theappellant had not asserted in its founding affidavit that the respondent had intended by its delay to abuse the process of the Court, the application must fail. Such a conclusion is inconsistent with the statement in *Aussenkehr* that the question whether the conduct of any particular litigation amounts to an abuse of process 'may be inferred from the facts of the case'.[41]

[30] Moreover, the High Court's approach is inconsistent with the approach in*Aussenkehr*as construed here. The High Court reasoned that an application for the dismissal of an action on the ground of delay might only succeed if intention is averred and established by the applicant. That approach was not firmly endorsed in *Aussenkehr*, and cannot be endorsed now.

[31] From what has been set out above, it can be seen that the High Court committed an error in its reasoning by relying on incorrect principles of law to conclude that the appellant had not made out a case for the dismissal of the

[40] Cited above n 17, at para 11.
[41] Id. At para 80, subpara 2.

respondent's action. The next question that arises is whether the appellant would have succeeded if the correct principles were applied?

[32] As mentioned above, there were three periods of excessive delay in this case: a period of nearly two years to respond to appellant's Request for Further Particulars; a period of three and a half years to amend its Particulars of Claim after the close of pleadings; and a further four year delay to Request Trial Particulars. In respect of the first period of delay, the respondent, in its affidavit opposing the application for dismissal of the action, disclosed that one of the factors in the delay was the fact that there had been settlement discussions during this time. The settlement discussions do excuse the period of delay in some part, but not entirely.

[33] The second period was a period of three and a half years from the close of pleadings till the time respondent sought to amend its Particulars of Claim. The respondent sets out the action that took place in this period, which involved first, the respondent taking steps to obtain a copy of a report from the consulting engineer, Mr Lacante, and secondly, instructing counsel to prepare a notice of amendment, which took a very long time. The respondents' legal representatives wrote on several occasions during 2002 to appellant's legal representatives to obtain a copy of Mr Lacante's report without success. Subsequently they obtained a copy of the report directly from Mr Lacante. The respondent's legal representatives then briefed a Quantity Surveyor to draft a costing of the repairs that the appellant had set out in its Counterclaim. That costing was received in April 2004 and counsel was then briefed to prepare an amendment to the

Particulars to Claim. The amended Particulars were only drafted by May 2005 when they were served. This delay is excused in some part by the fact that respondent's legal representatives did write to counsel several times from the time he was briefed asking for the Particulars to be finalised as a matter of urgency. Again this is an excessive period of delay for which an explanation has been provided, albeit not an entirely satisfactory account.

[34] The fourth period was a period of four years from May 2005 – June 2009. During this period, there were a series of attempts by respondent to bring the matter to trial. In July 2005, the respondent's legal representatives commenced the process of trial preparation by writing to appellant's legal representatives and requesting possible dates for the holding of the Rule 37 pre-trial conference. No response was received and respondent successfully applied to court for an order permitting it to apply for a trial date without the holding of a pre-trial conference. Immediately upon receipt of the order in September 2005, respondent applied for a trial date and the case was enrolled for hearing in July 2006. respondent's counsel was then appointed an Acting Judge and it was agreed that the trial would be postponed. The matter was then again enrolled for trial in October 2007 but was removed from the roll at the request of appellant, whose legal representatives appear not to have been prepared for trial at that stage. Respondent successfully applied to compel discovery by appellant in September 2007. Several further applications for a trial date followed, on each occasion unsuccessful because of the unavailability of either appellant's or respondent's counsel. Respondent became exasperated with the unavailability of his legal representatives for trial dates, and appointed new legal representatives in December 2008. The new legal

representatives applied for a trial date and enrolled the matter for hearing in September 2009. At that stage the appellant launched the Rule 33(4) application to dismiss the action for want of diligent prosecution.

[35] It is clear from this brief account of the events that took place between May 2005 and June 2009 when the September 2009 trial date was allocated, that respondent's legal representatives took a range of steps to bring the action to trial, which included several applications to Court (the Rule 37 application in August/September 2005 as well as the Application to compel discovery in September 2007). It is also clear that the failure to obtain a suitable trial date arose at times because of the unavailability of respondent's counsel but also because of requests by appellant for postponements or because of the unavailability of appellant's counsel for the allocated dates. The delay of four years from May 2005 till June 2009 was extensive, but the explanation goes some way to excusing it. The respondent's legal representatives were not supine during the period but did take steps to bring the action to trial. The failure to obtain a trial date cannot be blamed only on respondent for it arose also because of the unavailability of appellant. Moreover in respondent's favour is the fact that respondent itself finally took steps to find other legal representatives who would be more available for a trial, which resulted in the allocation of a trial date.

[36] An assessment of the delays has shown that although the time periods involved were inordinate, respondent has tendered partial explanations for the delays which make it plain that respondent never abandoned the litigation but continued to seek to prosecute the appeal, on several occasions launching

applications to compel action by appellant, and repeatedly seeking to find a suitable trial date. Although the explanations tendered are not entirely satisfactory, it also cannot be said that all the delays are inexcusable. Moreover, it is also clear that several delays are attributable to the conduct of appellant or his legal representatives, not respondent. In all the circumstances, it cannot be said that the delays in prosecution this action, while inordinate, are entirely inexcusable.

[37] It is necessary now to consider the question of prejudice. The appellant asserts that he has suffered prejudice as a result of the respondent's failure to prosecute its action diligently and timeously. In deciding whether prejudice has resulted from excessive delay, it is important to consider where the cause of any asserted prejudice lies. Appellant's erstwhile legal representative mentioned in a supplementary affidavit lodged in support of the Rule 33(4) application that, because of the delays in the litigation, he had lost a report prepared in respect of the quality of the cement works in the building project, and he had also lost contact with an expert witness who had prepared a report on the quality of the building work performed by the respondent. In assessing where the fault for this prejudice lies, the Court cannot overlook the statements made by appellant's legal representative in the affidavit supporting the Rule 33(4) application. There, the legal representative stated that he 'archived' the case file in late 2004 (during the second period of delay, discussed above)'given the absence of activity' on the claim. Appellant's legal representative continued by saying that '[s]ince it is not generally necessary to maintain the "archives" of my firm in any meticulous manner, given that the matters of which record is kept in such "archive" are

invariably "dead", many of the documents in the file disappeared, became destroyed, or were used as scrap paper for notes that I made in other matters'. This account of 'archiving' the file in this matter discloses a distinct absence of care, such that it cannot be said that the loss of the expert report and other documents in the matter can be laid entirely at the door of the respondent.

[38] Given that the delays in this matter, while exhibiting an absence of conscientious prosecution of the litigation, are not entirely inexcusable, that the prejudice asserted by the appellant cannot be said to flow only from the delays in the litigation caused by respondent or its legal representatives, and the fact that to uphold the rule 33(4) application would constitute a departure from the fundamental principle that the 'courts of law are open to all',[42] it would in the circumstances of this case not be appropriate to grant the order the appellant seeks. Accordingly, appellant has not established that he has prospects of success on appeal, even though this Court has found that the High Court erred in the legal principles it identified to determine the appellant's application. Had the High Court applied the correct legal principles, it would still have dismissed appellant's application.

Conclusion

[39] Given that this Court has found there to be no prospects of success in this appeal and given also that the Court found the appellant had not provided a cogent explanation for its delay in filing the appeal record, the application for

[42] See *Aussenkehr,* cited above n 12, at para 26.

condonation of the late filing of the appeal record and the reinstatement of the appeal falls to be dismissed.

Costs

[40] Theappellant has been unsuccessful and there is no reason why he should not be ordered to pay the costs of the respondent, such costs to include the costs of one instructed and one instructing Counsel.

Order

[41] The following order is made:

1. The application for condonation for the late filing of the record of appeal and reinstatement of the appeal is dismissed.
2. The appeal is struck from the roll.
3. The appellant is ordered to pay the costs of the Respondent, such costs to include the costs of one instructed and one instructing counsel.

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O'REGAN AJA

_____
SHIVUTE CJ

_____
STRYDOM AJA

APPEARANCES

APPELLANT:	T A Barnard Instructed by Mueller Legal Practitioners
RESPONDENT:	L Kok Instructed by Francois Erasmus & Partners