Sabadia v Dowset Engineering Ltd (1985) 11 MLR 417

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	His Honourable Justice L Unyolo
Cause Number:	11 MLR 417
Date of Judgment:	March 21, 1986
Bar:	Mr. Osman, for the Plaintiff Mr. Msisha, for the first Defendant

Head Notes

Civil Procedure - Dismissal for want of prosecution – Inordinate delay – Appeal allowed after court found no inordinate or inexcusable delay.

Civil Procedure - Dismissal for want of prosecution – Prejudice – The defendant must prove serious prejudice caused by inexcusable delay.

Civil Procedure - Dismissal for want of prosecution – Limitation of actions – Delay before a writ is issued is a relevant factor in determining subsequent delay.

Summary

The Plaintiff appealed to the High Court against an order of the Registrar dismissing her action against the First Defendant for want of prosecution. The dispute arose from a road accident on April 22nd, 1979, which resulted in the death of the Plaintiff's husband. The Plaintiff, on her own behalf and on behalf of her five children, initiated two separate actions on April 21st, 1982, the last day of the limitation period. These were later consolidated. The procedural history was marked by protracted exchanges between the parties, including several requests for further and better particulars, a summons for directions, and mutual non-compliance with court orders. The parties also attempted an out-of-court settlement which failed. On March 21st, 1985, the First Defendant applied for and was granted an order to dismiss the action for want of prosecution.

The principal issues for the Court were whether there had been inordinate and inexcusable delay on the part of the Plaintiff in prosecuting her action, and if so, whether this delay had caused serious prejudice to the First Defendant. A subsidiary question was whether the time elapsed before the issue of the writ, while still within the limitation period, could be considered in assessing whether subsequent delay was inordinate. The Court considered the precedents on this point and affirmed that pre-writ delay is a relevant factor.

The appeal was allowed. The Court found that while the Plaintiff was not entirely blameless, the overall pace of the litigation did not constitute an inordinate and inexcusable delay, particularly given that the First Defendant had contributed to the delays by making several requests for further particulars and consenting to adjournments. Additionally, the Court held that the First Defendant had failed to prove serious prejudice, finding its claim that key witnesses had disappeared unconvincing

as it had not made sufficient efforts to locate them. The Court ordered each party to bear its own costs of the appeal, noting that the Plaintiff was fortunate to have her action reinstated and was not entitled to costs given her partial responsibility for the delays.

Legislation Construed

N/A

Judgment

This is an appeal by the plaintiff from an order of the Registrar dismissing her action against the first defendant for want of prosecution. Four grounds of appeal were filed.

It is now the practice, acting on the principles enunciated in Evans v Bartlam (4), to deal with an appeal of this nature by way of a rehearing. I therefore proceeded to deal with the present appeal in that manner and treated the matter as though it had come before me for the first time. The appeal was strenuously argued and I commend counsel on both sides for their eloquence and industry in looking up the law.

The history of this case demands analysis and is as follows. The plaintiff is the widow of one M. E. Sabadia, who died in a road accident on April 22nd, 1979. The present action arises from that accident. She launched these proceedings on her own behalf and on behalf of her five children by her deceased husband. The first defendant was at all material times a limited liability company doing road construction projects in this

country and the second defendant was employed by the first defendant as a driver. Incidentally, the road accident I have referred to above was a collision involving the first defendant's motor vehicle, then being driven by the second defendant, and that of the deceased.

Originally, there were two separate actions in this matter, namely, Civil Cause No. 170 of 1982 and Civil Cause No. 171 of 1982. However, the two cases were subsequently consolidated on the ground that they involved the same parties and that both were substantially grounded upon the same facts. The writs were filed on April 21st, 1982 and served upon the first defendant on April 28th, 1982. The first defendant served its defence on May 27th, 1982. The second defendant could not be located. In the end, the plaintiff made an application for substituted service. Leave was granted her on October 20th, 1982. No reply was served by the plaintiff to the first defendant's defence. In the meantime, on August 4th, 1982, to be precise, the first defendant had filed an application by summons, requesting the plaintiff to furnish further and better particulars of her claim. The summons was served on the plaintiff's legal practitioners on October 5th, 1982 and the application was heard before the Registrar on November 3rd, 1982, when the plaintiff was ordered to furnish the requisite particulars within 14 days. The time was later extended to November 19th and then to November 26th, 1982.

By January 1983, the plaintiff had not yet complied with the order for further and better particulars and on April 11th, 1983, the first defendant filed an application to dismiss the plaintiff's action for failure on the part of the plaintiff to comply with the order. It was only on May 2nd, 1983 that the plaintiff complied and served the requisite particulars.

On May 19th, 1983, the plaintiff lodged a summons for direction which was heard on June 14th, 1983 and an order for directions was accordingly made, giving the parties 21 days for discovery and 14 days thereafter for inspection. Both the plaintiff and the first defendant failed to comply with that order. The first defendant submitted its affidavit of documents on September 29th, 1983, clearly out of time. The court rejected them and returned them to the first defendant's legal practitioners. It was only on October 25th, 1983 that the court accepted the affidavit of documents for filing. The plaintiff, on the other hand, only filed her affidavit of documents on December 6th, 1983. In the meantime, on September 27th, 1983, the first defendant had requested the plaintiff to furnish further and better particulars of the particulars given earlier On November 14th, 1983, the first defendant actually lodged a notice of motion with the court for an order that the plaintiff give such further particulars. The notice was set down for hearing on November 28th, 1983 but it was adjourned by consent since counsel on both sides were appearing in court.

This brings us to 1984. On February 24th, the first defendant's legal practitioners wrote to the court requesting that the adjourned notice of motion be restored to the cause list. The notice was so restored. It was heard on April 12th and, after hearing counsel in argument, the Registrar reserved his ruling thereon.

In the interim, the plaintiff had sent her bundle of pleadings with a request that the main case be set down for hearing. The Registrar promptly set it down for hearing from May 28th to 31st. On receipt of the relevant notice of hearing, the first defendant's legal practitioners wrote to the court, pointing out that it was premature to set down the case since the Registrar's ruling upon the notice of motion for further

and better particulars had not yet been pronounced. However, in a few days, the Registrar handed down the said ruling and a date for the hearing of the main case was fixed. The hearing was to commence on June 27th. The first defendant's legal practitioners intimated, however, that they required more time to be able to contact the first defendant's witnesses, some of whom were to come from outside Malawi. The case was accordingly taken off the cause list. Perhaps I should mention that, at around the same time, the parties were trying to reach a negotiated, out of court settlement in the matter. These negotiations fell through, however.

It appears that the plaintiff's legal practitioners suggested to the court that the matter be set down again for hearing, to commence on July 16th. However, this was not convenient for the first defendant's legal practitioners. The court file shows that the parties were thereupon left to agree the dates and advise the court when they had so agreed. However, the matter was left in abeyance until March 21st, 1985 when the first defendant made the application to dismiss the plaintiff's action. On this question, Mr. Osman averred that he could not apply for a date for the hearing of the case because he was engaged in another very long trial, also in the High Court. Be that as it may, at the end of the day, the learned Registrar granted the first defendant's application and ordered that the plaintiff's action be dismissed. That is the order from which the plaintiff appeals.

I have deliberately developed the facts elaborately for reasons which will become apparent later in this judgment.

In deciding whether or not it is proper to dismiss an action for want of prosecution, the court asks itself a number of questions. First, has there been inordinate delay? Secondly, is the delay nevertheless excusable? And thirdly, has the inordinate delay in consequence been prejudicial to the other party?

I shall deal first with the first two questions and, putting the two together, the question becomes: Has it been proved by the first defendant that the plaintiff was guilty of inordinate and inexcusable delay?

In answering this question in the course of his comprehensive ruling, the learned Registrar said:

"This is a personal injury/negligence action arising out of a motor vehicle accident. The limitation period for such actions is three years. The alleged accident is said to have occurred on April 21st, 1979. Proceedings were commenced on the very last day, on April 21st, 1982. So there was long delay in instituting proceedings. Although such delay in taking out the action cannot of itself give a right to have the action dismissed, it is relevant in considering whether delay after the issue of the writ is inordinate and inexcusable: see William C. Parker Ltd. v F. J. Ham & Son Ltd., [1972] 3 All E.R. 1051. If one leaves the issue of proceedings to the very last moment, one should then pursue the suit with expedition and further delay is normally inexcusable."

He continued:

"The history of the matter clearly shows that the plaintiff has been guilty of prolonged delay. To begin with, she let the matter lie until the very last day of the limitation period. Then, after instituting proceedings, she did not pursue the matter with expedition as one would have expected. In my judgment, such delay is inordinate and inexcusable. It is no answer to say that the defendant has contributed to the delay. The duty to prosecute an action lies with the plaintiff and she must do so expeditiously."

Whether or not the three-year limitation period was applicable to this case is arguable. The plaintiff is admittedly an adult but she instituted the present proceedings not only on her own behalf but also on behalf of certain children and it is to be observed that, ordinarily, the three-year limitation period is not applicable to minors. However, I do not find it necessary to discuss that question in this judgment so I will leave it aside.

One of the questions raised in this appeal is whether delay in the commencement of an action or the issue of a writ is a relevant factor in determining whether or not a plaintiff has been guilty of inordinate and inexcusable delay so as to warrant the dismissal of an action for want of prosecution. It will be noted from the passages I have quoted above that the learned Registrar answered this question in the affirmative. Counsel for the plaintiff submitted that the learned Registrar fell into error on this point. Counsel argued that the time that has elapsed before the issue of the writ, which does not extend beyond the limitation period, cannot be held against a plaintiff since the law permits it.

Strictly speaking, I do not think that there is now much difference of judicial opinion on this subject. In the William C. Parker (5) case cited by the learned Registrar it was held, according to the headnote in the All England Law Reports ([1972] 3 All E.R. at 1051):

"In considering whether an action should be dismissed for want of prosecution, the court may take into account delay before the issue of the writ in ascertaining whether subsequent delay after proceedings have commenced is inordinate, inexcusable and prejudicial to the defendant, even though the earlier delay was permissible under the rules governing the limitation of actions. Where, however, the defendants has been prejudiced as a result of the earlier 'permissible' delay in commencing the action, but has not been put into any worse position in consequence of the plaintiff's subsequent inordinate and inexcusable delay in prosecuting the action, it is not open to the court to dismiss the action for want of prosecution since there is no sufficient nexus between the plaintiff's inexcusable delay and the prejudice to the defendant."

The next case to which I would like to refer is Sweeney v Sir Robert McAlpine & Sons Ltd. (6). There it was held, according to the headnote in the All England Law Reports ([1974] 1 All E.R. at 474):

"In the great majority of cases, such as personal injuries cases, the court would, in a proper case, dismiss the action for want of prosecution if the total delay on the part of the plaintiff was inexcusable and inordinate and such as to be likely seriously to prejudice the defendant. In such cases the court was not restricted to looking at the delay, or prejudice caused thereby, since the issue of the writ."

The case of Birkett v James (2), a House of Lords decision, was also cited by counsel in argument. Actually, that was a case where the court dismissed the plaintiff's action for want of prosecution before the expiry of the period of limitation applicable to the plaintiff's cause of action. It was held, per curiam, according to the headnote in the All England Law Reports ([1977] 2 All E.R. at 802):

"Where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the action can only be dismissed for want of prosecution if (a) the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of court; (b) the delay is inordinate and inexcusable having regard to the delay before the issue of the writ, and (c) the delay after the issue of the writ has increased, by more than a minimal amount, the prejudice already suffered by the defendant by reason of the delay in bringing the action...."

Pausing there, I think that there is a consensus through the cases to which I have referred above that delay before the issue of writ may be taken into account in determining whether a plaintiff has been guilty of inordinate and inexcusable delay. For my part, I think that this is the correct approach. Perhaps I should add this: that it depends on the facts of each particular case, including the lapse of time from the time the cause of action arose to the time the writ was issued.

Having said that, I must now go back to answer the question whether the plaintiff was guilty of inordinate and inexcusable delay. The word "inordinate" is defined in 1 The

Supreme Court Practice 1985, para. 25/1/6, at 422 as: "[M]aterially longer than the time usually regarded by the profession and courts as an acceptable period." And concerning the word "inexcusable," it is said that this ought to be looked at primarily from the defendant's point of view or at least objectively. It is said that the best excuse would usually be the agreement of the defendant or difficulties created by him.

To my mind, giving the words their ordinary, natural meaning, there can be no doubt that the kind of delay envisaged is one which is both excessive and without excuse; the kind of delay which Lord Denning, M.R. in Allen v Sir Alfred McAlpine & Sons Ltd. (1) described as "intolerable" and as "delay so long as to turn justice sour" ([1968] 1 All E.R. at 546). It is, I think, the kind of delay which, to borrow a phrase from the criminal courts, "comes with a sense of shock." And of course it must also be shown that such delay is without excuse.

Pausing there, I revert to the facts of this case. I have already developed the history of the matter in much detail, tracing the course of events from the time the writs were issued to the time the application to dismiss was lodged. Upon those facts, the plaintiff cannot, in my judgment, be wholly exonerated from blame. There were certain instances of delayed action on her part. However, when the facts are considered as a whole, I do not think that this was a case where it can be said that the plaintiff went to sleep or simply sat back. On the contrary, the facts show that the plaintiffs legal practitioners were mindful of the case and that something was continually being done by them about it. Actually, the "table of contents" produced by counsel for the first defendant shows this vividly.

Again, on the facts, I am disposed to think that the first defendant contributed in some measure to the slow pace at which the action was prosecuted by the plaintiff. I have in mind the several requests made on the part of the first defendant for further and better particulars of the plaintiff's claim. I say this without in any way faulting the defendants in this regard.
They were entitled to make such requests under the rules and they may have had good reasons to ask for such particulars but, all in all, I think that those requests did decelerate the pace at which the action was going.

Further, it is to be observed that some of the adjournments granted in this case were at the instance of or consented to by the first defendant. It is also significant, in my judgment, that, at a certain point, the parties were trying to reach a negotiated, out of court settlement in this matter. It must also be noted that the plaintiff sent her bundle of pleadings requesting that the case be set down in March 1984, the action having been launched in April, 1982. We are therefore talking of a time lapse of less than two years.

In Biss v Lambeth, Southwark & Lewisham A.H.A. (3) to which I was referred, the Court of Appeal dismissed the action for want of prosecution. It is to be noted, however, that there was a delay of 10 years involved in that case. In Tolley v Morris (7), there was a delay of 13 years. Clearly, in terms of lapse of time, the delay in the present case does not stand comparison with that in these two English cases. All in all, I am unable to say, on the facts I have postulated, that the lapse of time in the instant case constituted an inordinate and inexcusable delay.

In case I am wrong in my finding and the delay here was inordinate and inexcusable, the next question for the determination of the court is whether such delay was likely to cause serious prejudice to the first defendant or give rise to a substantial risk that it would not be possible to have a fair trial of the issues in the action.

The point taken by the first defendant on this question was that its witnesses have since disappeared and their whereabouts are not known. Two of these were expatriate employees of the company and left Malawi on postings to the United Kingdom in the case of one and to South Africa in the case of the other. It is averred that both these prospective witnesses have since left the first defendant's employ. The other witnesses the first defendant intended to call are Malawians, three of them, who also used to work for the first defendant at the material time. It is said that their whereabouts are also not known.

I sympathise with the first defendant, I really do. However, I am inclined to think that, upon the facts, the first defendant has not tried enough. With regard to the two expatriate witnesses, it appears to me that these worked for the first defendant for a number of years and I find it difficult to suppose that the two would leave the first defendant's employ without leaving addresses of their new places of work or residence to which mail, for example, could be forwarded. Further, the first defendant must have records of the permanent home addresses of the two witnesses. I think that what I have just said here relating to home addresses applies equally to the three local witnesses. As a result, I am unable to say that the first defendant has been prejudiced. For these reasons, I would allow the appeal and set aside the order of the learned Registrar.

The question of costs has exercised my mind. Ordinarily, costs follow the event and the plaintiff has succeeded in this appeal. However, the question here is basically one of discretion and the court has unfettered discretion in the matter. I would repeat what I have said earlier; that the plaintiff is not wholly without blemish. Indeed, she is fortunate that her action has been resurrected. I do not think, therefore, that she is entitled to any costs. I therefore order that each party pays its own costs of the appeal.

Appeal allowed.