TALLSPRING INVESTMENTS (PVT) LTD
versus
WILFRED MUTEWEYE
and
SUSAN MUTEWEYE
and
STILLFORD INVESTMENTS (PVT) LTD
and
MACBASE INVESTMENTS (PVT) LTD
and
SHERIFF OF ZIMBABWE N.O.
and
LINAH NDOLI AGERE
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 16 June & 21 July 2021

**Court application**

*G Madzoka*, for applicant
*C Damiso* with *R Mabwe*, for the 1st & 2nd respondents

MANZUNZU J: This is an application for the dismissal of a court application for want of prosecution in terms of Rule 236 (3) (b) of the High Court Rules 1971. It is not in dispute that the 1st and 2nd respondents (hereinafter referred to as the respondents) filed a court application under case number HC 3079/20 on 19 June 2020 against the applicant and others seeking a cancellation of certain title deeds. The applicant filed a notice of opposition on 1 July 2020 and served the respondents with the same on 2 July 2020.

Applicant alleges the respondents did not file any answering affidavit, although it turned out that they did file an answering affidavit and served the other parties on 8 July 2020, but did not serve the applicant with the same. It is further alleged the respondents neither filed heads nor set the matter down within one month of receiving applicant's notice of opposition.

Rule 236 (3) (b) under which this application is brought reads as follows;

> "(3) Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either—

(*a*) set the matter down for hearing in terms of rule 223; or

(*b*) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

The spirit behind this rule is to bring finality to litigation. Matters which are brought to court must be dealt with due expedition, see *Shanje* v *Murehwa & 3 Ors* HH 218-18. It is also a leverage to guard against abusers of court process. This is because our rules of Court create a system where litigation is litigant/attorney driven as opposed to judge driven. Those who bring matters to court have a duty to comply with the rules and to ensure such matters are prosecuted expeditiously. Those who institute cases and then go to bed risk their cases being dismissed by the court in terms of this rule at the instance of the sued party.

In order to succeed in an application for dismissal for want of prosecution the applicant must prove that; the respondent failed to take necessary steps to bring the claim to finality and secondly that there is no honest, satisfactory and reasonable explanation for the delay. See *Melgund Trading (Pvt) Ltd* v *Chinyama & Partners* HH 703/16. The applicant do no more than allege the absence of a reasonable explanation on the part of the respondents. The duty to explain why the action was not pursued timeously lies with the respondent. In *Karengwa* v *Mpofu* HB 628/15 the court stated as follows:

"The court usually looks at the reasons for failing to act timeously. Where failure to act is the result of an utter disregard of the rules of the court and prescribed time limits, the courts are extremely reluctant to give any further indulgence to the defaulting party."

The court has a wide discretion in dealing with this application. This is because in terms of r 236 other than a dismissal of the action the court can make such other order on such terms as the court thinks fit. On the question of discretion, in *Guardforce Investments (Pvt) Ltd* v *Ndlovu & Others* SC 24/16 the court had this to say;

"The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration –

(a) the length of the delay and the explanation thereof;

(b) the prospects of success on the merits;

(c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time."

**a) Length of the delay and explanation thereof:**

For one to determine the length of the delay one looks at the processes filed by the parties. The respondents filed an answering affidavit on 8 July 2020 which was only served on the applicant on 18 March 2021. The respondents claim inadvertency on their part for failure to serve the answering affidavit timeously. Despite the inadvertency one looks at what action was taken by the respondents towards the setting down of the matter following the filing of the answering affidavit on 8 July 2020. The respondents filed no heads thereafter which were only filed on 30 April 2021 after the present application was filed and served on the respondents on 11 March 2021.

The fact that there was a delay in setting down HC 3079/20 is not in dispute. The applicant says the delay runs to nine months and the respondents say it's up to five months. Whichever the case might be, the question is what is the explanation for the delay by the respondents. Why was the matter not set down within 30 days from 8 July 2020.

The reason set out in the opposing affidavit is that there is a multiplicity of matters involving the same parties. In that regard the parties appeared before MUREMBA J and were directed to consider a way forward with the cases. As a result some were withdrawn and others disposed of by consent. It was then agreed to consolidate this application in HC 3079/20 with HC 928/19 a position denied by the applicant.

In a letter of 18 March 2021 to the applicant's legal practitioners the respondents stated in paragraph 3 that, "…we advise that we failed to set the matter down for hearing within a month from the 8th July 2020 due to a mistaken but genuine belief that the matter had been dealt with in the consent judgment filed in case number HC 3149/20."

The two explanations by the respondents are not congruent with each other. The consent judgment referred to in HC 3149/20 is a consent to a joinder of parties to case number HC 928/19 which was granted on 28 October 2020 way out of the 30 days calculated from 8 July 2020. I find no relationship between HC 3149/20 the case for joinder of parties and HC 3079/20 which is an application to cancel the deed.

I failed to appreciate the reasoning of the respondents in the heads of argument. The argument was put thus; "…when parties filed consent to judgment in HC 3149/20, the 1st and 2nd respondents formulated a genuine but mistaken view that their matter in HC 3079/20 had been made part of the parties' settlement in HC 3149/20. In other words, the 1st and 2nd respondent were harbouring under an impression that HC 3079/20 had been consolidated with HC 928/20 by virtue of the consent to judgment in HC 3149/20." How a consent to a joinder of parties can be mistaken to mean a

settlement to an application to cancel a deed and late alone to think of a consolidation of cases can only exist in one's imagination. There is no rationality. This is why I said there is no reasonable explanation proffered by the respondents for the delay.

It is not surprising that the respondents failed to proffer a reasonable explanation because a look at HC 3079/20 will show a cavalier approach by the respondents who are *dominus litis*. In fact there is no explanation touching the 30 day period within which the respondents were to act.

b**) The prospects of success and the balance of convenience**

The applicant's founding affidavit only concentrated on the absence of a reasonable explanation of the delay by the respondents. Indeed the applicant proved that the respondents took a lackadaisical approach towards the prosecution of their case. "However, the delay and the explanation thereof in this matter alone cannot form the basis for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for rescission for want of prosecution." see *Guardforce Investments* case *supra.*

The applicant led no evidence on the prospects of success and the balance of convenience. The heads of argument address these two factors raising factual issues which are not supported by evidence. It is procedurally wrong to lead evidence through the heads of argument. An applicant's case stands or falls on the founding affidavit. See *Austerlands (Pvt) Ltd* v *Trade and Investment Bank & 2 Ors* SC 92/05. In *Milrite Farming (Private) Limited* v *Porusingazi & Others* HH 82/10 the court stated; "The basic rule pertaining to application procedures is that the applicant's case stands or falls on averments made in the founding affidavit and not upon subsequent pleadings. The rational for the rule is quite clear. It is to avoid the undesirable effect of litigation assuming a snowballing character, with fresh allegations being made at every turn of pleadings."

It is for these reasons that the applicant cannot succeed in its application. Despite the success, the respondents cannot have the benefit of any costs in their favour as their inaction caused this application to be brought.

Disposition:

1. The application be and is hereby dismissed with no order as to costs.

*Mupanga Bhatasara Attorneys*, applicant's legal practitioner
*Mushangwe and Company*, 1st and 2nd respondents' legal practitioners
*Scanlen and Holderness*, 3rd and 4th respondents' legal practitioners