FREDA REBECCA GOLD MINE (PRIVATE) LIMITED
and
FREDA REBECCA HOLDINGS LIMITED
versus
SHANTEL MBEREKO
and
THE MINITSER OF MINES AND MINING DEVELOPMENT
and
THE MINING COMMISSIONER

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 11 February 2019 & 10 April 2019

Opposed Motion- application for dismissal for want of prosecution

R Mabwe, for the applicants
Mandizha, for the 1st respondent

MUSHORE J: Several events took place prior to the inception of the present matter. The first respondent filed an application for the review of the decision made by the Minister of Mines and Mining Development on 22 May 2018. In that decision the Minister of Mines had decided to cancel the registration of various mining claims which had been issued in favour of three syndicates: namely Rass Mining Syndicate; Chehumbe Mining Syndicate and Community Mining Syndicate. First respondent was not mentioned by the Minister nor did it appear that the first respondent had ever been a party to the matter wherein the Minister of Mines made that determination. However the first respondent took it upon herself to challenge the decision by the Minister of Mines on review in matter number HC 4044/18 in what she deems to be a representative capacity for those syndicates.

The applicants in the present matter opposed the first respondent's application for a review of the Minister's decision in HC 4044/18 and in so doing they filed their notice of opposition in HC 4044/18 on 22 May 2018. The first respondent did not file an answering affidavit to the applicant's notice of opposition at all.

The present matter is an application for the dismissal of the first respondent's review application in HC 4044/18. The current application is predicated upon the first respondent failure to file an answering affidavit and failure to set the matter down for hearing within the *dies inducie* prescribed by the rules of this court. When the applicants filed the present application on 22 July 2018, a period of almost three (3) months had elapsed without the first respondent filing an answering affidavit or setting the review application (HC 4044/18) down. The present application is made in terms of Order 32 r 236 (3) (b) which reads as follows:

> **"236. Set down of applications**
> (1) Where the respondent is barred in terms of subrule (3) of r 233, the applicant may, without notice to him, set the matter down for hearing in terms of r 223.
>
> (2) Where the respondent has filed a notice of opposition and an opposing affidavit and the applicant has filed any answering affidavit he may wish to file, the applicant may set the matter down for hearing in terms of r 223.
>
> (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 r 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."

In a nutshell the applicant believes that it is entitled to the dismissal of the review application for want of prosecution by the first respondent.

In first respondent's notice of opposition in the present matter, the first respondent is bafflingly announcing her intention to file her answering affidavit for the review application (HC 4044/18). This is what the first respondent said in her opposing affidavit:

> "Record p 114
>
> 7.5. An answering affidavit to the principal case **will accordingly shortly be filed** to address all these issues. Accordingly any thought of these issues being challenged is misplaced. I deny that court process has been abused and will demonstrate so in the replying papers.
>
> I accordingly pray for the dismissal of this application seeing as the replying affidavit it sought to motivate is now filed of record"

By the abovementioned statement it is clear that first respondent seems to be oblivious as to the legal ramifications of not having filed an answering affidavit in the first place. First respondent appears to be far removed from the reality of her dilemma if she sincerely believes or has been advised that the present application was filed to motivate her to file an answering

affidavit. She ought to have filed her answering affidavit to avoid the situation that she presently finds herself in. Instead it is a matter of fact that the first respondent is barred from filing it.

In the first respondent's heads of argument, the first respondent's counsel raised a new legal point which he wished the court to explore and which he submitted as follows:-

> "p 9 First respondent's Heads of Argument
> 2.4.1 Rule 236 (4) provides a patently fairer, and justice - driven approach to matters of this nature. Thus a party against whom r 236 (4) (a) is invoked is essentially jerked into preparing to argue the primary mater, on the merits.
>
> 2.4.2 *Per* contra a party against whom Rue 236 (b) of the Rues is invoked, is put to his defence not on the merits of the primary matter per se, but rather on the reasons for his or her default. He or she is then invited to convince the court, on sufferance of a dismissal of the principal matter, on the merits! Furthermore unlike his counterpart in receipt if Rule 4 (a) compulsion, he cannot do anything, or file any pleading or document in the principal case, to purge his/her breach, or even to withdraw the matter"

What I understand the first respondent to be suggesting in this added point of law is that if the applicant had elected to proceed in resolving the matter by way of setting it down on the unopposed roll under 236 (4) (a); then the first respondent would have been able to defend her case on the merits. And that because the applicant chose the route of setting the matter down under 236 (4) (b), that meant that the matter would be determined on the basis of first respondent's default without the first respondent having the opportunity to present an argument on the merits. First respondent is arguing that because the election between (a) and (b) is beyond her control; invariably if the applicant elects (a) she can place the merits of her case before the court; but if the applicant elects (b) then she is adversely affected by being deprived the opportunity to argue the merits of her case. I have been invited to make a pronouncement on this apparent inequity in the exercise of my discretion and the attendant injustice it causes.

However I hold the view that the current matter cannot be one on which the court should be burdened with exploring the point taken by the first respondent with respect to the burden placed upon the first respondent by r 236 (4) (b). And I say this because the first respondent was not a party to the decision by the Minister. Thus because the first respondent was not a party to the Minister's decision in matter number HC 4044/18 in the first place, first respondent holds no right to query or challenge the Minister's decision. How then am I expected to make a pronouncement upon an alleged inequity being visited upon a party who is not able to assume any right in the review matter? In the circumstances, it is not necessary for me to apply me discretion to the first respondent's rights in a matter where the first respondent is not a party. I

therefore decline from considering the point because the first respondent had and still does not have the *locus standi* to challenge the decision of the Minister. In other words the point is an academic one which should not unnecessarily detain the court in resolving this matter.

The net effect of all of the above is that the applicants are entitled to a dismissal of the review application.

Further, despite the simplicity of the issues with which I am seized; in their founding affidavit, the applicants went to great lengths to deal extensively with the detail in other matters; namely HC 4096/18; HC 3310/18 and HC 1662/18. However those other matters are not for my adjudication either, neither have they been consolidated. Those records merely provide the court with "background to the Application". Obviously, it is not for this court to pronounce any opinion on those other unresolved matters lest any *obiter dicta* statement which I may make be perceived as potentially persuasive commentary when the other matters are argued in the future; or at all. The Draft Order in this matter is a simple prayer for dismissal of the first respondent's application for review with no other reference to the other matters. The Draft order reads as follows:

> "1. The application HC 4044/18 be and is hereby dismissed with costs with costs at a legal practitioner and client scale.
>
> 2. First respondent to bear the costs of this application at legal practitioner scale."

Applicant is praying for an order of costs on a higher scale. I am persuaded to make such an order on the basis that the opposition to this application is so devoid of merit as to constitute an abuse of this court. The fact that the applicant alludes to and the first respondent does not deny that the first respondent has prosecuted those other matters without ensuring that they be resolved, demonstrates a tendency on the part of the first respondent to unnecessarily detain the court. In the result applicant has made out a case for the relief sought,

Accordingly I make the following order:

"The application for dismissal of matter number HC 4044/18 for want of prosecution is granted with first respondent paying the applicants' costs on a legal practitioner and client scale."

Gill Godlonton & Gerrans, 1st applicants' legal practitioners
Mandizha & Company, 1st respondent's legal practitioners