

JENA MINES (PVT) LTD

Versus

SCRAWMAN ENGINEERING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 18 JULY 2023 & 4 JANUARY 2024

Opposed Application

W. Musengwa for the applicant
M. S. Drau for the respondent

TAKUVA J: This is a chamber application for dismissal of matter for want of prosecution in terms of r59 (16) (b) of the High Court Rules 2021.

The rule provides;

59(16) where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, applied for the set down of the matter for hearing, the respondent on notice to the applicant, may either (a) apply for the set down of the matter for hearing in terms of rule 65; 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 such terms as he or she considers fit."

Background facts

The respondent filed a court application for rescission of default judgment in terms of Rule 29 of the High Court Rules 2021. The applicant proceeded to file its notice of opposition on the 30 of June 2022. On 19 July 2022, respondent filed its answering affidavit which was served on the applicant on the 20th of July 2022. One month has since lapsed and the respondent has not applied for the set down of the matter or taken any further procedural step within 1 (one) month from 20th of July 2022. Resultantly, the respondent has failed to prosecute its application for rescission of judgment. On these facts, the applicant has applied for the dismissal of the application under case number HC 2561/22 for want of prosecution.

The application is opposed by the respondent on the following grounds;

1. The applicant has failed to show that the delay in setting matter down was inexcusable that there is no honest and satisfactory reason for delay.

2. The respondent has filed the heads of argument in a bid to finalise the matter under HC 1694/22.
3. The respondent has since paid for the notice of set down of the matter.
4. No prejudice has been suffered by the applicant.
5. There are prospects of success in the main matter in favour of the respondent.

By way of simplification the respondent submitted that in terms of r16 (a) of the High Court Rules, the responsibility to set the matter down does not solely rest on the respondent. Therefore the respondent's delay in setting the main matter down was neither fatal nor prejudicial to the applicant.

Further it was submitted that there is an honest and satisfactory reason for the delay in that respondent made it abundantly clear that what led to the delay was a factor beyond its control. The reason being that the respondent's legal practitioners' office was flooded with water due to a pipe burst and this resultantly damaged "all the computers leading to the loss of research and heads of argument." Consequently, the respondent had to wait for the damaged files and information of the proceedings. According to the respondent this reason qualifies as an honest and satisfactory one. Therefore the delay in setting the matter down was not intentional or wilful. Reliance was placed on *Valentine v Mydale International Marketing (Pvt) Ltd & Anor* HH-233-18; *M Dorhani v Shoniwa* 1992 (1) ZLR 269 (S); *Ndebele v Ncube* 1992 (1) ZLR 288 (SS).

As regards prospects of success in the main matter, respondent contended that it has high prospects in that the applicant did not serve the respondent with the chamber application. Therefore, the respondent was not in wilful default.

The sole issue for determination is whether or not the applicant has successfully satisfied the requirements for the dismissal of the application.

The Law

In *Guardforce Investments (Pvt) Ltd v Ndlovu & Others* SC-24-16, the Supreme Court while interpreting r236 (3) of the old High Court Rules 1971 which is identical to rule 59 of the current rules, remarked as follows;

“... 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.”

See also *Upenyu Mashangwa & Anor v Emmanuel Makandiwa* SC-95-01.

The rationale behind the above-mentioned rule was stated in the case of *Scotfin v Mtetwa* 2001 (1) ZLR 249 at p50 where CHINENGO J stated this;

“Rule 236, as amended by s7 of the High Court (Amendment) Rules 2000 (No. 55) was intended to ensure the expeditious prosecution of matters in the High Court. The rule was deliberately designed to ensure that the court may dismiss an application if the principal litigant does not prosecute its case with due expedition. The rule gives the judge a discretion either to dismiss the matter or to make such other order as he may consider to be appropriate in the circumstances. I think however the overriding consideration for the judge is to exercise his or her discretion in such manner as would give effect to the intention of the law maker. The primary intention of the lawmaker, as I have stated to be is to ensure that matters brought to the court are dealt with due expedition.” (my emphasis)

I now turn to deal with the requirements *ad seriatim*.

Delay and explanation thereof

Respondent sat on its laurels for two months without doing anything about this matter. From 20 July 2022 until the 2nd of September 2022 the respondent did absolutely nothing. As at 28 September 2022, respondent had not applied for set down of the main matter which entails filing a notice of set down and consolidated index, paginating and binding the record and paying the requisite set down costs. While respondent in para 19 of its heads of argument refers extensively to the steps it took to prepare for the action matter under HC 1966/21, it remained mum on the application matter under HC 1059, an application for rescission of default judgment. In fact, the respondent is not a stranger to default judgments issued against it. In HC 602/22 respondent’s action filed in case number HC 1966/21 was dismissed for want of prosecution by this court per MOYO J. Unamused respondent then filed case number HC1059/22 to rescind the default judgment. It is this application that applicant wants dismissed for want of prosecution on the grounds that respondent has failed to prosecute it timeously. Such conduct is inconsistent with a party seeking indulgence.

The respondent thrives in delays and this is the mischief that rule 59 (16) (b) seeks to cure. In *Zambe Nyika Gwasura v Maxwell Matzvimbo Sibanda & 2 Ors* HH-298-19 at p 2, the court stated that;

“This rule (rule 236 (3) (b) is meant to ensure that litigants are serious in the disposal of their applications brought before the court. Matters must not be left stagnant before the court. A respondent to the application has a chance either to set down the matter for hearing or to apply for its dismissal.” (my emphasis)

I therefore disagree with respondent’s submission that the intention of the lawgiver in crafting this rule was to give either party an option to set down the matter for hearing. To so hold would defeat the intention of the legislature.

As regards the explanation for the delay I agree with counsel for the applicant that respondent has failed to give a reasonable explanation on why they failed to prosecute their application for rescission. The respondent says its lawyers’ offices were flooded and records destroyed. However no evidence in the form of pictures, insurance claims, or a report to the Law Society to back up this rather fanciful story was placed before the court. Nothing has been placed before the court to move it to exercise its discretion in favour of the respondent.

Further, it was submitted by counsel for respondent that the “flooding” occurred in early September 2022. On common cause facts, this was after the rule had already been violated by the respondent. In that regard, the flooding ceases to be the reason for the delay. In any event, an explanation anchored on falsehoods can never be categorized as reasonable by a court of law.

To that extent, I find that the explanation is contrived and not only unacceptable but inexcusable. This kind of excuse for failure to act falls within the ambit of the similar remarks by the Supreme Court in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) 290, where the court remarked;

“It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice.

Incompetence is becoming a growth industry. Petty disputes are argued and reargued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilante, bus non dormientibus jura subvenient* roughly translated, the law will help the vigilant but not the sluggard.”

Prospects of success in the main application

Despite respondent’s contention that it has bright prospects of success, it is clear that in the main matter, respondent’s basis for rescission is rule 29. Its argument being that the judgment it seeks to rescind was erroneously sought and erroneously granted. However in its heads of argument, respondent suddenly said its main application was premised on rule 27 of the High Court Rules. These two rules are mutually exclusive and cannot be invoked simultaneously in the same application. Such conduct displays lack of confidence in its own case.

Further, the opposing affidavit to the present application is silent on the prospects of success in the main. All that the respondent alleges is that the respondent’s application for rescission is merited and must be given an opportunity to be heard. For this reason I find that the respondent has failed to show good cause on why their matter should not be dismissed for want of prosecution. See *Scotfin v Mtetwa supra* where the learned judge added that;

1. ... The order which the judge may issue, if it is one of dismissal, is in effect a default judgment. But in considering the application the judge can only make an order other than dismissal if the respondent has opposed the application and shown good cause why the application should not be dismissed.”

In casu, I take the view that the respondent has not shown good cause.

The balance of convenience and possible prejudice to the applicant

Respondent is of the view that the main matter is of great importance to it since it involves a whopping figure of ZWL\$35 770 849,71 arising out of the rental of pumps and repairing services of pumps as well as costs of suit. The action was instituted under case number HC 1966/21 which case was dismissed for want of prosecution by MOYO J on 20 April 2022. What I find surprising is the lack of diligence when it comes to efforts to recover such a huge amount of money. Respondent prefers to move at its own pace irrespective of what the rules provide. On the other hand the applicant is forced to secure legal representation at its expense to defend the main matter. The respondent has not established the strength of his claim.

Further I find it ludicrous that a party who has flouted the rules of court can escape, the consequences of its action by alleging tongue in cheek that the other party did not suffer any prejudice. The balance of convenience favours the granting of the application for dismissal of the main matter in my view.

In the result, the following order is granted;

1. The court application for dismissal of matter for want of prosecution in terms of rule 59 (16) (b) of the High Court Rules. 2021, be and is hereby granted.
2. The respondent's claim under case number HC 1059/22 be and is hereby granted.
3. The applicant's costs of suit in case number HC 1059/22 and in this application shall be borne by the respondent on the ordinary scale.

Chimuka, Mafunge Commercial Attorney, applicant's legal practitioners
Tamuka, Moyo Attorneys, respondent's legal practitioners