DUDUZILE GUMEDE

Versus

KUDAKWASHE MAPONGA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 18 AND 27 JUNE 2024

Chamber Application for Dismissal

M. E. P Moyo, for the applicant
M. Mpofu, for the respondent

KABASA J: This is an application for dismissal of the respondent's application filed under HC 616/22 for want of prosecution. The applicant seeks the following order:-

> "1. The respondent's application in case number HC 616/22: UCA 03/22 be and is hereby dismissed with costs on an attorney and client scale for want of prosecution.
>
> 2. Respondent pays costs of this application on an attorney and client scale."

The application is opposed. The thrust of the opposition is that the respondent has since filed the Answering affidavit complained of and heads of argument are to be filed before the matter is set down for argument.

The delay in filing an Answering affidavit was due to the misfiling of the file in counsel's office. The file had been filed in another legal practitioner's office by mistake and was eventually retrieved on receipt of the application for dismissal.

The respondent also raised the issue of the propriety of the application for dismissal contending that rule 59(16) (b) is not applicable in the circumstances of this case.

It is important to set out the background to this matter. The background is this:-

The respondent filed an urgent chamber application for stay of execution under HC 616/22: UCA 03/22. Such application had been occasioned by the fact that the applicant had issued out a writ of execution against the respondent's movable and immovable property in order to satisfy an amount of US$25 000 which the respondent had agreed to pay in a deed of settlement entered into by the parties. Following that settlement which was reduced to an

order of the court the respondent paid ZWL 2 642 412.50 which was the equivalent of US$25 000 at the prevailing interbank rate. The applicant was unhappy with the payment and disputed that such payment amounted to a full and final settlement of the judgment debt. The applicant proceeded to obtain a writ of execution on 11 February 2022. The Deputy Sheriff thereafter placed the respondent's property under judicial attachment to satisfy the US$25 000.

The urgent chamber application was then filed to arrest execution of the writ as respondent believed that he had extinguished the debt. The application was opposed, opposing papers were filed. The matter was argued and the court came to the conclusion that the respondent (applicant) had shown a *prima facie* right that was about to be infringed if the writ was not arrested. Consequently the court held that the respondent had met all the requirements for an interim interdict and proceeded to grant the following order:

> "Pending determination of the legal validity of the writ of execution against movable and immovable property issued by this court as well as the notice of seizure and attachment issued by the 2nd respondent, the applicant is granted the following relief:-
>
> 1. An order be and is hereby granted for stay of execution of the writ of execution against movable and immovable property belonging to the applicant issued by this court on the 11th of February 2022 pending the determination of its lawfulness by this court on the return date.
>
> 2. An order that the 2nd respondent should not remove property belonging to the applicant pending the finalisation of this matter on the return date."

Mr Moyo, counsel for the applicant's contention is that after the grant of this order the respondent was supposed to file an Answering affidavit and have the matter finalised. Counsel further argued that after the grant of the Provisional order the respondent did not prosecute the matter and so the applicant is entitled to seek its dismissal. The applicant had already filed notice of opposition and opposing affidavit opposing the grant of the interim relief and such opposition was to stand as opposition to the grant of the final order, so counsel contends.

Mr Mpofu on the other hand raised what he called a point *in limine*. His argument was that the application is not properly before the court as rule 59(16) (b) applies to ordinary applications not urgent chamber applications where a Provisional order has been granted. Rule 60 therefore applies to Urgent chamber Applications and there is no procedure provided therein for an application for dismissal for want of prosecution. Rule 59(9) – (11) will be

applicable in a matter where a Provisional order has been granted and not rule 59(16) (b), so counsel argued.

Counsel further submitted that in any event an Answering affidavit was filed and the applicant has not made a case for the relief sought. Counsel relied on the case of *Guardforce Investments (Pvt0 Ltd* v *Ndlovu & Ors* SC 24-16 where CHIDYAUSIKU CJ set out the requirements to be met in an application for dismissal for want of prosecution.

Counsel's argument was that the length of the delay, the explanation thereof, the prospects of success on the merits, the balance of convenience and the possible prejudice to the applicant caused by the respondent's failure to prosecute its case on time were not satisfied given the circumstances of the case and so a case for dismissal had not been made.

In resolving this matter it is important to look at rule 59(15) (b) which provides for applications for dismissal for want of prosecution.

> "(15) 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) ……..
> (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 or she thinks fit."

In casu the urgent chamber application was opposed. The opposition related to the grant of the interim relief sought by the respondent in HC 616/22; UCA 03/22. The provisional order was however granted.

It is important to place that opposition in the proper context in so far as procedure is concerned. CHITAPI J in *Citizens for Coalition Change* v *Tshabangu & 3 Others* articulated the procedure thus:-

> "In relation to whether a provisional order is merited to grant rule 60(a) provides that:-
>
> "Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case, he or she shall grant a provisional order either in terms of the draft filed or as varied."
>
> The rule envisages that the application for a provisional order is decided on the papers filed of record without a formal hearing being held as a matter of course. Thus, where service of the application is effected on the respondent and the respondent files an

> opposition then the judge must consider the full set of papers and where the judge considers that the applicant upon a consideration of its application and/or together with opposing papers has established a *prima facie* case, the judge must grant a provisional order as prayed for or as varied."

This is what happened *in casu*. The judge considered the full set of papers, i.e. the application and opposition and was satisfied a *prima facie* case had been established and so granted the interim relief. I must pause to state that it matters not what description such an order is given, a provisional order provides for the interim relief sought as well as the final relief sought. Where the provisional order is granted such interim relief arrests the harm the applicant is wary of until the return day when the order is either confirmed or discharged. If confirmed the final order is then granted.

In casu Mr Moyo appeared to suggest that the interim order that was granted is to be accorded a different meaning to any other interim order granted in an urgent chamber application where the provisional order speaks to both the final order sought and the interim relief.

I must say it is not clear why the applicant under HC 616/22: UCA 03/22 did not utilize Form No. 26 A as required by rule 60(11) (b) as what was sought was a provisional order which was subject to confirmation, which confirmation was to speak to the final order.

The manner in which the provisional order was sought and granted appeared to have confused issues. I say so because *Mr Moyo's* argument is that the opposition he filed opposing the grant of the interim relief was to be the same opposition for the confirmation proceedings. In other words the court was to use the very same papers upon which an interim order was granted in an application for confirmation or discharge of that interim order. If such opposition had failed to stop the grant of an interim relief the same opposing papers could not possibly be used to oppose its confirmation.

In *Nhende* v *Zigora & Anor* SC 196/-22 M*ATHONSI* JA articulated this point thus:-

> "There is a reason why the rule is couched that way (r 69(a)). Firstly, in an urgent application, the applicant is usually granted interim relief on the basis of a *prima facie* case as the applicant would not have proved his or her case. The procedure allows a litigant which can show a *prima facie* right to be accorded interim relief that usually protects the status *quo ante* until the return date of the provisional order."

Had this been done *in casu* the provisional order would have shown what the interim relief sought and granted was and what the final relief sought was.

On the return day the applicant would then have an opportunity to prove a clear right as opposed to a *prima facie* right, entitling him to the final order.

It therefore makes no sense that the same opposition that was filed against the grant of the interim relief would form the basis of opposition for the grant of a final order. That opposition would have failed to stop the grant of the interim relief and where its confirmation is now in issue opposition to such confirmation has to be filed.

In *Nyakamha* v *Lobels Bread (Private) Limited* SC 4-06 GWAUNZA JA (as she then was) was seized with an appeal where an application for confirmation of a provisional order was heard as an unopposed application because no opposition had been filed. The appellant had appeared in the court *a quo* and objected to the confirmation arguing that he had filed a notice of opposition and opposing papers. It turned out that the opposing papers had been filed in opposing the grant of the provisional order which had been granted despite such opposition. Opposing papers had not been filed in opposition to the confirmation of the provisional order.

GWAUNZA JA in dismissing the appellant's appeal had this to say:-

> "As the provisional order in the court *a quo* was effectively unopposed it was not legally open to the appellant to appeal against it."

I find this matter relevant in that it underscores the fact that opposition to the grant of an interim order cannot stand as opposition to the confirmation of that provisional order. *Mr Moyo's* argument therefore that his opposition to the grant of the interim order is the same opposition upon which the respondent ought to have filed an answering affidavit is untenable.

I shy away from commenting on what it is that was to be confirmed on the return day as the order itself makes it difficult to say what the terms of the final order that was being sought were.

It appears the final order was to touch on the lawfulness or otherwise of the writ whose execution was stayed.

Counsel for the applicant's contention that an answering affidavit was supposed to be filed within 30 days after the grant of the interim relief and such answering affidavit was to sit on the opposition filed against the grant of an interim relief cannot be correct. Such

procedure is not provided for in the rules and I was not directed to a rule which speaks to what counsel submitted.

I refrain from commenting on the correctness of the step taken by counsel for the respondent in filing an answering affidavit in HC 616/22: UCA 03/22. Such answering affidavit does not appear to sit on a valid opposition.

In *Movement for Democratic Change (Tsvangirai) & 2 Ors* v *Timveous & 4 Ors* SC 9-22 CHITAKUNYE JA re-stated what a party has to establish in order to get an interim order. He proceeded to say:-

> "If the above conditions are met then the court may grant the provisional order sought and provide for a return date for the parties to then make arguments on whether or not the final order sought can be granted. On the return day a party ought to establish a clear right as opposed to a *prima facie* right."

In casu the judgment in case number HC 616/22: UCA 03/22 (HB 70-23) makes reference to a return date where the lawfulness of the writ of execution issued by the court on 11 February 2022 was to be determined.

Even if I am wrong in holding that there is no opposition upon which an answering affidavit was to be filed, I still hold that this is not a matter which calls for an application for dismissal for want of prosecution.

As was stated in the Guardforce case (*supra)* the delay and the explanation thereof is reasonable. This is not a matter where one visits the sins of the legal practitioner on the client. The misfiling of files is not anything out of the ordinary in busy law firms and such misfiling does not warrant the label of a sluggard.

The balance of convenience favours a proper ventilation of the matter as the dispute in the main matter is on the payment of US$25 000 which is not disputed was paid at the equivalent interbank rate. The issue therefore is whether in paying at that equivalent interbank rate the respondent discharged his indebtedness to the applicant. The respondent may very well succeed in showing that when he paid the equivalent of US$25 000 he did so in accordance with the law.

A dismissal of the matter would mean the respondent's property will be sold in execution to recover an amount he argues he has paid, albeit not as US$ but the equivalent of the US$ amount.

I therefore come to the conclusion that rule 59(15) (b) is not applicable in the circumstances of this case and an application anchored on the failure to file an answering affidavit after the grant of an interim relief cannot be sustained. Even if rule 59(15) (b) applied, the respondent has filed an answering affidavit and the delay is not inordinate given the explanation given.

A case for the dismissal of the application under HC 616/22 has therefore not been made.

The manner in which this matter was handled by either party does not warrant an award of costs in favour of either of them.

I hold the view that this is a matter where each party ought to bear its own costs.

That said, I make the following order:

1. The application to dismiss the application under HC 616/22 for want of prosecution be and is hereby dismissed.

2. Each party shall bear its own costs.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Maseko Law Chambers, respondent's legal practitioners