ZAMBE NYIKA GWASIRA
versus
MAXWELL MATSVIMBO SIBANDA
and
N.Z. INDUSTRIAL & MINING SUPPLIES
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 13 March 2017 & 17 May 2017

Chamber Application

Z. Makwanya, for the applicant
E. Mupanduki, for the 1st & 2nd respondent

MATANDA-MOYO J: This is a chamber application for dismissal of an application for stay of execution for want of prosecution in terms of s 236 (3) (b) of the High Court Rules, 1971.

The first respondent filed an application for stay of execution pending the determination of an application for rescission. On 18 November 2016 - case No. HC 11759/16 refers. The applicant filed a notice of opposition on 1 December 2016. Such notice of opposition was served upon the first respondent the same day. On 25 January 2017 the applicant filed this application. After receiving the application for dismissal, the first respondent immediately filed answering affidavits and heads of argument Case HC 11759/16. That main matter was set down for hearing. It was at such hearing that the court was advised of the existence of this present application. The parties agreed that this current application be referred to me for determination before dealing with the application for stay of execution.

Rule 236 (3) provides;

> "Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed and 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.
(c) ……"

From a reading of the above it is clear that a judge has a wide discretion in a matter for want of prosecution in deciding whether to dismiss or not. The remedy is not available on asking. Obviously this rule is designed to ensure that there is finality to litigation. This rule serves to ensure that once a litigant has instituted proceedings by way of application, matters are swiftly disposed. The rule is meant to ensure that litigants are serious in the disposal of their application brought before the court. Matters must not be left stagnant before the court. A respondent to the application has a choice to either set the matter down for hearing or to apply for its dismissal. The respondent herein opted for dismissal.

As reiterated above whether to grant the application or not is in the discretion of the court after scrutinising factors such as the lengthy of delay in fling answering affidavit and setting the matter down, the explanation thereof and prospects of the respondent's success in the main matter. It is common cause that the first respondent was served with the applicant's papers on 1 December 2016. In terms of r 236 (3) the first respondent was supposed to file his answering affidavit a month later, that is by the third of January 2017. He did not. This application was filed some three weeks after the deadline.

The first respondent's response to the application was that he had already filed his answering affidavit as well as heads of argument at the time of this application. I have perused the file dealing with the application for stay of execution – HC 11759/16 and found that answering affidavit was filed on 31 January 2017 after the application for dismissal had been filed on 25 January 2017. According to the stamp on the application the respondent's legal practitioners received same on 25 January 2017. It is therefore not correct that answering affidavits were filed before the respondents were aware of this present application. However once they received this application the first respondent immediately filed his answering affidavit and head of argument. Same matter had been set down for hearing before this application was set down.

In the main matter the first respondent's complaint is that he was not a party to the proceedings which culminated in the attachment of his immovable property. It is his submission that when the matter initially came before the court in 2011 that is under HC Case

NO. 6750/11 the parties before the court then were Maxwell Matsvimbo Sibanda and NZ Industrial and Mining Supplies. Under para 2 of the declaration the plaintiff therein wrote;

> "2. The defendant is a company duly incorporated in terms of the laws of the Republic whose given address for service is at No. 48 Dam Judson Road Milton Park, Belvedere Harare."

The default order, the first respondent claimed, suddenly introduced him as a defendant. He has challenged that order under r 449. He believes the court made an error by suddenly adding him as a defendant therein.

The applicant argued that there have been several applications wherein the first respondent was party to. He never raised the issues he is raising now. Instead the first respondent even used his customary wife to try and stop the sale of the house. The matter went as far as the Constitutional Court- CCZ 31/15 refers wherein the Constitutional Court's view was that the property must be sold. The applicant's view is that the first respondent is abusing the courts in a bid to save his property from execution. It is the applicant's case that from the time he got judgment up till now, he is being forced to defend spurious litigation. To date he has expended over $30 000-00 in legal fees. The property in question is likely to sell for $90 000-00 and most of the proceeds may be wasted on legal fees. The applicant called upon this court to stop this abuse by granting this application and thus refusing to hear further application from the first respondent.

Unfortunately the court has so far not been able to locate the file culminating into the order by default. The court has had sight of the summons which only bears the company name as the respondent. The court has also had sight of the default judgment where the first respondent was now a party to the matter. The court could not ascertain how the first respondent's name came to appear on that order. Whether there was an application for joinder or not, the court is only left to guess. In view of the above matter it may be an in justice for the court at this stage to refuse to hear the first respondent on the matter.

It is only for the above reason that the court reluctantly dismissed the application for dismissal for want of prosecution. It is in the interest of justice that the above issue be interrogated. It is my view though that, that issue is capable of resolution by hearing the application in terms of r 449. I am aware of other application pending before this court. Hearing those applications may only increase legal costs. Such increase in legal costs can benefit neither of the litigants, moreso the applicant who continues to suffer costs in defending these numerous litigations.

In the result, it is ordered as follows;

1) The application for dismissed of HC Case No. 11759/16 for want of prosecution be and is hereby dismissed.
2) Costs to be in the cause.

Coghlan, Welsh, Guest, applicant's legal practitioners
Chinawa Law Chambers, respondent's legal practitioners