AFRICAN STAR DIAMONDS (PVT) LTD
versus
JUDY NYAMUCHANJA
and
MEMORY MUNHENGA
and
SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 16 February and 17 May 2017

Opposed application

T. Mpofu, for the applicant
T. Magwaliba, for the 1st respondent

MAKONI J: This application is made in terms of r 236 (3) of the High Court of Zimbabwe Rules, 1971 on the basis that the respondents have not prosecuted an application which they filed in HC 4700/16 within the time provided by the rules. For that reason, the applicant seeks a dismissal of that application for want of prosecution.

The background of the matter is that the first respondent purchased an undeveloped stand from a judgement debtor and made developments on it. However, the property was not transferred into the first respondent's name because the seller was refusing to pay Capital Gains Tax. The property was attached and sold in execution for the seller's debt under Case No. HC 6100/11. In HC 4700 and on 09 May 2016 the applicant filed an application for setting aside the sheriff's decision in terms of order 40 r 359(8). The respondent filed its notice of opposition and opposing affidavits on the 23rd of May 2016 and served the papers on the applicant the same day. The applicant instead of setting down the matter or filling its answering affidavit within one month as in r 236(3), she neglected to do so for a period more than five months.

The applicant then filed the present chamber application seeking an order to dismiss the respondent's matter under HC4700/16 for want of prosecution where the respondent has failed to set the matter down for hearing within one month of receipt of opposing papers.

Mr *Mpofu* submitted that the respondent accepts that there was an inordinate delay in prosecuting her matter. The question is whether there is an acceptable explanation. He further submitted that the respondent avers that her failure to act was a result of financial constraints to raise legal fees to pay her legal practitioners who represented her at the hearing regarding confirmation of the sale of the property. She did not communicate with the applicant's legal practitioners to explain her failure to act. Her legal practitioners did not renounce agency and that created the impression that she could still afford lawyers. This puts into doubt the *bona fides* of her explanation.

He further submitted that she bought the property from Bernard Matanga, the judgement debtor. There is no explanation why she did not take transfer. She is being used by the judgement debtor to protect his property from execution. He further contended that the property was available for execution.

Mr *Magwaliba* submitted that a delay of slightly exceeding three months is not inordinate. The respondent bared it all to the court. There is nothing for his legal practitioners to explain. He further contended that as they argued the matter the default had been purged. The court should lean in favour of the main matter being heard.

He further contended that the applicant did not address the issue of prejudice where the main matter is ready. He further contended that the delay for the transfer was caused by the failure of the seller to obtain the Capital Gains Certificate.

He further contended that the court was not obliged to look at the prospects of success on the merits in applications of this nature.

In reply Mr *Mpofu* submitted that the respondent had defaulted twice in filing the Answering Affidavit and the Heads of Argument. He further contended that prospects of success on the main matter are important as it speaks to the default. Matanga defaulted in 2007 when he refused to pay Capital Gains Tax. She should have sued him to get transfer. She has no real rights in the property.

The second respondent fully associates herself with the submissions and relief sought by the applicant.

The primary task of this court is to determine simply whether the explanation given by the first respondent is candid and satisfactory or put differently whether the first respondent has established good and sufficient cause for the delay.

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 an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either—
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> (a) set the matter down for hearing in terms of rule 223; or
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> (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."

Rule 236 is one of the remedies available to a litigant who wishes to overcome an abuse of court process by an uninterested applicant

The position of the law is settled. In *Scotfin* v *Mtetwa* 2001 (1) ZLR 249 AT 250 D-E, CHINHENGO J stated:

> "Rule 236, as amended by s7 of the high court (Amendment) Rules 2000 (No.35), 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 consisder5 to be appropriate in the circumstances. I think however the overriding consideration for the judge is to exercise his or her discretion in such a manner as would give effect to the intention of the law maker. The primary intention of the law maker, as l have stated it to be, is to ensure that matters brought to the court are dealt with, with due expedition. The order in which the judge may issue, if it is one of dismissal, is in effect a default judgement. But in considering the application the judge can only make an order other than a dismissal if the respondent has opposed the application and shown good cause why the application should not be dismissed." See also *Munyikwa* v *Jiri* HH 338/15, *Moon* v *Moon* HB 94/05 and *Ndlovu* v *Chigaazira* HB 104/05.

In casu the respondent did not tender any reasonable explanation as to why she delayed in the filing of her answering affidavit or why she failed to set the matter down for hearing within the required time. The respondent's defence of lack of financial funds was considered in *Moon* v *Moon* (*supra)* where NDOU J stated:

> "The excuse given by the applicant is one of poverty. The Applicants funds dried up. The applicant's legal practitioners did not renounce agency. This financial dilemma was not conveyed to the respondent or his legal practitioner. No extension of time was sought by the applicant. This excuse was only raised ex post facto. It was foolhardy on the part of the applicant's camp to ignore the option of order 32 rule236 (3) supra available to the respondent. How the respondent was expected to know that the in-action within the required one month was occasioned by poverty and not abandonment of the matter? The only inference to be drawn is that the applicant knowingly and deliberately refrained from setting down the matter down or filling an answering affidavit."

As correctly submitted by Mr *Mpofu*, the respondent should have conveyed her financial dilemma to the applicant and seek an extension of time so that the applicant would know that the delay is being driven by poverty that and she is not abandoning the matter. The respondent could have negotiated a payment plan with her legal practitioners. In addition the respondent's legal practitioners did not renounce agency giving the impression that she can afford a lawyer. She could have gone to the legal aid directorate or file an answering affidavit on her own as a self-actor. In my view it was incumbent upon the legal practitioners to file an affidavit in this matter explaining why they did not act in time but they did not. One is then left doubting the *bona fides* of the explanation.

Instead, the first respondent in para(s) 9-13 of the opposing affidavit conceded that she breached the rules and the common thread running through all these paragraphs is that " first respondent was still considering whether to proceed with the matter or not". Such an explanation shows lack of seriousness on the part of the first respondent.

With regards to prospects of success, the first respondent bought the property in 2007 from the judgement debtor Bernard Matanga, and she never took transfer. There is no reasonable explanation as to why she failed to take transfer. In any event her claim has prescribed. Therefore, she never owned the property, and she has no real rights over the property.

Mr *Magwaliba* submitted that it is not necessary to consider prospects of success in the main matter in such applications. I want to agree with Mr *Mpofu* that prospects of success are an essential element in matters where one is considering granting indulgence to a defaulting party. The considerations that pertain to applications for rescission of default judgement should apply in this matter. What is the point of dismissing an application in terms of r 236 when it is clear that the main matter is doomed to fail?

I do not find the first respondent's explanation to be persuasive. Failure to act timeously due to financial constraints to raise legal fees is not a reasonable and credible explanation. The fact that the first respondent was legally represented clearly indicates that she was aware of the court rules and procedures but she flagrantly disregarded them by failing to file her answering affidavit. Legal practitioners and their clients must always be aware that they work within prescribed time limits and in terms of laid down procedures, failing which one must have a reasonable and acceptable explanation for failure to comply.

The next issue for consideration is whether the court can still proceed with the application in terms of r 236 if the first respondent would have purged his or her default. My view is that once the respondent fails to file the answering affidavit or set down the matter he or she is barred. No further papers should be filed without leave of the court. To do otherwise would be to defeat the mischief why r 236 was enacted which is to ensure that principal litigators prosecute their matters expeditiously. Otherwise we will end up with cases where principal litigants file applications and sit on them only to be jolted into action when an application is made in terms of r 236. It is a settled principle of law that the courts do not protect the sluggard.

The only inference that can be drawn from the present matter is that the respondent knowingly and deliberately refrained from filing her answering affidavit or setting down the matter within one month as her explanation is not reasonable and satisfactory.

The applicant prayed for costs on a higher scale. Seeing the way the respondent conducted herself in the main matter and in the present proceedings, l see no reason of not granting the applicant's prayer. None were advanced by the first respondent.

Accordingly, it is ordered that:

1. The application filed by the applicant under case HC4700/16 for want of prosecution is hereby dismissed.
2. The respondent be and hereby ordered to bear the costs of this application on attorney and client scale.

Dube, Manikai and Hwacha, applicant's legal practitioners
T.H Chitapi and Associates, 1st respondent's legal practitioners
Kantor & Immerman, 2nd respondent's legal practitioners