

RIOZIM LIMITED
versus
NIGEL DIXON-WARREN N.O.
(In his capacity as Liquidator of BCL Limited in Liquidation).

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 30 January 2020 and 4 March 2020

Application to dismiss action for want of prosecution

D Ochieng, for the applicant
F Girach, for the respondent

DUBE-BANDA J: This is an application for dismissal for want of prosecution of case number HC 11505/18. The order sought is drawn as follows:

1. The action filed under case No. 11505/18 be and is hereby dismissed for want of prosecution.
2. The first respondent to pay costs of suit.

The application is opposed. There is need to set out the brief facts of the matter which give rise to this chamber application.

Factual background

The parties in this application, where context permits will be referred to by their names for ease of reference. *Nigel Dixon-Warren* caused a summons to be issued against the Riozim Limited on the 3rd December 2018. Riozim Limited entered a notice of appearance to defend, and on the 9 January 2019, filed a request for further particulars, such particulars were supplied on the 5 February 2019. On the 27 January, it filed a request for further and better particulars. *Nigel Dixon-Warren* declined to supply the particulars requested stating that the particulars sought are matters of evidence and are not necessary to enable Riozim Limited to plead. Aggrieved by the refusal to furnish it with the particulars requested, it filed an application to compel the delivering of the requested particulars, the application has not yet been finalized.

Riozim limited asked for security *de restituendo* and the Registrar of this court ordered *Nigel Dixon-Warren* to tender security in the form of a security bond from a reputable insurance company in the sum of USD 50 000.00. It appears *Nigel Dixon-Warren* acquired a bond from Zimnat Lion Insurance Company, and on the 18 September 2019 Zimnat withdrew the bond it had issued.

Nigel Dixon-Warren instituted these proceedings in his capacity as liquidator of BCL Limited, and he resigned such office of liquidator on the 30 July 2019. This application was filed on the 4 November 2019. A Mr. *Glaum* is the new BCL liquidator in Botswana, his appointment has not been regularized in this jurisdiction.

Riozim Limited aggrieved by the non-availability of the bond as ordered by the Registrar of the High Court and the delay in regularizing Mr. *Glaum*'s appointment in this jurisdiction as liquidator of BLC Limited, filed this application for the dismissal of the action for want of prosecution.

Preliminary points

It is argued for the respondent that the application is fatally defective for want of compliance with r 241 (1) of the High Court Rules, 1971 (Rules). Rule 241 (1) provides that:

“A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies:

Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications.”

In *casu* applicant used Form No. 29B. Applicant concedes that the use of Form 29B instead of Form No. 29 with appropriate modifications is not correct. It says it should have used Form No. 29 with appropriate modifications because the chamber application was to be served on an interested party. For the use of an incorrect Form, applicant seeks condonation. Rule 229C provides that the adoption of an incorrect form of application shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that some interested party has or may have been prejudiced by the applicant's failure to institute proceedings in the proper form and such prejudice cannot be remedied by directions for the service of the application on that party, with or without an appropriate order of costs.

Respondent has not alleged that it will suffer any prejudice occasioned by the adoption of an incorrect form. Respondent was served with a copy of the application, filed a notice of opposition, opposing affidavit and heads of argument. I perceive of no prejudice that befell respondent as a result of applicant's use of an incorrect form. Respondent cited the case of *Kaseke & Others v Chizengeni N O* HH 56/2012 in support of its position that the application is fatally defective and must be dismissed. Each case must be decided on its own facts. Rule 4C permits a court or a judge to condone any departure from any provisions of the rules, if satisfied that the departure is required in the interests of justice. My view is that the court rules are designed to ensure a fair hearing and should thus be construed in such a manner as to advance, and not curtail, the scope of the right to a fair hearing; to promote access to the courts and to facilitate the expeditious handling of disputes and the minimization of costs involved. In *casu*, applicant's adoption of an incorrect form is condoned in terms of rule 4C. See *Nyarota v ANZ* HH 591-15.

Applicant raised a point a preliminary point, that Mr. *Ronald Mutasa* who deposed to the opposing affidavit had no authority to do so. The argument is that the respondent, cited as Nigel Dixon Warren N.O. [in his capacity as Liquidator of BLC Limited], and had resigned office on the 30th July 2019. It is contended that the new liquidator, Mr. *Glaum* has not regularized his legal position in this jurisdiction, and as a result he could not give authority to Mr. *Ronald Mutasa* to depose to the opposing affidavit.

Applicant is seeking to have the matter disposed of as unopposed on the basis of its own citation of a party which it says has no *locus standi*. It is applicant that cited a party that it knew had resigned office of liquidator of BLC Limited. In *Mudzengi & Others v Hungwe & Another* 2001 (2) ZLR 179 (H) at 182 D-E, the court said thus:

“I found this to be a rather startling and unusual objection, coming as it did from a party that had cited the Respondents in the first place as having the necessary *locus standi* to defend the application. Surely, an applicant who cites a party lacking in legal authority cannot rely on that incapacity to have the matter resolved in his favour. Rather, if the applicant knowingly cites a party lacking in *locus standi*, then the matter will not be properly before the court and it must be dismissed with costs on a higher scale. Ordinarily it would be the Respondents who would raise their own lack of capacity, or indeed applicant's lack of capacity, as a defence in *limine*.”

A court cannot permit a litigant that has cited a party with no *locus standi*, to use the very fact of lack of *locus standi* to have the matter treated as unopposed. The application must be dismissed for the citation of a party that has no *locus standi*. A party that had long

resigned office as Liquidator of BLC Limited. See *Marange Resources (Private) Limited v Core Mining & Minerals (Private) Limited (In liquidation); Moses Chinengo, (retired judge); N.O.; President of the Law Society of Zimbabwe N.O.; Attorney General of Zimbabwe N.O.* SC 37/16. However, in the event I am incorrect on this point, I proceed to deal with the merits of the application.

Merits

The High Court Rules, 1971 make no provision for the dismissal of action proceedings for want of prosecution. See *Anchor Ranching (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Anor* 2008 (2) ZLR 246 H. However, the High Court has the inherent power, both at common law and in terms of the 176 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 to protect and regulate its own process. This power includes the right to prevent an abuse of its process in the form of frivolous or vexatious litigation. An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action.

An approach that commends itself is that postulated by Salmon LJ in the English case of *Allen v Sir Alfred McAlpine & Sons Limited; Bostic v Bermondsey & Southwark Group Hospital Management Committee. Sternberg & another v Hammond & another* [1968] 1 All ER 543 (CA), where the following was stated at 561e-h:

A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the Court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:

- (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.
- (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
- (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from

the delay itself; prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Under the common law, an inordinate or unreasonable delay in prosecuting any action may in certain, narrowly defined circumstances justify dismissal of the action (see *Verkouteren v Savage* 1918 AD 143 at 144; *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558; *Sanford v Haley NO* 2004 (3) SA 296 (C) at para 8; *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (C); and *Zakade v Government of the RSA* [2010] JOL 25868 (ECB)).

In *Cassimjee v Minister of Finance* (SCA) (unreported case no 455/11, 1-6-2012) (BORUCHOWITZ AJA) the court held (at para 11):

“There are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and, third, the defendant must be seriously prejudiced thereby. Ultimately the inquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant’s inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.”

First, there should be a delay in the prosecution of the action. The summons was issued on the 3rd December 2018. This application was filed on the 4th November 2019. The period between the issuing of the summons to the filing this application is approximately eleven months. A lot has been happening during the eleven months, there has been a request for further particulars; a request for further and better particulars and court application to compel the provision of further particulars, which application is still pending. There has been an application to compel plaintiff to provide a security bond, which application was granted by the Registrar of this Court.

The delay must be inexcusable. Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant its previous conduct in the action is always relevant. So far, if there is a delay, defendant has contributed to such delay, it obviously cannot rely on it. On the 4th September 2019, applicant’s legal practitioners addressed a letter to the Registrar of this Court, and reproduce the letter in *ex extensio*.

“THE REGISTRAR
High Court of Zimbabwe
HARARE.

RE: RIOZIM LIMITED vs. NIGEL DIXON-WARREN N.O. CASE NO. 2488/19

We act for the applicant in the above matter.

1. It has come to our attention that the respondent (plaintiff under HC 3438/19) resigned as Liquidator of BLC Limited.
2. The respondent’s legal practitioners, copied therein, requested that all the outstanding matters be held in abeyance pending appointment of a new liquidator in Zimbabwe for BLC limited and the subsequent substitution of the respondent by the new appointee.
3. That noted, we kindly request that the above matter be held in abeyance until such time when a new liquidator for BLC Limited is duly appointed in this jurisdiction.

Yours faithfully

T.A. Chiurayi
COGHLAN. WELSH & GUEST “

On the 4th September 2019, applicant accepted the request that all the outstanding matters be held in abeyance pending appointment of a new liquidator in Zimbabwe for BLC limited and the subsequent substitution of the respondent by the new appointee. It said “noted” meaning it agreed to the respondent’s request to the Registrar, and particularly requested that case No. 2488/19 (application to compel supply of further particulars) be held in abeyance until such time when a new liquidator for BLC Limited is duly appointed in this jurisdiction. The letter of the 4th September puts a debit entry in applicant’s case. Taking into account activity that has been taking place within the eleven months from the filing of the summons to the filing of this application, I do not think that the delay may be classified as inexcusable.

The defendant must be seriously prejudiced thereby. The court is required to consider whether the delay has occasioned prejudice to the applicant. The court must also consider, in this regard, if there was any delay on the respondent’s part and whether the applicant has availed itself of the remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial. Applicant could not exactly two months after the letter of the 4th September 2019, on the 4th November 2019 complain that the delay in the prosecution of the main matter has become prejudicial. Applicant agreed that the main matter be held in abeyance until such time when a new liquidator for BLC Limited was duly appointed in this jurisdiction. Further applicant has not itself done anything to bring the action expeditiously to trial, and in any event, its letter of the 4th September, stalled the

process. Applicant has not even prosecuted to finality the application to compel the supply of further particulars (case HC 2488/19). It cannot be heard to cry foul.

Seeking a dismissal of an action is not just for the asking. Applicant must show that there has been delay in the prosecution of the action, the delay must be inexcusable and it must be seriously prejudicial. The period from the date of the issue of the summons to the filing of this application is approximately eleven months. There has been some activity in the interim period, which in my view does not render the delay inexcusable. Applicant has not demonstrated exactly what serious prejudice it has suffered and will continue to suffer as a result of the delay. It complains about the issues of the bond, my view is that the answer to applicant's complaint about the bond is not filing this application, but to deal with the issue of the bond separately.

Finally, I take issue with applicant's failure to file an answering affidavit in the face of the affidavit deposed by Mr. *Ronald Mutasa*, which raised factual issues that had the effect of defeating the application. See *Loveness Sengeredo v Eric Cable N.O.* HH 32/08. Even if applicant believed that the opposing affidavit was not properly before court, out of caution, it should have filed an answering affidavit to deal with the sting of the opposition, and leave the issue of the propriety of the opposing affidavit to the court. The net effect of it all is that the factual allegations in the opposing affidavit have not been traversed. This is another debit entry in applicant's case.

Disposition

In conclusion, my view is that the applicant has not meet the jurisprudential requirements for the dismissal of an action for want of prosecution. There is no basis that warrants the dismissal of case number HC 11505/18 at this stage. In the result, I make the following order:

This application is dismissed with costs of suit.

Coghlan, Welsh & Guest, applicant's legal practitioners
Manokore Attorney, respondent's legal practitioners