G.H PAYNE
and
KUFAKUNESU CHITORO
and
THE PROVINCIAL MINING DIRECTOR: MASHONALAND WEST
and
THE MINING COMMISSIONER (2012)
and
THE CHIEF GOVERNMENT MINING SURVEYOR (2012) N.O
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
LAIMOS CHIMHURI
and
NOEL MUNYUKI

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 29 June 2021 and 11 July 2023

Opposed Application

Adv *R Mabwe*, for the applicant
Adv *M Ndlovu,* for the respondent

CHINAMORA J:

Factual background

This is an application for dismissal for want of prosecution. The application will be better understood against the background that follows. On 30 November 2020, the first respondent filed an application with this court for a declaratory order under HC 7089/20. In response to this, the applicant filed and served their notice of opposition on the respondent on 9 December 2020. It is the applicant's contention that the first respondent has neither filed an answering affidavit nor heads of arguments, or at least set the matter down in one calendar month as prescribed by the rules of this court. The application was filed in terms of rule 236 (3) (b) of the High Court Rules, 1971 ("the old Rules"). Let me examine the relevant law.

The applicable law

As I have already observed, the application to dismiss the application for rescission of judgment is anchored on r 236 (3) (b) of the old Rules, 2021 which provides as follows:

> "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) set the matter down for hearing in terms of rule 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".

The case of *Guardforce Investments (Pvt) Ltd* v *Ndlovu & Ors* SC 24-16 establishes the position of the law where a litigant applies for dismissal for want of prosecution. CHIDYAUSIKU CJ appositely stated that:

> "The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration - the length of the delay and the explanation thereof; the prospects of success on the merits; 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 *Dube* v *Premier Medical Investments (Private) Limited and Another* SC 32-22.

It is against this background of the law that I will examine this application and make my determination.

Application of the law to the facts

The length of the delay and the explanation thereof

The first respondent filed their application under HC 7089/20 on 30 November 2020 and the applicant responded by 9 December 2020. The applicant states that it is from this time that the first respondent did not take any action to prosecute their matter. The requirement of the rules is that the matter must then be set down within one calendar month. At the time of filing of this application, the respondent had been out of time for a period approximating two months. At this stage the delay was not inordinate.

It is the first respondent's explanation that the present application was filed at a time when the respondent had already filed their answering affidavit and heads of arguments on the 30 March 2021. It appears to me that the fist respondent had every intention to prosecute his

matter and see it to finality, even though there was a delay in doing this. In this context, I observe that in *Makaruse* v *Hide and Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) 65 D-F, KORSAH JA, made the following critical remarks:

> "By virtue of the power conferred on this court by r 4 *supra* to condone any non-compliance with the rules, none of the provisions of the rules are strictly peremptory. 'The rules are, however, there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced, in my view to persuade a court to act outside the powers provided for specifically in the Rules': per BOTHA J (as he then was) in *Moulded Components* v *Coucourakis & Anor* 1979 (2) SA 457 (W) at 462-3".

Thus, the inherent power which a court possesses to prevent abuse of its processes is a power which has to be exercised with great caution, and only in a clear case. I believe the delay by the respondent is not one which would warrant a dismissal of the application solely on this point. Even if I were to dismiss this matter, I would certainly not do so based on this consideration alone as this would be a cavalier disregard of the law as enunciated in the *Guardforce (Pvt) Ltd* v *Ndlovu supra.* My view is fortified by what the Supreme Court said in *Dube* v *Premier Medical Investments (Private) Limited and Anor supra.* I will refer to the court's relevant remarks, which are as follows:

> "By the same token, the court *a quo* in the present case was bound to follow the requirements set out in *Guardforce supra* when it exercised its discretion to dismiss the appellant's application for want of prosecution. It did not. Instead, the court *a quo* only considered the extent of the delay and the reasonableness of the explanation for it. It ignored the prospects of success on the merits and the balance of convenience or prejudice. By the authority of *Guardforce supra*, this was a misdirection. This court is, therefore, at large on appeal."

Relying on the above authorities, my view is that this matter cannot be dismissed based on lack of a sound explanation for the delay alone. It is apparent that the respondent intended to have HC 7089/20 heard. I say so because, after this application was filed the first respondent was triggered to attend to the finalization of the matter. I subsequently heard that matter.. The only way the first respondent could have shown that he was serious about the application for a declarator, was to proceed to have the matter set down after he was served with the present application. At any rate, the delay of two months in this case is by no means inordinate. I will now consider the first respondent's prospects of success in the main matter.

The prospects of success on the merits

The first respondent contends that the applicant has a case to answer in the main application for a declarator. The respondent is of the view that he has prospects of success on the merits of their main application. In this respect, he states that he purchased the mining claim and has been working on it until the time that he perceived there was a danger that his rights might be interfered with prompting him to approach this court for a declarator. The first respondent avers that he holds a mining certificate registered in his name as a successor in title. I have no reason not to accept the validity and regularity of this official document until it is lawfully invalidated as was stated in the case of *Mhandu* v *Mushore* HH 80-11. At a *prima facie* level, I am satisfied that the first respondent has prospects of success in the main matter. I am inclined to exercise my discretion in favour of declining the application for dismissal for want of prosecution. There is no prejudice that the applicant would suffer if the main matter is heard on the merits. In any case, such an approach would bring the matter to finality. That certainly is the goal of the justice delivery system, namely, that there must be finality to litigation. *See Mashangwa and Ors* v *Makandiwa* HH 40-19. In the circumstances, this court does not find that the balance of convenience to be in favour of the applicant, since the main matter cries out to be heard on the merits. In *Guardforce v Ndlovu supra* it was held:

> "In fact, under r 236 of the High Court Rules, when faced with an application for dismissal of an application, the High Court is enjoined to consider options other than dismissing the application for want of prosecution". **[My own emphasis]**

Disposition

Accordingly, in the exercise of my discretion, I make the following order:

1. The application for dismissal for want of prosecution be and is hereby dismissed.
2. There shall be no order as to costs.

Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners
Messrs Sonono & Partners, respondent's legal practitioners