

BLESSING MUTSENGI
and
LAIZA DOBI
versus
GRAPHITE PETROLEUM
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 29 February & 15 July 2024

Opposed Application – Dismissal of matter for want of prosecution

Mr S *Kuchena*, for the applicants
Mr K P *Shamhu*, for the 1st respondent

MUSITHU J: This chamber application for dismissal of a matter for want of prosecution was heard on 29 February 2024. The matter that the applicants wanted dismissed was an application for rescission of a default judgment filed by the first respondent herein under HC 679/23. After hearing submissions by counsel, and following concessions made by counsel for the first respondent, the court granted the following order after making a brief ruling:

“IT IS ORDERED THAT:

1. The application be and is hereby granted.
2. The court application under HC 679/23 be and is hereby dismissed with costs on an attorney and client scale.
3. The first respondent shall pay the applicant’s costs of suit on an attorney and client scale.”

At the time of the hearing, the first respondent was being represented by Mr *Shamhu* of Madotsa & Partners Legal Practitioners. The first respondent has written directly to the registrar requesting reasons for the order that I granted. There is a notice of renunciation of agency by Madotsa & Partners dated 15 April 2024 attached to the first respondent’s correspondence. The reasons for the order above are outlined hereunder.

Background

The brief background to the dispute between the parties herein is as follows. Sometime in September 2016, the applicants and the first respondent entered into an

agreement of sale in terms of which the first respondent sold to the applicants an immovable property known as Stand Number 3473 Warbury Road, Mabelreign, Harare measuring 1 238 square metres (the property). The purchase price was US\$ 43, 000.00. The applicants claim to have paid the sums of US\$5 704.00 in 2016, US\$ 10, 848.00 in 2017, and US\$3, 520.00 in 2018, leaving a balance of US\$22, 928.00. The applicants claim that the outstanding amount was paid off in RTGS currency after its introduction through Statutory Instrument 33 of 2019, which changed the currency regime in the country.

In HC4599/21, the first respondent herein approached this court for a *declaratur* seeking confirmation of the cancellation of the said agreement between the parties. It also sought an order for the eviction of the applicants from the property. During the hearing of that matter, this court on 14 July 2022 per DEME J referred the matter to trial for determination on the basis of *viva voce* evidence. The first respondent filed its declaration, and the applicants herein filed their plea simultaneously with a claim in reconvention. According to the applicants, the first respondent abandoned the matter and the applicants proceeded to prosecute their claim in reconvention, and on 7 December 2022, in HC 4599/21 this court granted the following order on the unopposed roll.

“IT IS ORDERED THAT:

1. The Respondent be and is hereby ordered to transfer a property known as Stand Number 3473 Warbury Road, Malbereign, Harare measuring 1238 square metres into the names of the 1st and 2nd applicants within thirty (30) days from the date of this order.
2. Upon failure of the respondent to effect transfer as per this order, the Sheriff of the High Court be and is hereby authorised and directed to sign all papers necessary to facilitate the transfer of the property to the 1st and 2nd applicants.
3. The Respondent be and are hereby ordered to pay costs of suit at an attorney and client scale.”

On 1 February 2023, the first respondent as the applicant and the applicants herein as the first and second respondents, filed an application for the rescission of the above order under HC 679/23. That application was opposed by both applicants herein. The notice of opposition was served on the first respondent on 15 February 2023. The first respondent did not react to the notice of opposition. It did not file an answering affidavit or take any steps to have its application set down. It is that inaction that prompted the applicants to approach this court with the present application.

On 31 August 2023 and in HC 5705/23, the applicants filed this chamber application for the dismissal of the first respondent’s application for rescission of a default judgment filed by the first respondent in HC 679/23.

The Hearing

At the hearing of the present application, no heads of argument had been filed on behalf of the first respondent. Mr *Shamhu* appearing for the first respondent conceded that heads were not filed but submitted that the filing of heads in chamber applications of this nature was not peremptory in terms of r 60(5) of the High Court Rules, 2021. He also submitted that the first respondent was keen on prosecuting the main matter for rescission of the default judgment by filing an answering affidavit and heads of argument. For that reason, counsel sought a postponement of the matter to allow him to file those further processes.

In response, Mr *Kuchena* for the applicants submitted that the first respondent was barred for filing its notice of opposition way out of time in the present matter. The failure to file heads of argument was also deliberate and r 60(5) that the first respondent sought refuge under was inapplicable to the circumstances of this matter. Counsel further submitted that the first respondent's legal practitioners were also barred in terms of r 9 for their failure to file a notice of assumption of agency. No renunciation of agency had been filed by erstwhile legal practitioners. An answering affidavit was purportedly filed in the main matter for rescission on 16 November 2023, long after the present application for dismissal was filed on 31 August 2023. Even after the filing of the answering affidavit, still no heads of argument were filed. The application for the postponement of the matter was therefore being made in bad faith.

The analysis

Having heard the submissions by counsel, I dismissed the application for a postponement of the matter reckoning that it was not being made in good faith. The parties appeared before me on 29 February 2024. In his exchanges with the court, Mr *Shamhu* advised that he had been seized with the matter since September 2023. For close to six months, he had done nothing to regularise the anomalies for which he now sought a postponement on behalf of the first respondent.

Legal practitioners should not accept briefs or requests for legal representation by innocent litigants if they are aware that they are incapacitated to fully and effectively represent that litigant for one reason or another. Courts of law are not playgrounds where legal practitioners can just appear and have matters postponed for the asking. Legal practitioners must be reminded that a postponement is not there for the asking.

Postponements will only be granted in exceptional and deserving cases, especially in those cases when that request is made at the hearing.

Further, it is only in exceptional and deserving cases that the court will exercise its discretion by condoning a departure from the rules in terms of r 7. Postponements of matters come at cost not only to the litigants. It also a waste of time for the Judge who would have read through the record of proceedings and prepared himself/herself to hear the matter. Professional courtesy requires that sufficient notice be given to the other interested parties and the court that a postponement will be sought and the reasons thereof.

Rules of court exist to ensure the orderly prosecution and management of court cases to avoid chaos. They provide a framework for the effective and efficient management of court cases. For that reason, they must be respected by all litigants. While r 60(5) does not make it mandatory that a chamber application be accompanied by heads of argument, it is desirable that heads of argument be filed especially in opposed chamber applications where legal arguments are inevitable. It is even more desirable in those cases where parties are represented by legal practitioners. Once opposing papers are filed, the matter assumes the character of an opposed matter and heads of argument will serve the same purpose as in ordinary opposed court applications.

The first respondent's troubles did not just start and end with its failure to file heads of argument in the present matter. The notice of opposition was filed out of time. Rule 59(9) is clear on the fate of such a respondent. The respondent is automatically barred for failing to file a notice of opposition timeously. Rule 9 places an obligation on legal practitioners to file an assumption of agency as a way of notifying all interested parties of their involvement in the matter. In the present matter, the erstwhile legal practitioners had not filed their notice of renunciation of agency. The record shows that at some point the first respondent was being represented by C Nhemwa & Associates. They filed the application for rescission of judgment. The notice of opposition to the application before me was filed by Madotsa and Partners. There is no record of the renunciation and assumption of agency.

A litigant who is serious about prosecuting their case to finality and have been served with an application for dismissal of their pending matter must conduct themselves in a manner that demonstrates a desire to prosecute the matter which is under threat of dismissal. For as long as the application for dismissal has not yet been set down and heard, nothing stops them from further progressing the dormant matter as required by the rules of court. The

filing of the application for dismissal is sufficient notice that the matter should be progressed failing which it will be dismissed if the dismissal application is set down first. Ordinarily, the two matters are progressed in such manner that they get to be heard at the same time by the same court.

The present application was filed on 31 August 2023. It is only in the hearing that the court was informed that an answering affidavit and a notice of set down had been filed in the main matter for rescission on 16 November 2023. This is almost four months after the first respondent had been warned of the impending dismissal of its application for rescission of the default judgment. Still, the first respondent remained unperturbed. Nothing was said about the filing of heads of argument in the main matter for rescission. It was under these circumstances that an application was being made to have the present matter postponed presumably to allow the first respondent's counsel to file heads not only in this matter before me, but the main matter that the applicants sought to have dismissed.

Legal practitioners must always remain vigilant in protecting their clients' interest. As officers of the court, they are aware of the rules of the court and the need to attain finality to litigation. The law favours the vigilant. Regrettably litigants end up suffering for the sins of their legal practitioners where rules of court are deliberately frowned upon. It must also be recalled that the judgment that the first respondent sought to have rescinded was granted in default. The first respondent and its legal practitioners have not been vigilant in the manner they have prosecuted this matter. Counsel for the applicants sought the dismissal of the main application for rescission of judgment with costs on the legal practitioner and client scale. The same level of costs was also sought in the present application. For the reasons given above, the court did not hesitate to make the award of costs as sought by counsel for the applicants.

It was for the foregoing reasons that the court granted the order stated above.

L.T. Muringani Law Practice, applicant's legal practitioners
C. Nhemwa & Associates 1st respondent's legal practitioners