HARDROCK VENUS MINE (PVT) LTD
versus
ROBIN UROMBO
and
MORGEN MUJERE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO, 15 February & 19 October 2023

Opposed Application

C Chigomere, for the applicant
A Sibanda, for 1st respondent

TAKUVA J: This is a court application for dismissal of action for want of prosecution in terms of Rule 31 (3) of the High Court Rules, SI 202/2021.

Background

The first respondent filed summons against the applicant and the second respondent on 12 November 2021 jointly and severally one paying the other to be absolved claiming for:

(i) Damages in the sum of US$70 000 or equivalent in local currency at the prevailing official rate at the time of payment.

(ii) Interest thereon at 10% per annum from the date of summons to the date of final payment.

(iii) Costs of suit.

The applicant was served with the summons on 20 November 2021. Applicant filed its notice of appearance to defend and request for further particulars on 24 November and these documents were served on the first respondent on the same day. Further particulars were filed on 3 December 2021 and the applicant then filed its plea on 11 January 2022 and served it upon the first respondent on 12 January 2022. More than a month has passed since the filing of the plea by the applicant and the first respondent did not take further steps to prosecute the action. Applicant then filed this application. The first respondent opposed it.

In its founding affidavit applicant laid out the grounds for seeking the relief in the following words;

> "8. More than a month has lapsed since the filing of the plea by the applicant and the 1st respondent has not taken any further steps to prosecute the action therefore warranting the filing of this application.
> 9. Thus being a clear act of lack of desire by the 1st respondent in pursuing its action as it ought to have done. The applicant therefore applies for the dismissal of the respondent's action for want of prosecution in terms of Rule 31 (3) of the Rules".

The application was opposed by the 1st respondent on the following grounds:

> "1. The application does not explain the "necessity for dismissal" of the claim save that one month has expired since the applicant filed a plea. Yet Rule 31 (3) is clear that the applicant should set out the grounds for seeking dismissal. In other words, the applicant should explain why it would be desirable to dismiss the plaintiff's claim.
> 2. The rule is meant to "manage" the case in order to reach a "proper" conclusion to it. A dismissal at this stage will simply mean "reinstitution of the proceedings and will serve no purpose at all.
> 3. Since there are 2 defendants pleadings cannot be closed in respect of one "defendant and not the other defendant".
> 4. The application also ignores the fact that the liability of the 2nd respondent puts the applicant in a very tight position.
> 5. The application ignores the merit of the matter and wants it terminated prematurely.
> 6. I have a good case against the 2nd respondent. Applicant and 2nd respondent are jointly and severally liable to me.
> 7. The "2nd respondent's plea" is outstanding and the claims against applicant and "1st respondent" are two in one and there is no way they can be separated.
> 8. My case against the applicant and the 2nd respondent has merit and "justice demands that it proceeds to finality."

The issue

(1) Whether or not the applicant has laid grounds warranting the dismissal of the action matter?

(2) Whether or not the first respondent has shown good cause why the action matter should not be dismissed for want of prosecution?

The law

An application for dismissal for want of prosecution is made in terms of Rule 31(3) of the High Court of Zimbabwe Rules 2021.

The Rule states:

> "Application for dismissal of actions
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> 31 (3) Where the defendant has filed a plea and the plaintiff has not, after one month of the filing of such plea, taken any further step to prosecute the action, the defendant may, on notice to the applicant make a court application for the dismissal of the action for want of prosecution and such application shall be supported by affidavit made by the

> defendant or a person who can swear positively to the facts or averments set out therein, setting out the grounds for seeking that relief and on hearing an application the court may either grant the application or dismiss it and make such order as to costs as it considers necessary in the circumstances.
> (4) Subject to this rule, the rules relating to the filing of court applications, shall apply to an application under this rule and to any opposition thereto."

In *Karengwa* v *Mpofu* HH-56-15, the court while dealing with an application for dismissal for want of prosecution in a matter where the applicant had failed to file his answering affidavit within the prescribed time said:

> "These courts have adopted a very strict approach in matters where an applicant failed to file his answering affidavit or set the matter down for hearing. The court usually looks at the reasons for failure to act timeously. Where failing to act is the result of an either disregard of the rules of the court or prescribed time limits, the courts are extremely reluctant to give any further indulgence to the defaulting party. See *Moon* v *Moon* HB-94-05. In the case of *Ndlovu* v *Chigaazira* HB-104/05 the learned judge indicated that the reason why Rule 236 had to be enforced is to ensure that finality is brought to legal proceedings."

The significance of the rule is to be found in the case of *Kimley Row Investments (Pvt) Ltd* v *City Bright (Pvt) Ltd & Anor* HH-792-15 wherein the court quoted an old case of *Marange* v *Hide & Skin Colrectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) 65D-F, where KHOSA JA remarked that:

> "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 ……. Non-compliance of the rules will only be condoned upon good cause shown by the applicant. There must be a reasonable and acceptable explanation for the failure to comply with the rules …"

The legislative intention is to ensure that matters that are brought to the courts are dealt with expeditiously. It is also trite that a presiding judge can only make an order other than dismissal if the respondent has opposed the application and has shown good cause why the application should not be dismissed for want of prosecution. In such disputes, the resolution rests on the conduct and the explanation given by the respondent for the failure to act timeously – see *Melgrund Trading (Pvt) Ltd* v *Chinyama & Partners* HH-703-16; *Scotfin Ltd* v *Mtetwa* 2001 (1) ZLR 249.

The discretion to dismiss a matter for want of prosecution is a judicial discretion to be exercised taking the following factors into consideration;

(a) the length of the delay
(b) the explanation thereof
(c) the prospects of success on the merits
(d) the balance of convenience and
(e) possible prejudice to the applicant caused by the other party's failure to prosecute its case on time. See *Guardforce Investments (Pvt) Ltd* v *Ndlovu & 2 others* SC-24-18.

Application of the law to the facts

Rule 31 (3) of SI 202/21 is crafted in clear and unambiguous language. Its meaning is crystal clear, namely that if plaintiff fails to take any further step, one month of filing a plea by the defendant, the defendant may on notice to the plaintiff, make a court application for dismissal of the action for want of prosecution. There are two requirements that must be met by the applicant in order to succeed.

Firstly, the application should be supported by an affidavit by the defendant or a person who can swear positively to the facts or averments set out therein. Secondly, the application should set out the grounds for seeking that relief. Applicant has filed an affidavit in compliance with the rule. The grounds upon which the relief is being sought are that upon receipt of the plea first respondent set on his laurels and absolutely did nothing to prosecute his matter. He abandoned his case from the 12th of January 2022 up until the 9th of March 2022, a period of almost 2 months. In my view, first respondent blatantly disregarded the rules of this court. He had more than adequate time to attend to this matter but he did nothing. Accordingly, I find that applicant has laid sufficient grounds warranting the dismissal of the action matter.

Whether or not the first respondent has shown good cause why the action matter should not be dismissed?

Instead of discharging the onus thrust on him to show good cause by proffering a reasonable explanation for the delay, first respondent totally got it wrong from the start by claiming that the purpose of this rule is "to manage cases". The rule is not meant to manage a case in order to reach a proper conclusion. Rather, it is meant to allow a defendant who has been dragged to court by an applicant who has no serious intention of prosecuting his or her case to have it dismissed. The rule speaks to dismissing a matter on technicalities without

going to the merits. Once the matter is dismissed that will be the end of it. Unfortunately, first respondent again erroneously submitted that dismissal at this stage will not be a bar as he will always be free to "reinstitute" his case *ad infinitum*. Therefore, according to him dismissal of the case will not serve any purpose as it is a pure waste of time. Further, first respondent's contention that the implication of the rule is to allow the defaulting party to do as he wishes is incorrect at law. Should matters be allowed to remain stagnant and clog the court's roll simply because a litigant wants to discharge at his own sluggard pace?

In an attempt to explain his delay, first respondent alleged that because one of the defendants had not filed his plea, pleadings could not be closed since the two are inseparable. The rules of court have provisions to deal with a defendant who does not file his or her plea. Assuming it is true, the question becomes what did first respondent do about it? Surely it is thoroughly unreasonable to just sit and wait indefinitely.

Again, instead of being relevant to the essentials of the application, first respondent complains that the application ignores the merits of the case. He attached irrelevant claimants to his notice of opposition. The first respondent has not in one sentence say why he did not act within the stipulated time. The first respondent refuses to take it upon himself that his matter has delayed with almost 2 months as a result of his inaction. His burden is to simply explain the delay. This he did not do.

The delay of almost 2 months *in casu* is inordinate. The explanation given is lame and unreasonable. The balance of convenience favours the granting of the application in that applicant has been prejudiced by the delay having been dragged to court when there is no real intention to have the matter prosecuted to finality.

In the result, it is ordered that:

1. The first respondent's summons filed under case number HC 1739/21 be and is hereby dismissed for want of prosecution.

2. The first respondent pays costs of suit.

Messrs Mhaka Attorneys c/o Majoko & Majoko, applicant's legal practitioners
Mutatu & Partners, c/o Masamvu & Da-Silva Gustavo Law Chhambers, first respondent's legal practitioners