PETKO PAVLO MATCHEV
and
TARA ROSE
versus
DILYANA PLAMENOVA TONOVA

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 16 July 2024 & 26 September 2024

Chamber application

N. Mpofu for the applicant
T. Moyo for the respondent

DUBE-BANDA J:

[1] The applicants who are the respondents in the main application in HC 1781/23 for *rei vindicatio* have brought this application in terms r 59(16)(b) of the High Court Rules, 2021. In this application the applicants are seeking to have the main application dismissed due to the delay in its prosecution. The application is opposed by the respondent. The main application was the result of the respondent's dissatisfaction with applicants' alleged possession, control and use of what she says is her motor vehicle without her consent. The main application is opposed by the applicants.

THE FACTS

[2] On 29 August 2023 the respondent as applicant therein filed a court application in HC 1781/23 ("main matter"). On 12 September 2023 the applicants filed a notice of opposition, and 18 December 2023 the respondent filed an answering affidavit. On 28 February 2024 the applicants launched this application contending that a period in excess of a month has lapsed since the respondent filed an answering affidavit in the main matter and the respondent has neither filed heads of argument nor made a request for a set down. On the merits, the applicants dispute the allegations and contend that the vehicle sought by the respondent is in possession, use and control of its registered owner, i.e., a company called Geodrill (Pvt) Ltd.

[3] The opposing affidavit was deposed by one Nqobani Sithole the legal practitioner for the respondent. The legal practitioner concedes that the respondent has fallen foul of the rules of court in regard to the failure to file heads of argument. He takes full responsibility of the failure to file heads of argument. He avers that after filing the answering affidavit in the main matter, he became seized with litigation that he says is in the public domain, involving the recall from parliament of certain members of a political formation called Citizen Coalition for Change ("CCC"). It is further averred that the litigation that ensued attained the level of national importance. He refers to twenty-four cases involving the dispute turning on the recall of CCC members from parliament in which he was involved. It is averred further that all the cases were dealt with either at the High Court sitting in Harare or the Supreme Court also sitting in Harare. He states that at the end of August 2023 he was literally camped in Harare, and admits that his other work suffered. The legal practitioner avers further that by 26 February 2024 he had prepared the respondent's heads of argument in the main matter and was ready to file, however he could not because the respondent was then served with this application.

[4] On the merits of the main matter, the respondent incorporated by reference a copy of a draft heads of argument in the main matter. It is contended that during the subsistence of the marriage between the first applicant and the respondent the latter bought the former the vehicle in issue as a gift. At divorce the vehicle was at a garage and was not included in the distribution of the assets of the parties, and it is now being used by the second applicant who is refusing to hand it over. It is contended that the applicants are in possession, use and control of the motor vehicle without respondent's consent, and they have no defence in the main matter. It is stated further that the applicants will suffer no prejudice if the respondent were to file heads of argument in the main matter, and whatever prejudice may be occasioned may be ameliorated by an appropriate order of costs.

THE APPLICATION OF THE LAW TO THE FACTS

[5] A convenient point of departure is r 59(16)(b) of the High Court Rules, 2021 on which this application is predicated. The rule says:

> "Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, applied for the set down of the matter for hearing, the respondent, on notice to the applicant, may either—
> (a) ....
> (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 such terms as he or she considers fit."

[6] This rule does not set out the factors to be considered by a judge or the court on an application for dismissal for want of prosecution. CHIDYAUSIKU CJ however set out those factors in the case of *Guardforce Investments (Pvt) Ltd* SC 24/16 at pp 5 -6 as:

> "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 and the explanation thereof;
> (b) the prospects of success on the merits;
> (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time.
> Dealing with the delay and the explanation for the delay, there is no doubt that there was a delay in this matter. However, the delay and the explanation thereof in this matter alone cannot form the basis for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for rescission for want of prosecution. This is a serious misdirection."

See *Dube v Premier Medical Investments (Private) Limited* SC 32/22; *Mashangwa & Anor v Makandiwa & Ors* SC 95/21.

[7] The discretion conferred by r 59(16)(b) must be exercised judicially, taking into account the factors stated in *Guardforce Investments (Pvt) Ltd (supra)* and the fact that the *onus* is on the applicant to make a case for the dismissal. It is on the basis of these legal principles that this application must be determined. I now turn to the factors for determination.

THE EXTENT OF THE DELAY AND THE EXPLANATION THEREOF

[8] The dismissal of the main case is essentially sought on the ground that it had been dormant since 18 December 2023 when the respondent filed an answering affidavit. However, the extent of the delay must be calculated after the expiry of the one-month window period provided in r 59 (16)(b). The window period permissible for the respondent to apply for a set down date expired on 18 January 2024. This application was filed on 28 February 2024. Therefore, the main matter remained dormant for a period approximating one month and a week. I take the view that a delay approximating one month and a week is not inordinate.

[9] Regarding the explanation for the delay the court is required to have regard to the reasons proffered by the respondent in failing to expedite the main application and the court must conduct a careful examination of the specific circumstances of the matter. In this case the fault of the inaction lies squarely on the foot of the legal practitioner. He abandoned the respondent's matter in preference to other matters he considered of national interest. He did not inform the respondent that he was busy with other matters, such that he had no time to work on her matter, and did not advise her that if she so wished she could seek services of an alternative legal

practitioner. Neither did he have the presence of mind to request another legal practitioner from the same practice to work on the respondent's matter. I take note that this matter was argued by Mr *Moyo,* and there is no explanation why he was not given the main matter to prosecute.

[10] The respondent's conduct cannot escape scrutiny either. She has not filed an affidavit in this matter. My view is that in such a case, it is for the litigant to file the founding affidavit, and leave the issues of procedure to be canvased by the legal practitioner in the supporting affidavit. In *casu,* it was incumbent on the respondent to have filed an affidavit and set out in detail the chronology depicting what he did, if any to prosecute the main matter. It is her matter. The obligation to prosecute it as required by the law is on her. She cannot merely hide behind his legal practitioner. Having made these observations, my view is that although the legal practitioner was, as he says inundated with various other litigation, placing the main matter on the back burner was a fragrant disregard of court processes and rules. The jurisprudence is that a wilful disdain of the rules of court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself. See *Beitbridge Rural District Council* v *Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190 (S).

[11] In the circumstances, I come to the conclusion that although the delay was not inordinate, the explanation for it is not reasonable. However, the absence of a reasonable explanation for the delay is not alone dispositive of this matter. The other factors listed in the G*uardforce Investments (Pvt) Ltd (supra)* must still be considered in determining whether or not the main application must be dismissed. I now turn to consider the other factors.

PROSPECTS OF SUCCESS OF THE MAIN MATTER

[12] An applicant for a dismissal for want of prosecution must show that the main application has no prospects of success. Bearing in mind that a dismissal of a claim for non-prosecution is a drastic remedy, which if granted shuts the door completely against the respondent, I take the view that a possibility of success, or an arguable case or a case that is not hopeless, must be enough to meet the prospects of success test.

[13] The applicants aver that the vehicle subject of litigation in the main matter is in the possession, use and control of its registered owner, a company called Geodrill (Pvt) Ltd. It is further contended that the applicants are not directors of this company, and therefore are not in a position to answer to the averments taken by the respondent in the opposing affidavit. *Per contra* the respondent contends that during the subsistence of the marriage between her and the

first applicant, the latter bought her the vehicle as a gift. At divorce the vehicle was at a garage and was not included in the distribution of the assets of the parties. The first applicant took it from the garage, and it is now being used by the second applicant who is refusing to hand it over to her. The respondent contends further that the applicants are in possession, use and control of the motor vehicle without respondent's consent, and they have no defence in the main matter. In the circumstances of this matter, the respondent's case cannot be said to be hopeless. She has an arguable case. Therefore, at a *prima facie* level, I am prepared to accept that the respondent has prospects of success in the main matter.

THE BALANCE OF CONVENIENCE AND POSSIBLE PREJUDICE TO THE APPLICANTS

[14] The applicants contend that they have suffered prejudice caused the respondent's reluctance to prosecute the main matter to finality. It is contended further that the failure to prosecute the matter on time has caused frustration and prejudice to the applicants who are eager to clear their names. *Per contra* the respondent contends that the applicants will suffer no prejudice which cannot be ameliorated by an order of costs.

[15] My view is that the requisite prejudice has not been shown. It is clear that the applicants have been affected by the delay. They want the main matter finalised and to move on with their lives. I accept that this in itself is "prejudice" in the general sense. However, it seems to me that the prejudice that must be shown in an application to dismiss a claim for want of prosecution is actual prejudice that will hamper the applicants in the presentation of their case in the main claim. The applicants are required to show that the delay has made it impossible for them to prosecute their defence in the main matter. In other words, it is actual prejudice that may be caused to the applicants in the prosecution of their defence of the main matter that counts, not just general prejudice that they may suffer as a result of the delay. In *casu* the applicants are merely complaining of general prejudice, and they have not shown how the delay will affect them in the prosecution of their defence in the main matter. I therefore, agree with the respondent that the delay in prosecuting the main matter has not caused actual prejudice on the applicants.

[16] In considering the balance of convenience requirement, the court must weigh the prejudice that the applicants will suffer if this application is not granted against the prejudice to the respondent if it is granted. If this application is granted that would mark the death knell for the respondent's case, however if it is not granted the applicants would still have a window open

to present their defence and argue their case in the main application. Therefore, the balance of convenience favours the respondent.

[17] For completeness, I deal with the submission made by Mr. *Ndlovu* counsel for the applicants that the respondent has still not applied for a set down date in the main matter. The respondent submitted that by 26 February 2024 heads of argument had been prepared in the main matter, and were not filed because the applicants had filed this application. The jurisprudence coming out of the superior courts is completely at variance with the approach taken by the respondent. See *Guardforce Investments (Pvt) Ltd* SC 24/16. In *casu* the filing of this application on 28 February 2024 must have jolted the respondent to move forward and finalise the main matter. It is clear that a erroneous decision was taken not to prosecute the main matter pending the finalisation of this application. This works against the respondent, however, it is not dispositive of this matter.

DISPOSITION

[18] In an application for a dismissal for want of prosecution the court is required to consider all the factors and to undertake a balancing exercise. In *casu,* the following issues are relevant in determining where the justice of the case lie, that the delay was not inordinate; and that the explanation of the delay is not reasonable; that the respondent seems to have prospects of success in the main matter; that the applicants have suffered no prejudice and that the balance of convenience favours the respondent. Furthermore, the vigorous opposition to the application for dismissal for want of prosecution also shows to some extent that the respondent really intends to proceed with the main application to finality. Furthermore, the jurisprudence is that a court faced with an application for dismissal in terms of r 59(16)(b) is enjoined to consider also options other than dismissing the application for want of prosecution. It is for these reasons that I am inclined to dismiss this application.

COSTS

[2] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. The circumstances of this case persuade me to depart from this rule. The respondent did not prosecute the main matter as required by the rules of court, causing the applicants to file this application. On another note, after being served with the notice of opposition in this matter, my view is that the applicants should not have persisted with this application. I find that it would not be just or equitable to award costs against either

party. The principle of fairness dictates that when both parties have contributed to the situation that has necessitated legal proceedings, neither should be unduly penalized in terms of costs.

In the result, I order as follows:

The application be and is hereby dismissed with no order as to costs.

DUBE BANDA J: ....

Cheda and Chada Associates, applicants' legal practitioners
Ncube Attorneys, respondent's legal practitioners