CHITUNGWIZA MUNICIPALITY
versus
PRIVILEDGE TIRIVAVI
and
FELISTAS SHUMBA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE ,18 May & 7 July 2021

Opposed Application

S. Baira, for the applicant
H. Chitima, for the respondent

TAGU J: This is a chamber application for dismissal for want of prosecution in terms of Order 32 r 236 of the Rules of this Honourable Court.

The basis of the application is that the 1st respondent filed an application under case number HC 8124/17 on 1 September 2017 for a declaratur against the applicant and one Felistas Shumba. The 1st respondent was seeking to be declared an innocent purchaser of Stand number 22930 Unit C situate in the District of Seke North, Goromonzi. The applicant and the 2nd respondent duly filed their Notices of Opposition to the application on 26 September 2017 and 2 October 2017 respectively. The Notice of Opposition for the applicant was served on the 1st respondent on 27 September 2017. To date the 1st respondent has not filed its answering affidavit nor has he filed heads of argument or taken any steps to have the matter heard by the court. This has prompted the applicant to file the present application for dismissal for want of prosecution.

The 1st respondent opposes the application on the basis that the parties held a round table conference to settle the matter on 30 October 2017 wherein the applicant placed her on the high priority list to get another Stand. All the progress was then stalled as the applicant failed to avail an alternative Stand. She said she has been appraised of the provisions of Order 32 r 234(1)(a) of the High Court Rules 1971 which provide that filling of an answering affidavit is optional and the

option remains open until not less than ten days from the date of hearing of the application. Further, she said she was appraised that in terms of Order 32 r 238 subrule 1(a) of the High Court Rules an application shall not be set down at the instance of the applicant unless his legal practitioners has filed with the Registrar Heads of argument and proof that such heads of argument have been served on every party. It submitted that the implication of these two provisions clearly show that the applicant herein could in all circumstances set the matter down despite the none filing of heads of argument or answering affidavit but alas the applicant chose to leave the dispute in abeyance and simply ask for dismissal of the matter despite its pivotal position in the dispute. It was submitted that this current application shows that the applicant is colluding with the 2nd respondent in its approach to resolving this dispute. Hence an application of this nature could have been quite tenable if it was made by the 2nd respondent and not the applicant. The 1st respondent prayed for the dismissal of the application.

The matter for determination by this Court is a fairly simple one. It is the interpretation of r 236 of the Rules of this Honourable Court. Rule 236(3) states that-

> "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-
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> 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 order on such terms as he thinks fit."

The Rules are very clear and unambiguous. In this case the 1st respondent filed an application against the applicant and the 2nd respondent. The applicant duly filed its Notice of Opposition and served the same on the 1st respondent. For seven months the 1st respondent did nothing. No answering affidavit was filed, nor any attempt made to set the matter down for hearing. The 1st respondent as the *dominus litis*, showed no inclination in having the matter heard by this honourable court and the applicant correctly approached this court to dismiss the 1st respondent's application for a declaratur since it had become apparent that the 1st respondent was not pursuing the matter but was only too happy to leave it hanging like the proverbial sword of Damocles. Having noted that the applicant was not forthcoming in providing an alternative stand, the 1st respondent ought to have taken action.

In the case of *Karengwa* v *Mpofu* HB 56/15 the court held that:

> "These courts have adopted a very strict approach in matters where an applicant has failed to file his answering affidavit or set the matter down for hearing. The court usually looks at the reasons for failing to act timeously. Where failure to act is the result of an utter disregard of the rules of the court and prescribed time limits, the courts are extremely reluctant to give any further indulgence to the defaulting party.''

The remarks by CHIDYAUSIKU J (as he then was) in *Lovemore* v *Chairman of the Public Service Commission and Anor* HH 28-96 P2 of the cyclostyled judgment are apposite.

> "Those who sit on their litigation until cows come home have only themselves to blame if condonation is refused when they finally wake up from their years of somnambulism."

In the present case r 236(3) gives a respondent who has filed a notice of opposition. Either to set the matter down for hearing in terms of rule 223 or to make a chamber application for dismissal of the application. The applicant opted to make a chamber application for dismissal and there is nothing amiss. As was stated in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) the court stated as follows-

> "The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subvenient*- roughly translated, the law will help the vigilant but not the sluggard."

Rule 236 is one of the remedies available to a litigant who wishes to overcome an abuse of court process by an uninterested applicant. As was properly stated in *African Star Diamonds (Pvt) Ltd* v *Judy Nyamuchanja and Memory Munhenga and Sheriff of the High Court* N.O HH-313/17 at p 3 the position of the law is settled. In *Scotfin* v *Mtetwa* 2001 (1) ZLR 249 at 250D-E CHINHENGO J stated:

> "Rule 236, as amended by s7 of the high court (amendment) Rules 2000 (No. 35), was intended to ensure the expeditious prosecution of matters in the High Court. The rule was deliberately designed to ensure that the court may dismiss an application if the principal litigant does not prosecute its case with due expedition. The rule gives the judge a discretion either to dismiss the matter or to make such other order as he may consider to be appropriate in the circumstances. I think however the overriding consideration for the judge is to exercise his or her discretion in such a manner as would give effect to the intention of the law maker. The primary intention of the law maker, as I have stated it to be, is to ensure that matters brought to the court are dealt with, with due expedition. The order in which the judge may issue, if it is one of dismissal, is in effect a default judgment. but in considering the application the judge can only make an order other than a dismissal if the respondent has opposed the application and shown good cause why the application should not be dismissed." See also *Munyikwa* v *Jiri* HH 338/15, Moon v Moon HB 94/05 and *Ndlovu* v *Chigaazira* HB 104/05."

In the present case the 1st respondent did not tender any reasonable explanation as to why she delayed in filing of her answering affidavit or why she failed to set the matter down for hearing

within the required time having noted that the applicant was dilly dallying and not avail an alternative stand.

In my view the Rules of this court are not just put in place as a formality. The Rules are in place to enable proper conduct of matters. The importance of compliance with the Rules of this Honourable Court can never be overemphasized. All conditions for the granting of the application have been met. The application will be granted with costs on a higher scale.

IT BE AND IS HEREBY ORDERED THAT

1. The 1st respondent's application for a declaratur filed under Case no. HC 8124/17 be and is hereby dismissed for want of prosecution.
2. The 1st respondent to pay the applicant's wasted costs in case HC 8124/17 and costs of this application on a legal practitioner and client scale.

Matsikidze Attorney at Law, applicant's legal practitioners
Hamunakwadi & Muzvaba, 1st respondent's legal practitioners