OFER SIVAN
versus
GILAD SHABTAI

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 11 and 19 October, 2022

Opposed Application

T W Nyamakura, for the applicant
T O Mapuranga, for the respondent

BACHI-MZAWAZI J: The applicant has approached this court in terms of r 31(3), seeking the dismissal of the respondent's action in case HC 783/22, for want of prosecution. The application is premised upon the failure of the respondent to file his replication to the defendant's plea, and to take any further steps to prosecute his matter, in the main action thereafter.

The facts and the inaction of the respondent to file further pleadings are not in dispute. It is common cause that, the applicant and the respondent were once co-directors in the same Company, sharing the same business premises. It is alleged that the applicant took into his possession a vehicle Toyota Land cruiser, Registration number AFE 1934, that was on the Company premises and disposed it without the consent or authorization by the respondent.

In an effort to recover the said vehicle, the respondent, on 7 February 2022, instituted summons against the applicant in case HC 783/12, mentioned above. Consequently, the applicant filed his appearance to defend and plea on 11and 24 February, 2022, respectively. From that date on, nothing was done by the respondent towards the finalisation of his matter, leading to the launching of the current application for dismissal for want of prosecution, filed on 13 June 2022, by the applicants.

It is also a given fact that this application propelled the filing of the respondent's plea with the attendant Pre-trial documents on 29 June, 2022.

It is the applicant's contention that, the rules governing the time frame for filing subsequent pleadings after the filing of a plea are succinctly clear. They dictate that, once the stated time is exceeded the defaulter is automatically barred from filing any further pleadings. The defaulting party will also cease to have any right of audience before the court in that matter, save for making an application for condonation for the non -compliance with the rules or for the upliftment of the operating bar.

They thus argue that, the delay of four months in filing the requisite pleadings, is an inordinate delay on the part of the respondent. One which, should not be condoned as no reasonable or any explanation has been advanced by the respondent of the delay. In that regard the applicant, argues that, the wanton disregard of the court's rules illustrated by the respondent's filing of pleadings without seeking leave of the court when they were fully aware of the operational bar, warrants the dismissal of the matter as claimed with costs at a higher scale.

Whilst the respondent conceded to the flouting of the rules as stated, he argues that, he has prospects of success in the merits of the main matter. He submits that such default on his part can be cured by costs as applicant suffers no prejudice, as he did not authorise him to sale his vehicle. He motivates that, his subsequent filing of pleadings though late and or irregular, is not frivolous nor vexatious and evinces his intention to prosecute his matter to finality.

Given the above facts and submissions, the issue confronting the court is, whether or not the respondent's matter in case HC 783/22, should be dismissed for want of prosecution? Factors to be taken into consideration in applications of this nature are well established. These are the length of and reasons for the delay, the prospects of success on the merits and the balance of convenience and possible prejudice to the applicant caused by the other party's failure to prosecute its case on time. These essential elements are outlined in the case of. *Guardforce Investments (Pvt) Ltd* v *Ndlovu and Others* SC 24/16.

To begin with, r 31(1) of the 2021, High Court rules, the rule upon which this application has been mounted, gives the applicant the right to institute these proceedings. However, it also gives the court a discretion to grant or refuse the application with costs against the background of each individual case.

On analysis, in reiteration, the respondents do not deny the non-compliance with the rules of this court as detailed above. Instead they are advocating that, this is not a case that should be dismissed for want of prosecution as there is no prejudice that has been visited on

the applicants. They also say they have exhibited an intention to pursue their right in the property central to the dispute by the pleadings filed thereafter *al beit* out of time and in the face of an operating bar.

Mr Mapuranga, on behalf of the respondents argued that, the authority of *Gerbisch* v *Hobson and Another* 1970(4) SA 322, RSA, does not sanction the avenue of the dismissal of a matter for want of prosecution on the basis of the non- filing of replication alone. They further, propound that, though a party may be barred from filing the replication, it does not necessarily mean that they will be barred in the subsequent processes in the action. He also argued that the respondent had other open avenues to explore in ensuring that the matter has been set down for continuation, other than the drastic route of dismissal.

In my assessment, there is no doubt that the time upon which the plea and attendant pleadings were supposed to be filed exceeded the time limit by four months. Rule 40(1) of the 2021, rules states that, the defendant's replication where necessary should be filed within twelve days after the service of the plea upon the plaintiff.

In the present matter, there is an undisputed delay of approximately four months, from 24 February, 2022, to 29 June 2022. In the case of, *Seed Potato Co-op Ltd* v *Gushungo Holdings* (*Pvt) Ltd* 2019(2) ZLR 230 (H), in a similar application, a one and half month delay was considered as an inordinate delay.

The respondents did not give any explanation whatsoever as to the reasons why they failed to comply with the governing rule. Instead they have concentrated on the issue of prospects of success and the lack of prejudice on the part of the applicants if application is not granted.

In the absence of such an explanation then the respondents fail on the first essential requirement of the delay and the explanation thereof.

The court also takes cognisant of the fact that the rules do not make it mandatory for the plaintiff to file a replication. Rule 40(1), says,

"… the plaintiff shall 'were necessary', file a reply thereto…".

This in my opinion, entails that the plaintiff has an option to respond or not to respond to the plea filed by the defendant. From this angle, the submissions made by Mr. Mapuranga, is sustained only to the extent of the filing of the replication.

In contradistinction, however, r 31(3), reads,

> "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…"

Of note, apart from the discretionary filing of a replication to a plea, the rule introduces the aspect of, "plaintiff has not taken any further steps to prosecute their appeal". On examination of this factor against the facts of this case, the respondent did not take any further action to prosecute their case. The actions available to them as propagated by the applicants where to kick into motion the pre-trial conference or trial proceedings. They did not do so until the expiration of four months after being jogged into action by this application for dismissal.

In view of that, does this exhibit an intention to prosecute the matter on the part of the respondents? Not only that, Rule 40(9), states that, any party who fails to file and deliver a replication or subsequent pleadings within the time stated in this rule shall be as a result of this fact barred. In the present scenario, the respondent had a four months operative bar against them but they nevertheless proceeded to file their further, pleadings without complying with the requisite procedural steps in such a situation.

Inevitably, this leads to the question of what is the effect of a bar on subsequent pleadings? Pleadings that are filed after a party has been barred are of no force and effect. They are in fact a legal nullity. They are as good as not being there and cannot be considered by the court until an application for condonation has been made and granted by the court. See, *Mcfoy* v *United Africa Company Ltd* ALL Er 1169, *Freezewell Refrigeration Services (Private) Limited* v *Bard Real Estate (Private) Limited SC 61/03.*

I must however, quicken to say that, whilst the fact that the pleadings filed after the bar are not regarded until after condonation, I am also alive to the fact that the respondent still have the prerogative to make an application for condonation and the upliftment of the bar before the court presiding over their main action at any given time. Nevertheless, sight cannot be lost on the fact that the lack of valid further pleadings is indicative of the laxity of the respondents to prosecute their main action.

Turning on the point of prospects of success which is the respondent's main thrust of argument. I am not convinced by the applicant's averment that they had authority to sale the vehicle emanating from the power of attorney granted by the respondent. Why I say so, is that, the applicant's failed to put the court in their confidence by attaching a copy of the said Power of attorney. Further, it would have worked in their favour to support their stance by furnishing proof of the agreement of sale with the third party and proof of the purchase price collected

and handed over to the respondent. These crucial points augment the respondent's version of what transpired as opposed to that of the applicants. It is the applicant that is seeking dismissal for want of prosecution. The onus rests on them to convince this court as to the lack of prospects of success in the respondent's main action. In the absence of such rebuttal evidence, I find that the respondent has prospects of success on appeal as it is not denied that the vehicle in question belonged to them in the first place.

In respect of the last point for consideration, I link the balance of convenience with the concept of finality to litigation. The respondents somehow, though late in and subsequent irregular filing of the requisite papers in terms of the standing rules of this court have illustrated that they do have prospects of success on the merits. The versions of the parties differ as to the possession and sale of the contentious vehicle. The balance of convenience favours' the canvassing and determination of the main matter on the merits.

MANGOTA J. in, *Haisaid* v *Masomera and Others* HH 255/2022, commented that,

"… finality can never be achieved where a litigant such as the applicant was not accorded the opportunity to ventilate the issues which are of paramount importance."

Further, it is a policy of law that there must finality to litigation. This can only be brought about by nipping the main bone of contention in the bud. instead of concentrating on time consuming peripheral interlocutory issues. The main dispute and real issue revolve around the vehicle in issue, it is in the interests of justice that that should be dealt with once and for all. In *Wangayi* v *Mudukuti HB* 155 /2017, it was noted that,

"… there must be finality to litigation and courts of law should not be abused in that manner by litigants with wounded pride and a lot of money to waste fighting…'

See, *Mbatha* v *National Foods (Private) Limited* CCZ 6/2021

The rules of the court govern and regulate court proceedings. For uniformity and standardization, they have to be adhered to. They however, are not an end in themselves. They are for the convenience of both the court and the litigants, that is all the stakeholders, but not meant to enslave the court. Their purpose is for, what is colloquially referred to as for the "ease of doing business" That is why, there is rule 7 of the 2021 high court rules, which dictates that in deserving cases certain aspects of the rules may be waived in the interests of justice within the context of the uniqueness of an individual case.

In *Basera* v *The Registrar of the Supreme Court of Zimbabwe* SC 35/22, it was enunciated that,

> "The rules of the court must always be interpreted in a way that gives effect to the scales of justice that they are designed to balance".

In canvassing the issue of the possible prejudice caused by the other party's failure to prosecute, I have also considered the would-be resultant effect on an innocent third-party purchaser as counterbalanced with the doctrine of nothing comes from an illegal or unsanctioned act or action. It is nevertheless, the trial court that will be in a position to weigh in that factor. See, *Mcfoy, supra and Sammy's Group (Pvt) Ltd* v *Meyburgh N.O SC 45/15.*

On further analysis, a literal interpretation of r 31(3) does not make it pre-emptory for the aggrieved party to file an application such is this one, for dismissal. The word *"may 'is* used as opposed to *'shall'.* Applying the *pari materia* rule, the old 1971, High Court rules of this court, explicitly spelt out other options available to the affected parties other than the drastic action of dismissal. The said rule, also placed it upon either part to proceed to the next relevant effective action, other than an application of this nature, where the defaulting party would not have taken the initiative. See *Basera v The Registrar of the supreme Court above.* Having stated that, I find no prejudice that will be visited on the applicants if the application for dismissal does not succeed.

Ngwerume v *Masawi and Anor* HH 69/2018, buttresses the point that at the end of the day the discretion to grant or not an application for dismissal for want of prosecution lies with the court. It is trite that, such discretion should be exercised judiciously, bearing in mind, all the facts, evidence and the law. In this regard, applicants in the absence of the above mentioned documentary evidence, will have a mammoth task to demonstrate their prospects of success in the main matter.

Disposition.

The respondent was honest with the court from the onset that they did not comply with the rules and that they were almost four months out of time. They did not pretend to have or come with any excuse or explanation but urged the court to zero in on the aspect of prejudice and prospects of success. The lack of explanation would have greatly swayed the court in favour of granting the application. Nevertheless, the circumstances of this case, with great emphasis on the prospects of success led to the conclusion that in the spirit of, treating each case on its own merits, this is not a case to be visited with such a drastic action of dismissal. More so, when the applicants failed to substantiate their defence in the merits by the requisite

documentary proof. In that regard it is my finding that the application for dismissal for want of prosecution is drastic and is not warranted in this case.

Indeed, the fact that there was a delay in complying with the rules coupled with the fact that further court process was filed in the face of an operative bar persuades me to grant costs as claimed by the applicants, at a higher scale.

Accordingly,

1. The application is dismissed.
2. The respondents are to pay costs of suit at a higher scale.

Tarugarira Sande Attorneys, for the applicant
Rubaya and Chatambudza for the respondent