JACOB KUDZAI MUTISI
versus
PLAN MUSARURWA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 15 May 2017 & 7 June 2017

**Chamber Application**

*T Goro,* for the applicant

FOROMA J: In this matter the applicant was sued by the respondent for adultery damages in the sum of $25 000.00 being $12 500.00 for contumelia and $12 500.00 for loss of comfort solicity and services of the spouse i.e. loss of consortium. The applicant on being served with the summons and declaration duly entered appearance to defend and filed his plea under case No. HC 4093/16. The respondent duly filed his replication to the applicant's plea on 7 June 2016 after which no further activity took place until the applicant filed this application seeking an order for the dismissal of the respondent's claim for want of prosecution. The applicant served the application on the respondent by serving a copy on Ngarava Moyo and Chikomo, the respondent's legal practitioners. Despite the respondent being given 10 days in which to file any opposition the respondent did not file any opposition resulting in the applicant moving that the application be granted on an unopposed basis. The applicant argues correctly that the expiry of 8 months after filing of the application is an inordinate period to wait. The applicant also indicates that the respondent has no intention to prosecute his claim and further argues that the applicant cannot wait *ad infinitum* as there must be finality to litigation.

Not having cited the rule in terms of which the applicant relies on for moving the court to grant the relief sought I asked the applicant to indicate the basis of this procedure especially since Order 32 r 236 3 (b) as read with r 236 4 (b) relate to matters commenced as court applications and not as actions.

In response to the query raised the applicant's legal practitioners argued again correctly that the High Court has original and inherent jurisdiction to regulate its own process. See *Hatfield Town Management Board* v *Myfred Poultry farm (Pvt) Ltd* 1963 (1) SA737 at 739. Counsel also cited the case of *Verkouteren* v *Savage* 1918 AD 143 at 144 where the court held that an inordinate or unreasonable delay in prosecuting any action may constitute abuse of court process which may justify dismissal of the action.

The court was also referred to the following cases – *Gopaul* v *Subbamah* 2002 (6) SA 551 D; *Sanford* v *Haley N.O* 2004 (3) SA 296 (c) at para 8 and *Goldern International Navigation SA* v *Zeba Maritime Co. (Pvt) Ltd* (3) SA 10 (c).

Counsel did not refer to a *locus classicus* for the proposition made but I have no difficulty in agreeing with the correctness of the judgments cited from the South African jurisdiction. I am not convinced that our law is any different. That, notwithstanding it is my view that there are no hard and fast rules as to the manner in which the court's discretion should be exercised to dismiss an action for want of prosecution. In the case of *Cassimjee* v *Minister of Finance* (SCA) case No. 455/11 1-6-2012 (an unreported judgement of BORUCHONITZ AJA) the learned judge expressed the position as follows:

> "But the following requirements have been recognized first there should be delay in the prosecution of the action, second the delay must be inexcusable and third the defendant must be seriously prejudiced thereby ultimately the inquiry will involve a close and careful examination of all the relevant circumstances including the period of the delay the reasons therefore and the prejudice, if any caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant and in other cases the delay may be inordinate but the prejudice is slight. The court should also have regard to the reasons if any for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do to bring the action expeditiously to trial."

The High Court Rules are replete with procedures that either party to litigation can avail itself in order to protect oneself against dilatoriness. A party can insist on a religious observance of time limits imposed by the rules for filing pleadings including barring procedure as well as the right to determine quickening of procedures where the adversary seems not to be in a hurry to have the case finalised. *In casu* once the plaintiff chose to do nothing after filing a replication the defendant was at liberty to have pleadings closed request discovery and apply for a pre-trial conference and apply for set down of matter for trial. There is nothing barring the defendant calling the shots as it were.

The applicant was content to wait while time continued silently ticking away. While it is correct that there must be finality to litigation such finality need not be at the behest of the *dominus litis*. In considering whether the court should grant a dismissal of the respondent's action the court is reminded to consider the three requirements namely the extent of the delay and that the delay must be inexcusable and prejudice to the applicant.

Although 8 months is in my view an inordinate delay the applicant did not profer evidence of what if any prejudice it suffered as a consequence of such delay save its contention that there must be finality to litigation with which I do agree. However the applicant does not seem to have been that much concerned about seeing an end to the dispute either as he did not avail himself of the remedies which it might reasonably have been expected to take or do in order expeditiously to bring the action to trial and thus end the litigation. No evidence was adduced as to what prejudice if any applicant suffered or was likely to suffer. The court cannot speculate on this aspect. In any event such prejudice could fairly and squarely be placed on the applicant's door as it was not unavailable as the procedure to speedily expedite the bringing of the matter to trial has always been avoidable to the applicant.

Coming to the applicant's aid in the circumstances would be to render nugatory the remedies provided in the rules of court as a solution or relief in situations where a *dominis litis* exhibits signs of having developed cold feet. In the circumstances I am not inclined to come to the applicant's aid and must instead remind the applicant to be diligent in the enforcement and protection of its interests. The application is accordingly refused. As the respondent did not oppose the application there will be no order as to costs.

*Kadzere, Hungwe & Mandevere*, applicant's legal practitioners