TEMBA MLISWA
versus
KILLER ZIVHU

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 14 November, 2019 and 4 December 2019

Opposed Application

I Goto, for the applicant
T Machiridza, for the respondent

DUBE-BANDA J: This is an application for an order dismissing the application for recession of judgment in case HC 4659/19 for want of prosecution. For ease of reference I will identify the parties as follows; *Themba Mliswa* or defendant or applicant as the context permits, and *Killer Zivhu* or plaintiff or respondent as the context permits. I do this to avoid a mix-up as *Killer Zivhu* is applicant in case number HC 4659/19 and respondent in this application, Themba Mliswa is applicant in this application and respondent in the application for recession of judgment. To merely refer to the parties as applicant and respondent will not clearly show as to which party is being referred to at any point in time.

The brief background of the matter is that *Killer Zivhu* caused a summons to be issued against *Themba Mliswa* in case number HC 8987 /18, claiming damages for defamation and other ancillary relief. On the 10th December 2018 *Themba Mliswa* filed a special plea to the summons and declaration. The special plea was set down for the 21st May 2019 on the opposed roll. *Killer Zivhu* and his legal practitioners did not attend court for the set-down, and the special plea was granted in default.

On the 31st May 2019 *Killer Zivhu* filed an application for recession of judgment anchored on r 449 of the High Court Rules, 1971 (Rules), seeking to rescind the special plea granted on the 21st May 2019. On the 13 June 2019 *Themba Mliswa* filed a notice of opposition and an opposing affidavit. *Killer Zivhu* then filed an answering affidavit on the 19 June 2019. *Killer Zivhu* did not cause the matter to be set-down for a hearing within a month of the filing of the answering affidavit. *Themba Mliswa* then filed this application for dismissal of the application for recession of judgment in terms of r 263 (4) (b) of the Rules.

This application is opposed.

Preliminary points

Themba Mliswa raised two preliminary points in respect of *Killer Zivhu*'s opposing affidavit. I heard argument on both the preliminary points and the merits of the matter. This judgment deals with both aspects – preliminary points and the merits of the case.

The first preliminary point is that the opposing affidavit is fatally defective for alleged non-compliance with r 227 (4) of the Rules, in that it contains inadmissible hearsay evidence, and the second point is that the opposing affidavit is inadmissible on the basis that it was attested to by a legal practitioner who is an associate in the law firm of *Killer Zivhu's* legal practitioners.

It is argued that the opposing affidavit does not comply with the requirements of r 227 (4) of the Rules, and that consequently there is an invalid notice of opposition before court. Rule 227 (4) says an affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein.

It is argued that *Killer Zivhu* cannot swear positively to the facts deposed to in the opposing affidavit, as such fats are in the exclusive domain of his legal practitioners. In *casu* the opposing affidavit is deposed to by *Killer Zivhu*, the respondent, this in compliance with r 227 (4) of the Rules. Applicant further argues, on the same preliminary point that the opposing affidavit contains inadmissible hearsay evidence, because the deponent, who is respondent does not have first-hand knowledge of the facts deposed therein. Even if one were to accept that the opposing affidavit contains hearsay evidence, such qualifies as first-hand hearsay and admissible in terms of section 27 of the Civil Evidence Act [*Chapter 8:01*], which provides that:

> Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statements, if direct oral evidence by that person of that fact would be admissible in those proceedings.

See *Hiltumen* v *Hiltumen* 2008 (2) ZLR 296.

It only becomes a question of weight, i.e. what weight should this court attach to such evidence. Therefore the preliminary point that there is no opposing affidavit before court on the alleged non-compliance with r 227 (4) and on the argument that it contains inadmissible evidence has no merit.

The second preliminary point is that the opposing affidavit is incurable bad and should be expunged from the record because it was attested to by a legal practitioner who is an associate in the same firm that is representing the respondent. From the bar, *Mr Machiridza,* for the respondent made the point that the commissioning legal practitioner seized to be an associate at the law firm representing respondent. It is argued that there is no evidence before court that she is still an associate at the law firm representing respondent. The only evidence before court is a letter-head from Machiridza Commercial Law Chambers, showing that one *Chiedza Fransisca Gwanda* as an associate. There is no evidence from the Law society of Zimbabwe, the regulatory body of legal practitioners in this jurisdiction that the same *Chiedza Fransisca Gwanda,* at the time of attesting to the opposing affidavit was still an associate at Machiridza Commercial Law Chambers.

What applicant is asking for is drastic, surely there must be evidence which shows that the attesting legal practitioner was still at Machiridza Commercial Law Chambers at the time she attested to the affidavit. He who alleges must prove, applicant has not met the required standard of proof in this instance.

Even if I were to accept for a moment that indeed *Chiedza Fransisca Gwanda,* at the time of attesting to the opposing affidavit was still an associate at Machiridza Commercial Law Chambers, I do not agree that that fact standing alone makes the opposing affidavit invalid. Mr *Goto* for applicant cites the case of *Aaron Chafanza* v *Edgards Stores Limited* HB 27-05, where the court said:-

> to my mind it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate on behalf of a client who is being represented at his firm as such a law firm clearly has an interest in the matter at hand. Legal practitioners are therefore guided accordingly.

The court said it is undesirable, not that it is forbidden. In my view it is an issue to be decided on a case by case basis. In *casu,* I find that even if the attesting legal practitioner was an associate at Machiridza Commercial Law Chambers at the material time, such fact is not fatal to the opposing affidavit before court. There is no evidence that has been placed before court to show the prejudice suffered by applicant as a result of the attestation of the opposing affidavit by *Chiedza Fransisca Gwanda.* Again I do not see what kind of direct interest she would have in a matter being handled by a colleague in the law firm, which could be sufficient to render the affidavit invalid. I find that the second preliminary point has no merit. See *Muhammad Zakir* v *Chief Immigration and Minister of Home Affairs* HH 185-2010.

The preliminary points are devoid of merit and are accordingly dismissed.

The law

Rule 236 (4) (b) provides that where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within one month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either –

a. set the matter down for a 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 other order on such terms as he thinks fit.

A civil case is mostly litigant driven and r 236 is designed to ensure that applicant's foot does not move from the accelerator, and that the proceedings remain in motion until the matter is finalised.

My view is that the rule is designed to ensure that those matters which are not being prosecuted and lie dormant are removed from the system, in other words, it is to clear the system of dead cases. It is not to remove from the system those matters which are hotly prosecuted, but had a temporary lapse. To my mind this explains why the rule gives a respondent two options, to either set down the matter or apply for its dismissal. In choosing which option to take, respondent has to consider whether the application is now dead or suffering a somehow temporary lapse. If it is dead, clogging the system for no good measure, respondent may make an application for dismissal, however if it is apparent that applicant has an intention of prosecuting the application to its finality, respondent has to set down the matter. The decision whether to set down the matter or apply for its dismissal must be an informed decision, based on what the objective facts show. Otherwise r 236 might fall to be used for the purpose of which it was not designed, of removing live and contested matters from the system.

The rule further provides a further safeguard against removing live and contested matters from the system. It gives a judge a discretion whether to dismiss the matter with costs or make such other order on such terms as he thinks fit. To my mind this means, even if applicant in the main application has not set down the matter within a month of filing an answering affidavit, a judge may still refuse to dismiss the main matter for want of prosecution. Obviously such a discretion must be judicial discretion. I will later in this judgment deal with what I think a court should consider in deciding whether to dismiss the application for want of prosecution or give some other order.

I agree with what my brother CHITAPI J said in *Edwick Ngwerume* v *Chipo Masawi and Tichaona Masawi* HH-69 -18 :-

> that rule 236 is permissive rather than directory. A dismissal for want of prosecution is a drastic remedy whose effect is to remove the matter from the roll of pending matters. An order of dismissal should therefore be granted where the circumstances of the conduct of the defaulting party point to a clear intention not to pursue his or her rights. Where such intention is not apparent or cannot be inferred, I would suggest that the more justiciable approach should be to give the defaulting party a directive to comply with, following which if there is default, the dismissal is then ordered. The discretion given to the judge therefore provides for a window to allow those matters which had a temporary lapse to continue to finality, on condition a clear intention to prosecute the matter to finality is shown.

To my mind, once an application to dismiss for want of prosecution is opposed, applicant must seriously reflect whether to continue with such an application. Instead of deploying too much time, resources and energy in fighting to have the application for dismissal for want of prosecution granted, it would be better and preferable and in the interests of justice to deploy such resources, energy and time to set down and finalise the main matter.

However once an application to dismiss for want of prosecution has been filed, in order to escape the dismissal of the application, the respondent must show good cause why the application should not be dismissed. (See *Scotfin* v *Mtetwa* 2001 (1) ZLR 249). In *Guardforce Investments (Private) Limited* v *(1) Sibongile Ndlovu* ***(2)*** *The Registrar of Deeds N.O. (3) The Deputy Sheriff* SC 24-18 the court said the discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration – the length of the delay and the explanation thereof; the prospects of success on the merits; the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time.

The law and the facts

Dealing with the delay and the explanation for the delay, there is no doubt that there was a delay in this matter. The reasons given for the delay are that an application for recession of judgment is complex, counsel needed time prepare the case with utmost care. I agree with applicant that this explanation in just unreasonable. Respondent initiated the application for recession, before filing the application he should have known the law he intended to rely on and the authorities to support his case. This explanation carries no weight, because it borders on being untrue.

Further respondent says his legal practitioner's offices were hit by electricity load shedding that has hit the whole country, making it impossible to complete work timeously. He says the offices are located in the residential area of Bluffhill in Harare, where power cuts occur from 0300 hours in the morning to 2200 hours in the evening, making it virtually impossible to work during the productive hours of the days. There is no supporting affidavit from the legal

practitioners to show how the electricity power cuts affected their work in respect of the application for recession of judgment. Although this evidence of the respondent has been ruled admissible in terms of section 27 of the Civil Evidence Act, it is of little weight. An affidavit from the legal practitioners could have cured this deficiency. My finding is that the delay in prosecuting the application for recession has not been satisfactory explained.

However, the delay and the explanation thereof in this matter alone cannot form the basis for the dismissal. The other factors should also be considered in determining whether or not to dismiss the application for rescission for want of prosecution. See *Guardforce Investments (Private) Limited* v *(1) Sibongile Ndlovu* ***(2)*** *The Registrar of Deeds N.O. (3) The Deputy Sheriff (supra).*

I now turn to the issue of the prospects of success on the merits. In considering prospects of success of the application for recession of judgment, I will not use a microscope, because I am not dealing with the recession application itself. As long as the application for recession is arguable, I will be more than willing to find that it has prospects of success. It is not about "good prospects of success" but merely "prospects of success" which is under consideration at this stage. Whether the application for recession of judgment has good prospects of success, is for the court which will hear that application to determine.

It is not in dispute that respondent's legal practitioners were aware of the set-down date of the special plea, but did not to attend court. This was conceded by *Mr Machiridza* for the respondent. Respondent reasoned that the special plea was clearly not properly before court and expected the court to strike it off the roll. He say the special plea was due for filing on the 31st October 2018, but was filed on the 10 December 2018, way out of time. Respondent argues that the special plea was filed out of time in violation of r 119 of the Rules. No condonation was sought and granted. After the grant of the special plea plaintiff then filed an application for recession of judgment in terms of r 449 of the Rules, contending that the special plea was erroneously sought and granted. This is the application that applicant seeks the court to dismiss for want of prosecution.

Applicant argues that the recession application was incorrectly filed in terms of r 449. See *Unitrack (Private) Limited* v *Telone (Private) Limited* SC 10-18, *Capital Brake Company (Private) Limited and Robert Daniel Benatar* v *Colleen Beatrice Benatar* HH 34-16, *De wet & Others v Western Bank Limited* 1979 (2) SA 1031, *Nyingwa* v *Moolman N.O.* 1993 (2) SA 508. He contends that it should have been brought to court in terms of r 68. It is argued for the applicant that the recession of judgment has no prospects of success.

Respondent argues that the special plea was granted in error. He contends that r 119 commands in peremptory language that the defendant shall file his special plea within ten days of the service of plaintiff's declaration, in case number HC 8987/18 defendant filed his special plea more than a month after service of plaintiff's summons and declaration. The question is, was the special plea properly before court on 31 May 2019? Can a court grant a special plea, filed out of time, without an application for condonation, simply because the opponent has defaulted court? Is r 449 application a correct procedure to rescind the special plea granted in default on the facts of this case? Should plaintiff seek redress in terms of r 68 of the Rules? These and other questions have to be answered by the court hearing the application for recession of judgment. My view is that the application for recession is arguable. It might well fail, it is not for me, without the benefit of argument in respect thereof, to say it will fail. It might well succeed, again it is not for me, without the benefit of argument thereof to say it will succeed.

I now consider the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its application for recession in terms of the Rules of court. Neither the founding affidavit nor the answering affidavit in this application contain any evidence on the prejudice that applicant has suffered due to the failure of the respondent to prosecute the application for recession timeously. If this application is granted, *Killer Zivhu's* intention to prosecute his application for recession will be thrown out of the window. To the contrary, if it is refused *Themba Mliswa* will still have an opportunity to oppose the granting of the recession application. My view is that the balance of convenience favours *Killer Zivhu*.

To his credit, respondent, consequent to filing of this application, has since filed heads of argument and applied for a set-down date of the application for recession. I was told from the bar that the application for recession of judgment had been set-down and postponed pending the finalisation of this application.

Although the delay is not satisfactory explained, respondent has been jolted to action, and taken steps to finalise his application for recession of judgment. There is no rule of law that barres respondent from proceeding with his application for rescission of judgment despite the making of the application for dismissal for want of prosecution. In fact under r 236 of the High Court Rules, when faced with an application for dismissal of an application, the court is enjoined to consider options other than dismissing the application for want of prosecution. The

fact that the *Killer Zivhu* has taken tangible steps to finalise the application for recession of judgment is a factor that weighs heavily in his favour.

In fact the chamber application to dismiss ought to trigger the respondent to attend to the finalisation of the application for rescission of the default judgment, which in this instance it has done. The only way the respondent could have shown that he is serious about the prosecution of the application for rescission was to proceed to have the matter set down after he was served with the chamber application for dismissal for want of prosecution. See *Guardforce Investments (Private) Limited* v *(1) Sibongile Ndlovu* ***(2)*** *The Registrar of Deeds N.O. (3) The Deputy Sheriff (supra).*

In *casu,* despite the failure of the respondent to set-down the application for recession in terms of the rules, a clear intention has been shown to prosecute the matter to finality. Respondent has since filed heads of argument and caused the recession application to be set-down. *Killer Zivhu* opposed this application, a clear intention of his desire to prosecute the recession application to finality. To my mind these are some of the factors that a court should factor into the scales in considering whether to dismiss the application for want of prosecution or not.

In conclusion, when interpreting r 263 (4) (b) of the Rules I factor into the equation the provisions of section 46 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013, which say when interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum of body must promote and be guided by the spirit and objectives of the Declaration of Rights. My interpretation of r 263 (4) (b) aims to promote the fundamental right enshrined in section 69(3) of the Constitution, which says every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. It must be noted that section 46(2) of the Constitution requires that the Declaration of Rights must be applied indirectly where it cannot be applied directly and every court has a constitutional jurisdiction to do so. See *Mkhize v Commissioner for Conciliation, Mediation and Arbitration* 2000 1 SA 338 (LC).

On the factual and legal matrix of this case, I am not prepared to bang the door on respondent, and deny him his right to prosecute to finality his application for recession of judgment in case number HC 4659/19. I am of the view that applicant has not made a good case for the relief he seeks in this application. The application has no merit.

On the issue of costs, although I am of the view that applicant ought to have abandoned this application on being served with the notice of opposition, I will give him a benefit of doubt and order that the costs of this application be costs in case number HC 4659/19.

Disposition

In the result I order as follows:

This application is dismissed and costs shall be costs in case number HC 4659/19.

Kadzere, Hungwe and Mandevere, Applicant's legal practitioners
Machiridza Commercial Law Chambers, respondent's legal practitioners