Case 1 **HC 8511/22**
COUCHGRASS (PVT) LTD
versus
SAYLES CORPORATION (PRIVATE) LIMITED

Case 2 **HC 64/23**
COUCHGRASS (PVT) LTD
versus
SAYLES CORPORATION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 16 June 2023 & 6 August 2024

Opposed Applications-Dismissal of application for want of prosecution

Advocate *T Mpofu*, for the applicant in both Case 1 and Case 2
Advocate *W Ncube*, for the respondent in in both Case 1 and Case 2

MUSITHU J: This judgment is concerned with two related applications that were heard at the same time. Case 1 seeks the dismissal of the respondent's application for condonation and rescission of a default judgment filed under HC 5086/22. Case 2 seeks the dismissal of the respondent's application for joinder filed under HC 5085/22. The applicant wants both applications dismissed with costs on the legal practitioner and client scale.

Background to Case 1

The applicant claims to be the lawful owner of an immovable property known as Lot 4 Rietfontein situated in the District of Salisbury held under Deed of Transfer No. 4258/12 (the property). The applicant claims that this position was confirmed by a judgment of the Supreme Court under SC 342/20 following a dispute between the applicant, the respondent and an entity known as Samalyn Investments (Private) Limited (Samalyn).

Despite the determination of the Supreme Court in SC 342/20, the respondent allegedly filed the court application in HC 5086/22 on the eve of the hearing of yet another application filed by the same respondent under HC 1313/22. The application for condonation was therefore meant to sabotage the hearing of the matter under HC 1313/22, and an afterthought. The applicant contends that the application for condonation and rescission of judgment ought not to have been filed as the judgment sought to be rescinded was confirmed by the Supreme Court in SC 342/20. The same legal practitioners who filed the said application had appeared in the Supreme Court and tried to stay the Supreme Court proceedings at the last minute by filing an application under SC 117/21 which was dismissed by the same court.

Following the filing of the application for condonation and rescission, the applicant filed its opposing papers on 11 August 2022, and served them on the respondent's legal practitioners on the same day. The respondent had not bothered to file an answering affidavit or have the matter set down for hearing within one month of the service of the opposing papers. More than two months had since elapsed since the respondent was served with the applicant's opposing papers. The respondent had also failed to prosecute its other three applications against the applicant in HC 1313/22, HC 5085/22 and HC 3354/20. The latter was also an application for rescission of judgment.

It was further averred that the application for condonation and rescission was never filed with the *bona fide* intention of obtaining relief. This court could not be petitioned to overturn a decision of the Supreme Court. The respondent could not be permitted to continue filing one application after the other without bothering to finalise them. There was need to attain finality in

litigation, and a party seeking condonation from the court was expected to be even more diligent. It was for that reason that costs were sought on the legal practitioner and client scale.

Background to Case 2

This is the application for joinder that the applicant also wants dismissed. It was allegedly filed on the eve of the hearing of another application filed by the applicant under HC 1313/22. The applicant claims that the application for joinder was filed solely to sabotage the hearing of the application under HC 1313/22. No proper explanation was given as to why the application for joinder was filed after the set down of the main matter under HC 1313/22. In HC 1313/22, the respondent had allegedly told the court that it was not necessary to cite the parties that it now sought to have joined to the proceedings. These parties were Timothy James Searson, Simon David Searson, Brenda Carol Leeper and Shepherd Chimutanda N.O.

Opposing papers to the application for joinder were filed on 11 August 2022 and served on the respondent's legal practitioners on the same day. Since the date of service, the respondent's legal practitioners had not bothered to file an answering affidavit or have the matter set down for hearing. The respondent had not taken steps to prosecute the application for joinder for close to four months.

The applicant further averred that the application for joinder had no prospects of success at all. The issue of non-joinder had been raised in opposition to the main matter, but the respondent was adamant that joinder was not necessary.

According to the applicant, the respondent filed an application for leave to serve the court applications in HC 5086/22, HC 5085/22 and HC 1313/22 on the Searson brothers in Australia under HC 7880/22, but it did not cite the applicant as an interested party. The applicant contends that the application for edictal citation was defective because there was no court order permitting the respondent to join the Searson brothers to the proceedings in HC 1313/22; HC 5085/22 and HC 5086/22. The application for joinder was opposed and there was no court order joining the Searson brothers to the proceedings in the said matters. The respondent was accused of jumping the gun to further delay proceedings to the prejudice of the applicant. Further, the application for edictal citation had no bearing on the respondent's failure to prosecute the matter for joinder for

close to four months. That application for edictal citation was filed on 21 November 2022, when the respondent was aware from 11 August 2022 that it had thirty days to file an answering affidavit in the main matter. The respondent could not be allowed to mask its failure to comply with the rules in the present matter because of the application under HC 7880/22, when that matter was premature.

For the foregoing reasons, the court was urged to dismiss the application for joinder with costs on the legal practitioner and client scale.

Respondent's Opposition in Case 1

The opposing affidavit raised as a preliminary point, the fact that the failure to cite in this application the 2nd, 3rd, 4th, 5th, 6th and 7th respondents in HC 5086/22, who are parties in that matter was fatal to the present application. The respondent averred that the failure to cite the said respondents was a deliberate ploy to circumvent the difficulties that the applicant was bound to encounter in serving the Searson brothers who were said to be resident in Australia. The applicant could not be allowed to proceed until such time the other respondents in HC 5086/22 were also cited.

Concerning the merits, the respondent averred that the application for dismissal was ill-conceived because the applicant was fully aware of the of the pending interlocutory applications which affected the progress of HC 5086/22. According to the respondent, in HC 1313/22 it sought a declaratory order that the applicant never had lawful title to the property. The respondents in that case were the applicant, Samalyn Investments (Pvt) Ltd, the Registrar of Deeds and the Master of the High Court. The respondent did not cite the Searson brothers, being the former Executors of the Estate Late June MacLachlan, as the parties who allegedly sold the property to the applicant.

The applicant objected to the respondent's failure to cite the said parties. The respondent conceded to the non-joinder on the eve of the hearing of HC 1313/22, resulting in the hearing being postponed *sine die,* pending the resolution of the application for joinder. The respondent also applied under HC 5086/22, seeking condonation and the rescission of the judgment in HC 993/18 and HC 9866/17, which matters had a bearing on the determination of HC 1313/22.

The respondent claimed that it attempted to serve the applications in HC 1313/22, HC 5085/22 and HC 5086/22, on the Searson brothers through their erstwhile legal practitioners Matizanadzo & Warhurst Legal Practitioners, but they declined service and proceeded to renounce agency. Meanwhile, the applicant filed its notice of opposition which the respondent claimed it elected not to respond to before serving the Searson brothers. The respondent claims that it could not process the three applications prior to service on the Searson brothers whose version of events was crucial.

The respondent claims that it sought information on the whereabouts of the Searson brothers and was advised that they were now based in Australia. After obtaining that information, it proceeded to file the application in HC 7880/22, seeking an order for substituted service. That application was granted on 14 December 2022, but the court order was only availed on 3 January 2023. According to the respondent, the second and third respondents in HC 5086/22, namely Timothy James Searson and Simon David Searson were the co-executors of the Estate Late June Searson and the beneficiaries of the estate. They were also the ones who fraudulently sold the property to the applicant notwithstanding several prohibitions against the sale. They therefore had a real and substantial interest in HC 1313/22. They were still to be served with the application following the granting of the order for substituted service.

The respondent accused the applicant of misleading the court by alleging that the matter under SC 342/20 was between the applicant, respondent and Samalyn Investments, yet the correct position was that the parties actively involved were the applicant and Samalyn Investments. The respondent sought to be joined to the proceedings in SC 342/20 through an application in SC 117/21, in order to have the matter dealt with holistically. The applicant opposed the said application.

The court was urged to dismiss the application with costs on the legal practitioner client scale as the applicant was abusing the court process.

Respondent's Opposition in Case 2

The same preliminary point raised in Case 1 was also raised herein. The averments that accompany the point are also the same. I shall deal with the preliminary point later in the judgment.

As regards the merits of the matter, the respondent justified the joinder of the Searson brothers and Shepherd Chimutanda on the basis that they had an interest in the main matter. They were all former executors to the Estate of the Late June Searson. The respondent claims that when he filed the application in HC 1313/22, he was under the impression that the said parties had finalized the estate of the late June Searson and saw no need to cite them. It later discovered that Shepherd Chimutanda had not filed the final distribution accounts with the Master of High Court. He was removed as executor before the finalization of the estate's distribution account. The application under HC1313/12 raised issues which the Searson brothers ought to respond to as the Executors of the estate late June Searson. The application for the joinder of these parties was by no means an abuse of court process.

The respondent had not filed opposing papers nor set the matter down for hearing because the Searson brothers still needed to be served with a copy of the application. Their response was critical to the preparation of the respondent's answering affidavit. The application for edictal citation was sufficient proof that the matter for joinder was progressing in the background. The application under HC 5085/22 was interlocutory and it sought the joinder of the Searson brothers and other interested parties in the main matter under HC 1313/22. The respondent claims that it agreed with the applicant that the matter in HC 1313/22 be removed from the roll to enable the matter under HC 5085/22 to be prosecuted.

The Answering Affidavit in Case 1 and Case 2

In its response, the applicant averred that the 2nd, 3rd, 4th, 5th, 6th and 7th respondents were not opposed to the application in HC 5086/22. Further, no relief was sought against these respondents by the respondent, and the failure to cite them in the present application was therefore not fatal. In any case, the rules of court provided that the non-joinder of a party did not render the application fatally defective.

The applicant insisted that the respondent should have prosecuted its application for joinder before applying for an order of substituted service. The application for substituted service was therefore premature. The applicant also insisted that the application for condonation was never filed with the *bona fide* intention of obtaining relief, but solely to frustrate the applicant. This was because the Supreme Court upheld the decision by KWENDA J in HC 9866/17 declaring the applicant as the true owner of the property. The respondent was now claiming a declaratory order over the property in HC 1313/22, thus effectively seeking to overturn the decision of the Supreme Court. The application was therefore frivolous and vexatious.

Similar averments were made in respect of the application in Case 2. In short, the applicant persisted with its position that the two applications be dismissed for want of prosecution.

Submissions on the application for removal of bar for late filing of heads of argument

At the commencement of oral submissions, Advocate *Ncube* for the applicant applied for the removal of the bar for the late filing of heads of argument by the respondent in both applications. The late filing of heads of argument was attributed to the oversight of the respondent's legal practitioners who inadvertently placed the heads of argument inside the case files. The existence of those heads of argument did not come to the attention of the practitioners until they were out of time. Counsel submitted that given the importance of the issues raised in the matters and the need for finality on the merits of the litigation, there was no real prejudice to be suffered by the applicant if the bar was uplifted. Counsel was ready to argue the matters.

In response, advocate *Mpofu* opposed the application for the upliftment of the bar on the grounds that this was not the first time that the respondent was barred. The matter was previously set down and the same issue was raised, but no attempt was made to apply for the removal of the bar in compliance with the law. The reason why the applicant sought the dismissal of the two applications was because there was no compliance with the rules of court. Counsel further submitted that this kind of application ought to have been brought on affidavit, and there was no explanation as to why this was not done. The application itself was based on hearsay evidence which was not admissible. The respondent's legal practitioners ought to have explained their

failure to act in an affidavit. The other point was that the court exercised discretion in deciding whether to uplift the bar or not. Such discretion was not unfettered.

The last point raised by counsel was that when the matter was last postponed, the respondent had undertaken to pay the applicant costs of suit from previous matters. Such costs were not paid, and the applicant continued to incur costs at the instance of the respondent. Counsel cited the case of *Makoni* v *Makoni & Anor*[1], where the court stayed the applicant's application for condonation of late noting of appeal and extension of time within which to appeal, until such time the first respondent's taxed costs in the lower court were paid. The court was urged to dismiss the application for the removal of the bar and treat the matter as unopposed.

In response Advocate *Ncube* submitted that an application for the removal of the bar could be made orally at the hearing of a matter and it was not mandatory that it be in writing. Condonation for failing to comply with rules of court was always a matter of discretion which ought to be exercised judiciously. Counsel further submitted that the explanation given for the failure to comply with the rules was reasonable as legal practitioners often made mistakes of that nature. The mere fact that an explanation for the oversight was required on affidavit by the legal practitioner concerned did not detract from the fact that the court was endowed with discretion to grant the indulgence. Counsel further submitted that this was a fitting case for the granting of condonation as there was no prejudice that could not be compensated by an order of costs.

As regards the question of unpaid costs in other matters, Advocate *Ncube* submitted that unpaid costs have never been a reason for making an adverse decision in a matter. He further submitted that he had since been informed by his instructing practitioners that the directors of the respondent were on their way to pay the said costs directly to the applicant's offices.

Analysis

Rule 39(5) of the High Court Rules, 2021, provides that a party that has been barred may make a chamber application for the removal of the bar or an oral application at the hearing of the matter for the removal of the said bar. It goes on to state that the court may allow the application

[1] SC 7/18

on such terms as to costs and otherwise as the court considers proper. The said rule does not delineate those circumstances under which the said application may be brought through the chamber book or made orally at the hearing. The court is at large to dictate the way the application should be made. What is paramount is to consider the interests of justice and the need to achieve finality in litigation. In so doing, the court must not overlook the prejudice that maybe occasioned to the other party to the dispute. For instance, if the applicant was unprepared to respond to the application, the court would have been inclined to postpone the matter to give it an opportunity to prepare and respond to the application.

In my view, r 39(5)(b), which permits the making of an oral application was conceived as a way of bringing convenience in the hearing of cases that are ready to be argued, but for the failure to comply with the rules of court. For instance, where a party is barred for failing to file heads of argument timeously, but those heads of argument have been filed and served on the other party at the time of the hearing, it serves the interests of justice well to allow the party in default to make an oral application for the removal of the bar. No prejudice would be occasioned to the compliant party if the heads of argument have already been served upon it. Rules of court must be complied with as they bring orderliness and expedience in the management and resolution court cases. But the same rules must not act as an impediment to the resolution of matters on the merits especially if no conceivable prejudice would arise.

In granting the application for the uplifting of the bar in the two matters, I considered the fact that heads of argument were already on record and the applicant's counsel had a chance to study them before appearing in court. The parties were also ready to argue the matter on the merits. Dismissing the oral application and directing that it be made through the chamber book, to allow the respondent's legal practitioners to explain their tardiness would entail further delays in the disposal of the matter.

As regards the question of the unpaid costs, it was unclear from counsels submissions whether such costs had been taxed or not, or whether they were the subject of an agreement between the parties. The case of *Makoni v Makoni & Anor*, that the applicant's counsel referred to was concerned with an outstanding bill of taxed costs that remained unpaid. In my view, liability

to pay the successful party's costs as ordered by the court only arises when such costs have been taxed and the extent of the losing party's liability has been ascertained. This court cannot direct that those costs be paid when the full extent of the respondent's liability is unknown.

I pause to observe though that after I reserved judgment in this matter, the applicant's legal practitioners wrote a letter advising that contrary to the representations made by Advocate *Ncube* during the hearing that the respondent's officials were on their way to pay the said costs to the applicant, such costs were never paid. The applicant's legal practitioners requested further audience to address the court on this point. In response, the respondent's legal practitioners admitted that they had indeed advised counsel that the respondent was making payment directly to the applicant. They had since been advised that payment was not made because of some changes in exchange rates that scuttled their payment plans. They claimed to have been misled by their client and profusely apologized for their conduct. They proceeded to renounce agency on the same day their letter was dispatched to the registrar.

Submissions on the merits

Counsels agreed to argue the merits of the case so that the court could make a holistic ruling depending on the outcome of the application for the removal of the bar for the late filing of heads of argument. Advocate *Mpofu* submitted that in HC 9866/17, Samalyn tried to wrestle the property from the applicant, but this court per KWENDA J dismissed its application. Samalyn appealed to the Supreme Court under SC 342/20. The respondent also made an application to be joined in the Supreme Court proceedings under SC 117/21. That application was dismissed with costs on the legal practitioner and client scale. The respondent allegedly claimed to have acquired rights in the property from Samalyn, and it was on that basis it sought to be joined in the proceedings at the Supreme Court. When the respondent failed in this bid, it then brought proceedings in HC 1313/22 alleging to be the owner of the property. One of the points taken in opposition to that was that the claim was futile in view of the judgment by KWENDA J, which judgment was upheld by the Supreme Court.

The respondent filed the application for condonation and rescission of judgment in HC 5086/22 on 29 July 2022. The applicant herein filed opposing papers on 11 August 2022. The

respondent was required to file its answering affidavit or have the matter set down by 11 September 2022. Nothing was done. On 21 November 2022, the respondent applied for an order of edictal citation. The application for dismissal in Case 1 was filed on 16 December 2022. Counsel submitted that upon being served with the application for dismissal, the respondent ought to have sprung into action, but still no heads or answering affidavit was filed. No explanation had been given as to why no action had been taken by 11 September 2022. The matters that were allegedly being pursued did not stop the filing of heads of argument. The Searson brothers ought to have been joined to the proceedings as far back as 11 November 2020. The need to join the two brothers, and the impediments caused by KWENDA J's judgment were also known to the respondent. At any rate, the respondent ought to have communicated the reasons for not taking action. It owed the applicant an explanation rather than leaving the matters in limbo.

Counsel submitted that the submissions made in respect of Case 1 applied with equal force to Case 2. The respondent was served with the second application for the dismissal of its application for joinder and did nothing. It ought to have progressed the main matter on being served with the main application. The court was urged to grant both applications with costs on the punitive scale.

In response, Advocate *Ncube* submitted that the respondent was not involved in the legal contests between the applicant and Samalyn. The respondent never got the chance to defend the title that it once held in the property as an innocent purchaser. This is the reason why the respondent instituted proceedings in HC 1313/22. Counsel further submitted that HC 5085/22 was filed out of the need to join the Searson brothers who are interested parties in the dispute in HC 1313/22. There was no point filing heads of argument or an answering affidavit without having first served the Searson brothers with the applications.

Advocate *Ncube* submitted that an application for dismissal for want of prosecution involved an exercise of discretion by the court. All that was required of the respondent was a reasonable explanation of why the matters had not progressed further. A reasonable explanation was provided in the papers. The application for substituted service had since been granted, but the respondent could not proceed to prosecute HC 5085/22 before the principal parties were served.

As regards the application for condonation and rescission of the default judgment, it was submitted that the Searson brothers were parties in the matter in which judgment was sought to be rescinded. As interested parties there had to be cited so that they could show cause why the respondent should not be condoned. The court was urged to dismiss both applications for lack of merit.

Analysis of the Merits

The preliminary raised by the respondent concerning the failure to cite other interested parties in both Case 1 and 2, was not pursued by counsel for the respondent during oral submissions. I considered it abandoned. In any case, that point was devoid of merit because the parties that the respondent wanted cited did not oppose the applications in HC 5085/22 and HC 5086/22. The real contest, as far as those two matters are concerned, is between the applicant and the respondent herein. The said parties' interest is in respect of the main matter under HC 1313/20. In any case, no relief was being sought against the parties that the respondent wanted cited.

The reasons advanced by the respondent for its failure to prosecute the two matters that the applicant wants dismissed are similar. For that reason, the analysis hereunder relates to both Case 1 and Case 2.

A party that initiates litigation must take all steps necessary to bring the matter to finality. As the *dominus litis*, the initiator of the suit has control over how proceedings must progress within the timelines prescribed by the rules of court. The *dominus litis* must not wait to be nudged into acting in its own cause by other litigants that it has dragged along in the process. The rules of court have come up with a mechanism of penalizing such litigants who develop that unwillingness to prosecute their matters to finality. Rule 59 (15)(b) of the High Court rules in terms of which the applications for dismissal were filed states as follows:

> "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—
> (a) apply for the set down of the matter down for hearing in terms of rule 65; 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 or she thinks fit."

The court or the judge is reposed with discretion to dismiss a matter for want of prosecution and the approach to follow was set out in *Guardforce Investments (Private) Limited* v *Ndlovu & 2 Ors*[2] as follows:

> "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."

The above factors must be considered holistically in my view. The length of delay in taking action may be inordinate, but the explanation for the delay and the prospects of success of the matter on the merits may tip the scales in favour of refusing the dismissal of the matter. Conversely, the length of delay maybe moderate and the explanation given is satisfactory but the prospects of success on the merits are very negligible.

The application for condonation and rescission of judgment in HC 5086/22 was filed on 29 July 2022. The applicant opposed the application on 11 August 2022. The respondent as the applicant was expected to have filed heads of argument or set the matter down for hearing by 11 September 2022. It did neither of the two. Case 1 (HC 8511/22) was only filed on 16 December 2022. In the meantime, the respondent had in HC 7880/22, made an application for substituted service on the Season brothers in Australia. The order for substituted service was granted by MAKOMO J on 14 December 2022. For reasons that are not stated, the respondent claims that it only managed to obtain the issued order on 3 January 2023. Be that as it may, the respondent had still not served the Searson brothers by the time that this present application was argued on 16 June 2023.

Similarly, the court application for joinder in HC 5085/22 was filed on 29 July 2022. The applicant opposed the application on 11 August 2022. No further action was taken thereafter. The application for dismissal for want of prosecution was filed on 5 January 2023. The respondent does

[2] SC 24/16 at pages 6-7

not deny that it took no further action after the filing of the applicant's opposing papers. The reasons given for not progressing the two applications further are similar. There was need to serve the applications on the Searson brothers who were now outside the jurisdiction of this court. This explained the filing of the application for edictal citation.

The conduct of the respondent is in my view reproachable. The management of the cases pending before the court is a collective responsibility which involves the registrar's office, judges assistants and the litigants. The respondent was aware that the rules required it to file an answering affidavit or set the matter down within one month after the filing of opposing papers. It was obviously aware that a failure to do so would invite an application for dismissal of the two applications. It owed the other stakeholders involved in the management of pending cases, a duty to inform them that it was staying the further prosecution of the applications pending the filing of an application for edictal citation as well as the service of the three applications in HC 1313/22, HC 5085/22 and HC 5086/22 on the other interested parties.

Counsel for the respondent admitted that no such formal communication was made to advise the other interested parties. He however submitted that the interested parties were aware that the respondent had approached the court for leave to serve the Searson brothers through edictal citation. I do not find that submission persuasive. That applicant herein was not a party to the application for edictal citation in HC 7880/22. A courteous letter requesting the indulgency of the applicant and its legal practitioners as well as the registrar, to stay further processes in HC 5085/22 and HC 5986/22, pending the determination of the application for edictal citation and service of the said applications on the Searson brothers would have been the proper thing to do.

The respondent did not deny that the two applications that stand to be dismissed were only filed after the application in HC 1313/22 was set down and ready to be argued. In its opposing affidavit to the respondent's application in HC 1313/22, the applicant herein had warned the respondent of the folly of proceeding with that matter without citing the Searson brothers who were interested parties in all the matters involving the property in question. The respondent proceeded to file its answering affidavit averring that the matter could still be resolved without

involving the said interested parties that it sought to have joined in all the three applications pending.

The judgment by KWENDA J HC 9866/17 (HH 476/20), was handed down on 21 July 2020. Admittedly, the respondent was not a party to those proceedings. Its attempt to be joined in the Supreme Court proceedings was unsuccessful. The respondent was aware that KWENDA J had all but declared that the applicant legitimately acquired title in the property, thus dismissing the claim by Samalyn for the same property. The respondent claimed to have acquired rights in the property from Samalyn.

According to its own version of events, the respondent had the same property registered in its name at some point. The parties that it sought to have joined to the proceedings in HC 1313/20, are the same parties that were at the center of the alleged fraudulent sale of the property to the applicant herein. The applicant was aware of these accusations against the parties that it opted not to cite in HC 1313/20. This is because the respondent sought to be joined in the Supreme Court proceedings where those allegations were made by Samalyn in a bid to have the applicant's title to the property revoked. How the respondent then decided to exclude the same parties in its own claim under HC 1313/20 remains a mystery. The applicant's submission that the two applications it wants dismissed were not *bona fide* is therefore meritorious.

I have already highlighted that the order for substituted service was granted by this court on 14 December 2022. The respondent claims to have had access to that order on 3 January 2023. At the time the parties argued the two applications before me, the Searson brothers had still not been served with the three applications as directed by that order in HC 7880/22. At the time of writing this judgment, I had the occasion to check all the three records in which service was supposed to be made on the Searson brothers in terms of the 14 December 2022 order. No service was made. Nothing stopped the respondent from serving the said interested parties in terms of the 14 December 2022 order which it sought and was granted by this court. The respondent was expected to spring into action the moment it received the applications for the dismissal of its pending matters. No explanation was given as to why after receiving the order in HC 7880/22, the

respondent had still not implemented the terms of that order as at the time these two matters were argued.

In view of the foregoing reasons, the court determines that there is merit in both applications. The explanations given by the respondent for not prosecuting HC 5085/22 and HC 5086/22 are implausible. A litigant in the respondent's position, which claims to have so much at stake in the property would have been more aggressive in asserting its rights if it genuinely believed it had prospects of success in the main matter in HC 1313/22. The applicant's title to the property was endorsed by the Supreme Court which upheld KWENDA J's judgment. The respondent appears to be on a wild goose chase. The balance of convenience clearly favours the granting of the application in both Case 1 and Case 2. The respondent's sluggishness in the manner it has prosecuted the two applications is clearly detrimental to the applicant's interests.

Costs of suit

The court was urged to grant the orders sought in the two matters with costs on the punitive scale of legal practitioner and client. The level at which costs must awarded is a matter of discretion. I am not persuaded to make a determination that costs on the punitive scale are warranted herein.

DISPOSITION

Resultantly it is ordered that:

In respect of Case 1:

1. The application be and is hereby granted.
2. The court application for condonation and rescission of judgment in HC 5086/22 be and is hereby dismissed for want of prosecution.
3. The respondent shall bear the applicant's costs of suit.

In respect of Case 2:

1. The application be and is hereby granted.
2. The court application for joinder in HC 5085/22 be and is hereby dismissed for want of prosecution.
3. The respondent shall bear the applicant's costs of suit.

Dhaka Lightfoot & Stone, legal practitioners for the applicant in Case 1 and Case 2
Moyo & Jera, legal practitioners for the respondent in Case 1 and Case 2