REPORTABLE (42)

SAYLES CORPORATION PRIVATE LIMITED
v
COUCHGRASS PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 11 NOVEMBER 2024 & 22 MAY 2025

W. Ncube, for the appellant

T. Mpofu, for the respondent

CHIWESHE JA:

This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, dated 6 August 2024, granting with costs two applications filed by the respondent for the dismissal for want of prosecution of the appellant`s application for condonation and rescission of a default judgment under HC 5086/22, and the appellant`s application for joinder under HC 5085/22. The two applications were heard together and determined in one composite judgment.

FACTUAL BACKGROUND

Both parties are companies registered in terms of the laws of Zimbabwe. The parties are involved in a protracted dispute concerning ownership of an immovable property described as Lot 4 Reitfontein, situated in the District of Salisbury, held under Deed of Transfer No. 4258/12 (the property). Each party claims to be the sole owner of this property to the exclusion of the other.

The history of the property is as follows. On 2 December 2004, a company called Samalyn Investments (Samalyn) entered into an agreement of sale in terms of which it purchased the property then held by one June Searson under Deed of Transfer No 3121/1974. Upon payment of the full purchase price June Searson executed a power of attorney appointing one Herbert Kawadza as her attorney and conveyancer to appear before the Registrar of Deeds for the purpose of transferring the property to Samalyn. No specific date of transfer was set, with Samalyn indicating that it was not in a hurry to take transfer of the property. However, seven years later, in 2011, one Phillipus Fourie Naude, a director of Samalyn, discovered that Patrick Kennan, of Kennan Properties, had put the property up for sale. Upon inquiry, Naude learnt that June Searson had died on 7 July 2007, and the property was being sold by her deceased estate. Timoty James Searson and Simon David Searson (the Searson brothers) had been appointed co-executor datives of the estate late June Searson (the estate). They in turn had appointed Brenda Carol Leeper to administer the estate on their behalf.

These developments prompted Samalyn to immediately institute proceedings under HC 10340/11 seeking transfer of the property to it. It cited the estate, the Registrar of Deeds and the Master of the High Court as respondents. Upon being served with the application, the Registrar of Deeds placed a caveat against June Searson`s title deed. In 2014 the application was struck off the roll by the court *a quo* for failure to comply with its rules. Samalyn alleged that during the pendency of its application, the Searson brothers and Brenda Carol Leeper (Leeper) sold and transferred the property to Couchgrass Private Limited, the respondent in this appeal.

However, in 2018, by order of the court *a quo* under HC 4751/18, Sayles, the appellant in this appeal, purchased the property from the estate, represented by Shepherd Chimutanda, the

executor appointed by Leeper. The appellant paid the purchase price and took transfer under Deed of Transfer number 2783/2018. However, the respondent obtained, under default, an order rescinding the judgment under HC 4751/18 in terms of which the appellant had obtained transfer of the property.

On the other hand, the legal battles involving Samalyn, the respondent and the Searson brothers as to ownership of the property continued unabated. The appellant avers that in the various applications in the court *a quo*, the respondent did not cite it despite the fact that the appellant was now the registered owner of the property. Similarly, in an application filed by the respondent and heard by KWENDA J, the respondent had not cited the appellant. In that application, KWENDA J declared that the property belonged to Couchgrass, the respondent herein. Samalyn appealed that decision to this Court under SC 342/22. At the hearing of that appeal, the appellant applied to be joined to the appeal on the grounds that contrary to the claim by Samalyn, the property belonged to it. That application was dismissed by this Court as an abuse of court process. Thereafter this Court proceeded to hear the appeal and to uphold KWENDA J`s judgment granting ownership of the property to the respondent.

Despite the outcome of the appeal under SC 342/22, the appellant approached the court *a quo* on 28 February 2022, under HC 1313/22 (the main matter) seeking a declaration to the effect that the respondent never held lawful title to the property. It also cited as respondents, Samalyn, the Registrar of Deeds and the Master of the High Court. It was averred by the appellant that it had sought to serve the papers on Messrs Matizanadzo and Warhurst, who had all along been the legal practitioners of the respondent and the Searson brothers. The law firm had declined to accept service and soon thereafter had renounced agency. The notices of renunciation did not provide the

last known address of the Searson brothers save to advise that the Searson brothers were now resident in Australia.

On 22 November 2022 under HC 7880/22, the appellant applied for substituted service in order to serve its papers on the Searson brothers in Australia. The application was granted by MAKOMO J on 14 December 2022. The appellant avers that MAKOMO J`s order was only availed to it by the registrar of the court *a quo* on 4 January 2023.

At the time the application for substituted service was granted, the appellant had two other applications pending before the court *a quo*. Under HC 5085/22 the appellant sought an order for joinder of the Searson brothers whilst under HC 5086/22/18 the appellant sought condonation for non-compliance with the rules and rescission of the order granted by the court *a quo* under HC 993/17. On its part, the respondent made separate applications for the dismissal for want of prosecution of the appellant`s applications for joinder and for condonation and rescission of judgment, respectively.

It was these two applications by the respondent to dismiss the appellant`s applications aforesaid for want of prosecution that the court *a quo* was called upon to determine.

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PROCEEDINGS IN THE COURT *A QUO*

Submissions by the respondent

With regards the application for the dismissal of the application for condonation and rescission of the judgment made under **HC 5086/22**, the respondent maintained that it was the owner of the property as confirmed by this Court under SC 342/22. The respondent submitted that

the application ought not to have been made as its ownership of the property was confirmed by the Supreme Court, a fact known to the appellant`s legal practitioners at the time of filing. It averred that after it filed its opposing papers to the application for condonation and rescission of judgement, the appellant, despite service on it of the opposing papers, had neither filed an answering affidavit nor set the matter down within one month of such service as required by the rules. It submitted that more than two months had lapsed since the appellant had been so served. It also averred that appellant`s application was never filed with the *bona fide* intention of obtaining relief since the court *a quo* could not be petitioned to overturn a decision of the Supreme Court.

Similar arguments were raised by the respondent with regards the application for the dismissal of the appellant`s application for joinder. It was pointed out that the appellant had neither filed its answering affidavit, nor set the matter down within the stipulated time and that the delay in doing so was a period of four months. The respondent further submitted that when the issue of joinder was raised in HC 1313/22 (the main matter) the appellant had told the court *a quo* that it was not necessary to cite the parties it now sought to join. These parties were the Searson brothers, Leeper and Shepherd Chimutanda. The respondent saw no reason why the appellant would now seek to join these parties. It submitted that in any event, the application for joinder had no prospects of success. It also submitted that the application for leave to serve the Searson brothers in Australia was defective because no order had been granted to join the brothers to the proceedings. Further, it was submitted that the application for edictal citation had no bearing on the appellant's failure to prosecute the application for joinder for close to four months. The application for edictal citation was filed on 21 November 2022, when the appellant had been aware, since August 2022, that it had thirty days to file an answering affidavit. For these reasons, the respondent urged the court *a quo* to dismiss the application for joinder for want of prosecution.

Submissions by the appellant

With regards the application for condonation and rescission of judgment, the appellant raised a preliminary issue to the effect that the application for dismissal for want of prosecution was defective for failure to cite the Searson brothers and other interested parties.

On the merits, the appellant submitted that the application for dismissal was ill conceived as the respondent was aware of the pending interlocutory applications affecting progress in HC 5086/22. It was averred that it was the respondent who had objected to the non-joinder of the Searson brothers and others in a prior application. However, the appellant had subsequently conceded the need for joinder. It did so on the eve of the hearing of the main matter in HC 1313/22. As a result, the court *a quo* postponed that hearing *sine die* pending the resolution of the application for joinder. The appellant had also applied under HC 5086/22 for condonation and rescission of the judgment in HC 993/18 and HC 9866/17, which matters had a bearing on the main matter. It submitted that it had 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, Messrs Matizanadzo & Warhurst. The legal practitioners declined service and proceeded to renounce agency advising that the Searson brothers were now resident in Australia.

The appellant was of the view that it could not respond to the respondent's opposing papers before serving the Searson brothers whose version of events was crucial in the resolution of the dispute between the parties. To that end it had applied for an order for substituted service on the Searson brothers. The application was granted in December 2022 but the order was only availed to it on 4 January 2023. It averred that the Searson brothers were the co-executors of the

Estate and were the ones who had sold the property to the respondent despite several prohibitions. Their evidence was crucial in the resolution of the main matter. The appellant made similar submissions in opposing the application to dismiss its application for condonation and rescission of judgment.

In reply, the respondent insisted that the application for substituted service should not have been granted in the absence of an order joining the Searson brothers to the proceedings. It averred that it had not cited the Searson brothers because it sought no relief against them. In any event, argued the respondent, the Rules of the court *a quo* provided that the non-joinder of a party would not on its own, render the application fatally defective.

Findings of the court *a quo*

The court *a quo* noted that the preliminary point which had been raised by the appellant concerning the failure by the respondent to cite interested parties in both applications had not been pursued by counsel for the appellant in his oral submissions. It concluded, therefore, that the preliminary point had been abandoned. It proceeded to consider the merits of the two applications before it.

The court *a quo* observed that r 59 (15) (b) of the High Court Rules was designed to penalize litigants who, having dragged others to court, do not, as *dominus litis*, prosecute their matters to finality. It noted that the rule reposed on it the discretion to dismiss a matter for want of prosecution. It was aware that in the exercise of that discretion it would be guided by the approach adopted in *Guardforce Investments (Pvt) Ltd* v *Ndlovu & Ors* SC 24/16. In that case, it was held that in exercising that discretion the court should take into account the following factors:

(a) the length of the delays and the explanation thereof.

(b) the prospects of success on the merits, and
(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 court *a quo* noted as follows:

> "The above factors must be considered holistically in my view. The length of the 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 the delay may be moderate and the explanation is satisfactory but the prospects of success on the merits are very negligible."

Having set out the applicable rules in applications of that nature, the court *a quo* proceeded to apply the same to the facts of the matters before it. It noted that the reason given for the delay in both applications was that the appellant needed to serve the papers on the Searson brothers in Australia following an order for substituted service granted by the court *a quo* on 14 December 2022. It observed that at the time it heard the applications before it, the appellant was yet to serve the Searson brothers. It criticized the appellant for not informing interested parties that it had ceased progressing the applications pending service on the Searson brothers. In any event, observed the court *a quo*, the respondent had warned the appellant in HC 1313/22 (the main matter) of the folly of not serving the Searson brothers. The appellant had stated then that it was not necessary to cite the parties it now wanted joined to the proceedings.

The court *a quo* observed that the appellant was not party to the proceedings before KWENDA J where it was held that the property belonged to the respondent, and that the same order was confirmed by this court in SC 342/22. It reasoned that the appellant, having claimed to have acquired the property from Samalyn which in turn had lost its claim before KWENDA J, the appellant`s hopes were all but dashed. The court *a quo* criticized the appellant for failure to cite the Searson brothers in the main matter, more so as the appellant claimed that at some point the

property had been registered in its name and that it was because of fraudulent conduct on the part of the Searson brothers that it was divested of its ownership of the property. It was for this reason that the court *a quo* agreed with the respondent in its submission that the appellant's applications were not *bona fide*. It reiterated that at the time of hearing the applications before it, the appellant had not yet served the Searson brothers. It noted that no explanation had been given as to why such service was yet to be effected.

In the final analysis, the court *a quo* came to the conclusion that there was merit in both applications for dismissal for want of prosecution. It ruled that the explanations given by the appellant for the delay in prosecuting HC 5085/22 and HC 5086/22 were implausible. It opined that a litigant who believed that it had prospects of success in the main matter would have pursued its applications aggressively in order to achieve final resolution of the dispute. Noting that the respondent's title was endorsed by the Supreme Court when it upheld KWENDA J's judgment, the court *a quo* was of the view that the appellant was on a wild goose chase. It concluded that the balance of convenience favored the respondent and proceeded to grant the respondent's applications for dismissal for want of prosecution. The appellant was ordered to pay the costs.

Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal. The amended grounds of appeal are as follows:

"GROUNDS OF APPEAL

1. The court *a quo* erred in failing to appreciate that the pending interlocutory applications constituted a reasonable explanation for the failure to timeously file the pleadings within the time limits provided for in the Rules of court.

2. The court *a quo* erred and misdirected itself and accordingly exercised its discretion on the basis of the incorrect factual finding that appellant had not at the time of the hearing and writing of the judgment (a staggering 13 months after the matter was heard) served the three applications on the Searson brothers in the manner directed by the order of the High Court in case number HC 7880/22 when as a matter of fact by the time of hearing on 16 June 2023, the Searson brothers had been served by edictal citation as per the order of MAKOMO J and were in default.
3. The court *a quo* erred and misdirected itself in finding that the explanation given by appellant for not timeously prosecuting HC 5085/22 and HC 5086/22 were implausible when appellant had given the reasonable explanation that there were pending interlocutory applications which had to be concluded prior to the finalization of the said matters.
4. The court *a quo* erred in failing to appreciate that the Supreme Court order which upheld KWENDA J`s judgment was not of itself a bar to the remedy sought by appellant given that appellant was not a party to those proceedings whose outcome could not bind appellant and take away its rights without having been heard.
5. The court *a quo* erred and misdirected itself in finding that the balance of convenience favoured the grant of the applications for dismissal for want of prosecution.
6. The court *a quo* erred in placing undue reliance on appellant`s failure to extend courtesy to respondent by advising that the persecution (sic) of the cases would be held in abeyance pending the conclusion of the interlocutory applications on the service of the three applications on the Searson brothers when on the totality of the evidence before the

court *a quo* not only had respondent itself raised the need to join the Searson brothers but was aware of the background offer to bring the Searson brothers to court.

7. The court *a quo* erred in coming to the conclusion that appellant did not have any prospects of success without having regard to the basis of appellant`s claim against the respondent that the very judgment by which respondent took away appellant`s title was obtained through an elaborate fraud involving the respondent, its directors and its lawyers.
8. All in all the court *a quo* erred in adopting an approach towards the appellant and appellant`s other matters between the appellant and the respondent that effectively seeks to deny appellant of its right to have its dispute determined by an impartial court and appellant`s right to equal treatment under the law, particularly if regard is had to the undeniable fact that appellant was not a party to the matter between Samalyn investments Private Limited and the respondent in SC 342/20.
9. The court *a quo* improperly exercised its discretion and therefore seriously misdirected itself in that while cognizant of the factors to be taken into account in such applications, the court *a quo* only paid lip service to those factors by failing to:
    (a) recognise that the period of delay of 3 months in one case and of 3 months 3 weeks in the other were short delays and accordingly not inordinate delays.
    (b) consider whether or not the explanation given by the appellant for those delays was reasonable while being side tracked by the consideration of the fact that appellant had not extended a customary courtesy of advising the opposing party that proceedings were being held in abeyance while an interlocutory application for edictal citation of interested parties was being pursued.

(c) consider the prospects of success in the two applications for which dismissal was being sought and instead considering prospects of success in a related matter not before the court.

(d) by making only a cursory and in passing conclusion on the requirement to assess the balance of convenience and the possible prejudice to the applicant for dismissal for want of prosecution.

10. The court *a quo* improperly exercised its discretion and misdirected itself in granting the two applications without a proper analysis of and application of its mind to all the three mandatory factors which must be taken into account when considering an application for dismissal for want of prosecution.

11. The court *a quo`s* finding made without any analysis of the reasonableness of the explanation given for the delay, that the explanation given by appellant for the delay was "implausible" was so unreasonable that no reasonable court, properly applying its mind to the circumstances of the case, could have rationally made such a decision".

RELIEF SOUGHT

The appellant seeks the following relief:-

"1. The appeal is allowed with costs.

2. That the judgment and order of the court *a quo* in case number HC 8511/22 (case 1) be and is hereby set aside and in its place is substituted the following:

'The application be and is hereby dismissed.'

3. That the judgment and order of the court *a quo* in case number HC 64/23 (case 2) is hereby set aside and in its place substituted the following:

'The application be and is hereby dismissed with costs.'"

ISSUES FOR DETERMINATION

The grounds of appeal raise the following issues.

1. Whether the appellant is bound by the decision of KWENDA J in HC 9866/17 and the subsequent confirmation of that decision by this Court in SC 342/22.
2. Whether in granting the respondent's applications for dismissal of appellant's applications for want of prosecution, the court *a quo* exercised its discretion in accordance with the law.
3. Whether the court *a quo* grossly misdirected itself on material facts.

SUBMISSIONS BEFORE THIS COURT

Mr. *Ncube*, for the appellant, submitted in the main that in granting the applications for dismissal, the court *a quo* improperly exercised its discretion in that while it was cognizant of the factors to be considered in applications of that nature, it only paid lip service to such factors. In accordance with the *Guardforce* case, the factors to be considered are the extent of the delay, the explanation given for such delay, the prospects of success in the application sought to be dismissed, the balance of convenience and the possible prejudice to the applicant if the application for dismissal is not granted.

Mr *Ncube* submitted that the court *a quo* failed to conduct a proper analysis of the relevant factors and misdirected itself in that it should have recognized that the period of delay was not inordinate. Further, it had not considered whether or not the explanation given for the delay was reasonable nor did it consider the prospects of success in the applications sought to be dismissed. He submitted that the court *a quo* had also misdirected itself by failing to properly apply its mind in assessing the balance of convenience and the possible prejudice to the respondent.

It was further submitted that in applications of this nature, the court should exercise its discretion sparingly and should be slow to exercise it where the discretion would result in the negation of a litigant's right to have access to the courts in order to have the real dispute between the parties resolved on the merits. *In casu*, it was submitted that the court *a quo* had improperly exercised its discretion and for that reason its judgment should be vacated. In support of these submissions, reliance was placed on a number of authorities including the decisions in *Cuthbert Dube* v *Premier Medical Investments & Anor* SC 32/22, *Rodgers* v *Rodgers* SC 64/07, *Kini Bay Village* v *Nelson Mandela Metropolitan* 2008 ZASCA 66 or 2009 (2) SA 166, *Guardforce Investments* v *Ndlovu & 2 Ors* SC 24/16.

Specifically, Mr. *Ncube* argued that the delay in each application of 3 months 3 weeks and 3 months respectively was not inordinate. With regards the reasonableness of the explanation given for the delay, he submitted that the court *a quo* had not addressed its mind to the explanation but digressed by considering instead the fact that the appellant had not informed the respondent and the registrar of the court *a quo* that it was holding prosecution of the two matters in abeyance pending the application for edictal service on the Searson brothers and service in Australia. It was argued that failure to extend such courtesy to interested parties should not, on its own, form the basis for penalizing the appellant in applications of this nature. If the court *a quo* had applied its mind properly, it would have come to the inevitable conclusion that the delay arose from the need to serve the Searson brothers in Australia in terms of an order of the court *a quo*. That explanation was therefore reasonable in the circumstances. As a matter of fact, by the time the court *a quo* heard the applications, the subject matter of this appeal, such service had been effected on the Searson brothers.

Mr *Ncube* contended further that the court *a quo* had not assessed the prospects of success of the two applications sought to be dismissed but instead assessed the prospects of success in the main matter HC 1313/22. In doing so, the court *a quo*, it was submitted, misdirected itself. With regards the application for joinder, it was contended that the court *a quo* should have realized that the Searson brothers were interested parties whose participation was necessary in the determination of the main matter. The prospects of success in the application to join them to those proceedings were therefore very high. It was further submitted that the court a *quo* also failed to consider the balance of convenience. The court *a quo* was also criticized for basing its decision on the wrong facts in that it wrongly stated that the appellant claimed to have acquired the property from Samalyn whereas the appellant had acquired the property from the Executor of the Estate duly appointed by the Master of the High Court. The court *a quo* had also falsely found that by the time it heard the applications on 16 June 2003, the Searson brothers had not been served when in fact service had been effected by the time the applications were heard. It is trite, it was submitted, that a court which exercises its discretion with the aid of wrong facts commits a misdirection.

On the other hand, Mr Mpofu, for the respondent, submitted that following KWENDA J`s judgment, which judgment was upheld by this Court on appeal, the respondent`s rights could no longer be questioned as the finding had been made that the respondent had incontestable rights to the property. Despite that outcome the appellant filed an application in which it sought a declaration that the respondent did not have any rights to the property. It did so under HC 1313/22. On the eve of the hearing of that application, the appellant filed the two applications the subject of this appeal. Mr *Mpofu* contended that these applications were not *bona fide* as the appellant`s true intentions were to stall the hearing of the main matter in HC 1313/22 and create

pendency. It had spurned the advice earlier given by the respondent to cite the parties it now sought to join, a clear indication that its application for joinder was not *bona fide* but only made for purposes of delaying the hearing of the main matter. It was contended that the application for condonation and rescission of judgment was also filed for the same purpose. Having filed these two applications, the appellant then failed to prosecute them. When the applications for dismissal were filed the appellant sought to oppose them instead of progressing the applications sought to be dismissed. To make matters worse, the appellant was barred for failure to file heads of argument on time. The bar was subsequently uplifted. These facts, argued Mr Mpofu, indicate the appellant`s indolence and indifference to compliance with the rules.

Mr *Mpofu* observed that an application for dismissal of a matter for want of prosecution involves the exercise of a judicial discretion. That being the case, such exercise of discretion can only be interfered with if it was based on a wrong principle or was capricious on the facts. He pointed out that the court *a quo* made a finding that the appellant lacked *bona fides* in its conduct of litigation, more so because of its failure to comply with the rules. More importantly, the appellant`s application HC 1313/22 (the main matter) is an attempt to set aside title obtained pursuant to a Supreme Court order. The appellant cannot succeed in that matter because it is trite that judgments of the Supreme Court are final. For that reason, it was submitted that the matter was *res judicata* and, accordingly it was futile for the appellant to pursue these applications.

It was also argued that it did not serve the appellant`s cause to plead that the delay in prosecuting its matters was short. Once the prescribed period had lapsed, the court`s jurisdiction to dismiss is triggered. In any event, what was tendered as an explanation for the delay should have been attended to well before the two applications were lodged. For these reasons, Mr *Mpofu*

argued that the court *a quo* was justified in not exercising its discretion in favor of the appellant. Further, the appellant had not, as required by law, communicated to the respondent and the court, that it was holding the applications in abeyance pending service of the edictal citation. No explanation was given for such omission. It was submitted that the court *a quo* was right in holding that fact against the appellant in its decision to grant the applications before it.

Mr *Mpofu* also pointed out that when the appellant was served with the two applications for dismissal for want of prosecution, it should have taken immediate steps to progress the applications to their logical conclusion. Failure to do so was a factor properly taken into account by the court *a quo* in granting the two applications. The case of *Guardforce Private Limited* v *S Ndlovu & 2 Others supra* was cited as authority for the court *a quo* to do so.

For these reasons, Mr. *Mpofu* urged this Court to dismiss the appeal with costs.

ANALYSIS

1. **Whether the appellant is bound by the decision of KWENDA J in HC 9866/17 and the subsequent confirmation of that decision by this Court in SC 342/22.**

It is common cause that the appellant was not party to the proceedings in the court *a quo* wherein KWENDA J declared the respondent as the owner of the property. Nor was the appellant party to the proceedings in SC 342/20 wherein this Court confirmed the decision of KWENDA J. It is therefore trite that the appellant, not being a party thereto, could not be bound by KWENDA J`s order nor that of this Court under SC 342/20. The court *a quo* therefore erred in proceeding as if the matter was *res judicata* and consequently determining that the order of this Court was final and that the appellant was flogging a dead horse.

The requirements for the special plea of *res judicata* are well established. These are that there be a previous judgement by a competent court in a matter between the same parties or their privies based on the same cause of action, with respect to the same subject matter. See *Bafokeng Tribe* v *Impala Platinum Limited* 1999(3) SA 517 (B).

Clearly the appellant`s claim introduces a new party not involved in the previous judgment. It cannot be said that the appellant`s claim is between the same parties or their privies as before. For that reason, the appellant`s claim cannot be defeated on account of that special plea.

2. Whether, in granting the two applications for dismissal for want of prosecution, the court *a quo* exercised its discretion in accordance with the law.

Rule 59 (15) of the Rules of the High Court 2021 provides as follows:

> "(15) 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 not set the matter down for hearing, the respondent, on notice to the applicant, may either
>
> (a) apply for the set down of the matter for a hearing in terms of r 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 order on such terms as he deems fit."

The above rule gives the court *a quo* the discretion to grant or dismiss such application. It is trite that such discretion must be exercised judiciously. In *Cuthbert Dube* v *Premier Medical Investments Private Limited & Anor* SC 32/22, this Court held as follows:

> "Rule 236 (3) of the High Rules does not set out the factors to be considered by a judge or a court in an application for dismissal for want of prosecution CHIDYAUSIKU CJ however set out those factors in the case of *Guardforce Investments Private Limited* SC 24/16 at p 5 to 6 as follows:
>
> 'The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following 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 possible prejudice to the applicant caused by the other party`s failure to prosecute its case on time.

Dealing with the delay and the explanation for the delay there is no doubt that there was a delay in this matter. However, the delay and the explanation thereof in this matter alone cannot form the basis of the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for dismissal for want of prosecution. This is a serious misdirection."

The court *a quo* stated the applicable law succinctly and went on to state that the factors must be considered holistically in that the length of the delay may be inordinate but the explanation for the delay and the prospects of success on the merits may tip the scales in favor of refusing the dismissal of the matter. Conversely, the length of the delay may be moderate and the explanation given is satisfactory, but the prospects of success on the merits are very negligible, thus favoring the grant of the application for dismissal for want of prosecution.

The appellant argues that while the court *a quo`s* statement of the law was correct, it failed to apply the applicable law to the facts before it. There is merit in that submission. We agree with Mr *Ncube* that in the exercise of its judicial discretion the court *a quo* was clouded in its assessment of the factors outlined in the Guardforce case *supra*, in that it took the erroneous view that the appellant was bound by the decision of KWENDA J and the confirmation of that decision by this Court in SC 342/22. It is common cause that the appellant was not party to both those proceedings and, for that reason, could not have been bound by the resultant decisions. Thus, the court *a quo* was convinced from the outset that the appellant was on a wild goose chase pursuing a matter already concluded to finality by this Court. It concluded therefore that there were no prospects of success in the applications before it. It similarly paid scant regard to the

length of the delay and to the explanation given for such delay and did not give reasons for holding that the balance of convenience favoured the respondent. Its reasoning was based on the wrong principle, namely that the appellant was bound by decisions in which it had not been cited. The record shows that the respondent had been well aware that the appellant had a direct and substantial interest in the matter before KWENDA J but deliberately omitted to cite or join the appellant in those proceedings. This is so because the respondent was aware that in HC 475/18 MANGOTA J had granted a default judgment confirming an earlier decision of the court *a quo* which vested ownership of the property in the appellant. As a result, the appellant had proceeded to take transfer of the property. Thereafter the respondent sought and was granted an order rescinding MANGOTA J`s judgment. It is that order that the appellant wants rescinded on the grounds that despite the existence of opposing papers, the respondent improperly obtained a default judgment against it. Further, the record shows that the parties had been involved in various other applications in the court *a quo* concerning ownership of this property. It is for these reasons that we opine that the failure by the respondent to cite the appellant in the case before KWENDA J was inexcusable.

In assessing the conduct of the appellant in failing to prosecute its applications timeously, the court *a quo* made an erroneous factual finding to the effect that by the time it heard the applications before it, the appellant was still to serve its papers on the Searson brothers. It inferred that such delay further demonstrated the appellant`s dilatory approach in progressing court processes and, by implication, took this fact into account in determining the applications before it. However, the record clearly shows that the Searson brothers were served well before the court *a quo* heard those applications. In that respect the court *a quo* applied the wrong facts in resolving the issues placed before it.

The judgment of the court *a quo* stands to be vacated in that the court *a quo* applied the wrong principle by holding that the matter being pursued by the appellant was *res judicata*. It was also clouded in its judgment in that it took into account a factor that was based on the wrong facts. It is trite that the court *a quo* was required to exercise its discretion guided by the factors in the *Guardforce* case *supra* in determining the fate of the applications before it. An appeal court will not lightly interfere with the exercise of that discretion unless such exercise of discretion was based on a wrong principle or was capricious on the facts. See *Hama* v *National Railways of Zimbabwe* 1996(1) ZLR 664 (S). *In casu* we find that the court *a quo* exercised its discretion based on the wrong principle and wrong facts. That being so this Court is entitled to substitute the discretion of the court *a quo* with its own.

In that regard, this Court finds that the facts show that there were considerable delays in the prosecution of the applications sought to be dismissed. However, the explanation tendered for the delays was plausible in the sense that the appellant needed to serve the edictal citation on the Searson brothers who were then based in Australia. Indeed, the court *a quo*, per MAKOMO J, had granted leave for such substituted service. A party that expends reasonable time and energy to execute an indulgence granted to it by a court cannot be adjudged not to have had a plausible explanation for delays arising from such an exercise. No evidence was adduced to show that in the pursuit of that objective, the appellant acted without due urgency. Whilst it is true that the appellant informed neither the court *a quo* nor the respondent that it was holding its applications in abeyance pending service on the Searson brothers, that fact, on its own, does not detract from the fact that the appellant was indeed attending to such service, which service was effected by the time the court a *quo* heard the two applications.

The appellant`s applications have prospects of success. The application for joinder of the Searson brothers is likely to succeed because the Searsons, being the executors who sold the property to the respondent, are definitely interested parties in that their evidence would be crucial in the resolution of the dispute between the parties. With regards the application for condonation and rescission of a default judgment given under HC 9866/17, the appellant alleges that such default judgment was entered despite opposing papers filed of record and that such judgment was fraudulently obtained. If appellant were to prove such facts, then the likelihood is that it would succeed in having that default judgment set aside. Clearly there are prospects of success in that application as well. There are further allegations that the transfer of the property to the respondent following that default judgment was in breach of s 30 A (1) (a) of the Capital Gains Tax Act, in that no capital gains tax was paid on that transfer. If that were to be proved, the transfer would be deemed illegal and therefore null and void.

On the whole, the balance of convenience favours the appellant as it seeks to have the dispute between the parties resolved on the merits rather than on technicalities.

DISPOSITION

We are satisfied that the court *a quo* failed to exercise its discretion judiciously. It did not properly apply the mandatory factors outlined in the *Guardforce* case and applied the wrong principle in holding that the appellant was bound by the decision of KWENDA J and of this Court in SC 342/22. It also took into account wrong facts in its determination of the applications before it. For these reasons, its judgment must be vacated. In the circumstances, this Court is entitled to substitute the court *a quo`s* discretion with its own. To that end, we hold that the explanation given for the delay that occurred was plausible. Further there are good prospects of success in the

applications sought to be dismissed. The balance of convenience in this matter favours the appellant.

For these reasons, the appeal ought to succeed. Costs will follow the cause. Accordingly, it is ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* be and is hereby set aside and in its place substituted the following:

"(a) The application in case number HC 8511/22 be and is hereby dismissed with costs.
(b) The application in case number HC 64/23 be and is hereby dismissed with costs."

MAVANGIRA JA **:** I agree

MUSAKWA JA **:** I agree

Muzondo & Chinhema Legal practitioners, for the appellant.

Mtetwa & Nyambirai Legal practitioners, for the respondent.