JENNIFER NAN BROOKER
and
ADRIENNE STALEY PEARCE
versus
RICHARD MUDHANDA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 29 July, 2 August & 12 September 2022

Opposed Application

D Ochieng, for the applicants
N Chikono, for the respondent

MUSITHU J:

The applicants and the respondent are embroiled in action proceedings in this court in HC 10410/14 and HC 10411/14. The respondent is the plaintiff in both actions, which were consolidated for purposes of trial. The cases could not proceed to pre-trial conference because of respondent's failure to file documents necessary to progress the said matters to that stage. The applicants approached this court under HC 2211/21 for an order to compel the respondent to file the requisite documents. On 16 June 2021, CHITAPI J granted the following order in chambers:

"IT IS ORDERED THAT

1. Respondent shall, within seven days from the date of service of this order by an employee of Wintertons, applicants' legal practitioners, on Ngarava, Moyo & Chikono, file and serve the following documents in Case Numbers HC 10410/14 and HC 10411/14:
   1.1 Plaintiff's Discovery Affidavit with Schedule
   1.2 Plaintiff's Certificate of Service of Discovery Affidavit
   1.3 Plaintiff's Index of Documents
   1.4 Plaintiff's Bundle of Documents
   1.5 Plaintiff's Certificate of Service of Index and Bundle of Documents
   1.6 Plaintiff's Summary of Evidence
   1.7 Plaintiff's Certificate of Service of Summary of Evidence

1.8 Plaintiff's Proposed Pre-Trial Conference Minute
1.9 Plaintiff's Certificate of Service of Pre-Trial Conference Minute
1.10 Plaintiff's Proposed Issues
1.11 Plaintiff's Certificate of Service of Proposed Issues

2. In the event that respondent fails to file and serve any of the aforesaid documents within the aforesaid period of seven days, applicants shall be entitled to file a further chamber application establishing such failure and seeking the dismissal of all respondent's claims in Cases Numbers HC10410/14 and HC 10411/14.
3. Respondent shall pay the costs of this application."

The applicants have approached this court for the dismissal of the respondent's claims alleging non-compliance with the order by CHITAPI J. The present application was filed on 20 July 2021. The founding affidavit was deposed to by NICHOLAS MARCH WILLSMER in his capacity as the applicants' counsel.

A certificate of service filed by the applicants' legal practitioners on 30 June 2021 shows that the order by CHITAPI J was served on the respondent's legal practitioners on 24 June 2021. According to the applicants, at the time the chamber application for dismissal of the claims was filed, the respondent had only supplied documents listed in paragraphs 1.1; 1.6; 1.8 and 1.10 of the order by CHITAPI J. As at that time, the applicants did not know whether the respondent had filed the documents listed in paragraphs 1.2; 1.7; 1.9 and 1.11, of the said order by CHITAPI J. The applicants averred that the two matters in HC 10410/14 and HC 10411/14 could not proceed to the round-table conference, pre-trial conference and to trial unless the outstanding certificates were filed.

The import of the order by CHITAPI J was that the said documents must be filed within seven days. The applicants contend that even assuming the said documents were, they had not been served on the applicants' legal practitioners as directed by the court order. The applicants further averred that the respondent had not filed or served the documents listed in para(s) 1.3, 1.4 and 1.5 of the said order. The respondent's claims could not progress to the next stage until these documents were also filed and served. The applicants claimed that the respondent was aware that these documents were required by the court from as far back as May 2021 when the application in HC 2211/21 was filed. He was also aware since 24 June 2021, when CHITAPI J's order was served that his failure to file and serve any one of the documents, let alone six of them, would lead to the filing of the present application.

It was for the foregoing reasons that the applicants prayed for the dismissal of the respondent's claims with costs.

In his opposition the respondent denied that the deponent to the founding affidavit was authorized to depose to that affidavit by the applicants whom he believed were outside the country. While not denying that the court order may have been served on his legal practitioners, the respondent claimed that he could not attend at his legal practitioners offices because he was exhibiting some symptoms akin to Covid 19. He only managed to engage with his legal practitioners on 15 July 2021, in order to deal with the matters. On 19 July 2021, his legal practitioners wrote to the applicants' legal practitioners in response to their letter of 9 July 2021. In the letter of 19 July 2021, the respondent denied that he was trying to sell the properties in dispute. That letter does not deal with the order by CHITAPI J. In further exchanges between the parties legal practitioners' proposals were made for a meeting to discuss the matters further. Such meeting never materialised.

The respondent averred that he had since filed all the documents that the applicants claimed were outstanding, and as such there was no prejudice to the applicants as the matter was now ripe to proceed to pre-trial conference. The respondent's trial bundle had been prepared and ready for filing. The respondent claimed that he had since complied with the court order and for that reason the matters ought to be heard on the merits in order to put the dispute to rest.

In his reply the deponent to the founding affidavit averred that para 2 of his affidavit confirmed that he was authorized to make the application as well as swear to the founding affidavit. The means by which he was authorized to do so was irrelevant. All that mattered was that he had been authorized.

The deponent further averred that the respondent's claims that he could not visit his legal practitioners' offices because he evinced symptoms of Covid 19 was just a ruse. Letters had been written to the respondent's legal practitioners from as far back as September 2020 to May 2021 requesting the respondent to submit the said documents. The chamber application under HC 2211/21 was filed and served in mid May 2021. The order by CHITAPI J was granted in mid June 2021 and served in late June 2021. The respondent only visited his legal practitioners in July 2021. The applicants argued that the period during which the respondent failed to act was inordinately

long. It was well in excess of a year. In any event, it was not even clear whether he took a Covid 19 test to verify if indeed he had contracted that virus. The respondent had failed to give a plausible explanation for his delay.

The applicants further contended that it was not a defence to an application for dismissal that the cause for the complaint had since been removed. At any rate, the respondent had only partly complied with the court order. The order by CHITAPI J required him to file and serve the various certificates of service. If at all they were filed, then they were not served. The respondent therefore remained in default.

Submissions

At the hearing, it emerged that the respondent's heads of argument were filed out of time, and the respondent was consequently barred. Mr *Ochieng* for the applicants consented to the upliftment of the bar to allow arguments on the merits. The bar operating against the respondent in respect of the failure to file heads of argument timeously was accordingly uplifted by consent. The issue of whether or not the deponent to the applicants' founding affidavit was authorized to depose to that affidavit on behalf of the applicants appeared to have been taken as a preliminary point. It was not pursued in the respondent's heads of argument and oral submissions. I therefore considered it abandoned.

Mr *Ochieng* submitted that the application turned on a consideration of the extent of delay, the explanation for the delay, prospects of success and balance of convenience. The order by CHITAPI J was granted unopposed. The respondent was nevertheless served with a copy of the order, but did not comply. The court was referred to the case of *Bishi* v *Secretary for Education*[1]. It was further submitted that the court needed to take a sterner approach in disposing of this matter. The respondent had not only failed to pursue his claims for a considerable period of time, but he had also failed to take action despite being served with the application in HC 2211/21 and the subsequent court order. The delays were too lengthy and the prospects of success were not even satisfactorily explained.

[1] 1989(2) ZLR 240 (HC)

In response, Mr *Chikono* for the respondent submitted that tremendous progress had been made in the main matter to the extent that the parties had appeared before a pre-trial conference judge. The matter could not be dealt with because of this present application which was pending. There was need to achieve finality to litigation. The issue of finality required that the merits of the matter be ventilated. Counsel further submitted that all the documents had been filed at the time that the notice of opposition was filed.

Analysis

It is a settled position of the law that courts have a duty to regulate and protect their processes. One way of achieving that is by issuing court orders directing litigants to fulfill certain obligations failing which adverse consequences will befall such litigants. The applicants approached this court in HC 2211/21 having been frustrated by the respondent's failure to furnish the required information in order to progress his claims under HC 10410/14 and HC 10411/14. The order by CHITAPI J came as no surprise.

I have had occasion to peruse the record HC 2211/21, and observed that between September 2020 and May 2021, there was a constant flow of communication from the applicants' legal practitioners to the respondent's legal practitioners requesting them to submit the outstanding documents so that the matter could proceed to pre-trial conference. Some of the correspondence was directed to the Registrar of the High Court. The applicants' legal practitioners were advised to attend to the outstanding issues raised by the pre-trial conference office to enable the Registrar to refer the matter to a judge. The queries pertained to outstanding documents from the respondent.[2] The communication between the applicant's legal practitioners and the Registrar was copied to the respondent's legal practitioners of record herein. There is nothing in the record to suggest that the respondent was galvanized to act notwithstanding all these reminders.

The order by CHITAPI J must therefore be understood in the context of the events preceding its granting. Paragraph two of that order was clear that in the event that the respondent failed to file and serve any documents within a period of seven days, then the applicants were entitled to approach this court seeking the dismissal of the respondent's claims. The respondent does not

[2] Letter of 26 November 2020 from the Registrar to Wintertons and the attached query sheet. See also the Registrar's letters of 17 December 2020, 1 April 2021. All the correspondence are attachments to the applicants' application in HC 2211/21.

deny that the court order was served on his legal practitioners. It has not been demonstrated before this court that upon service of that court order, the respondent or his legal practitioners attempted to comply with the order within the prescribed seven days.

I agree with the applicants' submission that the explanation given for the non-compliance with the order is more of a stratagem. It is highly unconvincing. The alleged illness on the part of the respondent was not backed by medical evidence. Even assuming that was the case, the respondent's legal practitioners had already been served with a copy of the court order a whole month before their purported meeting with their client. Still they did not find it prudent to seek an extension of the time within which to comply with the order assuming they needed to take instructions from client, and in consideration of his alleged illness. Further, and out of courtesy, they were expected to communicate their predicament to the applicants' legal practitioners, but they did not. In their communication with the applicants' legal practitioners, there was no reference to the court order. They did not even allude to the outstanding documents which had stalled progress of the matter.

In determining this application, the court was urged to consider the principles applicable to an application for dismissal of a matter for want of prosecution. Applicants' counsel referred to the case of *Melgund Trading (Pvt) Ltd* v *Chinyama & Partners*[3], while the respondent's counsel cited the case of *Dube* v *Premier Medical Investments & Ano*[4]. Both matters were concerned with an application for dismissal of a matter for want of prosecution. The *Dube* v *Premier Medical Investments* matter reaffirmed the principles applicable in an application for dismissal for want of prosecution. MATHONSI JA set out the position of the law as follows:

> "Rule 236 (3) of the High Court Rules (now r 59 (15) of the High Court Rules, 2021 does not set out the factors to be considered by a judge or the court on an application for dismissal for want of prosecution. CHIDYAUSIKU CJ however set out those factors in the case of G*uardforce Investments (Pvt) Ltd, supra,* at pp 5 -6 as:
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> "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.

[3] HH 703/16
[4] SC 32/22

> 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 for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for rescission for want of prosecution. This is a serious misdirection."[5]

The *Dube* v *Premier Medical Aid Investments* matter effectively overturned the *Megund Trading (Pvt) Ltd* v *Chinyama* matter in setting out the factors to be considered in applications for dismissal for want of prosecution. The application before this court is not one for dismissal for want of prosecution. It is one for dismissal for want of compliance with an order of this court. The factors to be considered are therefore different to the extent that if I am to consider for instance the prospects of success on the merits, and I am convinced that the respondent's claims are indeed meritorious, then it follows that I cannot dismiss the claims as directed in the order by CHITAPI J. Yet the gravamen of the application before me is the failure to comply with the said order. Were this court to do so, then it would be varying the order by CHITAPI J, which it cannot competently do at this stage. In my view all that the applicants need to establish is that the respondent was aware of the order by CHITAPI J and he failed to comply with same.

Had the respondent and his legal practitioners been so diligent, then they would have approached the court for condonation and extension of time so that they are allowed to submit the required documents outside the seven days directed by the court order. I am not persuaded that it is in the interests of justice at this stage to effectively close the door to the respondent if he so wishes to reinstitute the claim. It is an order of this court that was not complied with. That court order sought to direct compliance with procedure so that the matter could be accelerated to the next level.

Ordinarily, a failure to comply with a court order invites contempt of court proceedings. A litigant is given an opportunity to purge their contempt within a certain period of time failing which drastic measures will ensue to the party in contempt. Contempt of court proceedings for purposes of ensuring compliance with a civil order seek to achieve two objectives, which are enforcing compliance and protecting and upholding the dignity and respect of the court.[6] The party in contempt can always seek redress once they have purged their contempt. In short, a failure

[5] At p11 of the judgment
[6] *Cawood & Ano v Mangena & 3 Ors* HB 41/04

to comply with an order of court does not necessarily result in the court permanently closing its doors to the litigant in contempt. Depending on the circumstances of each case, the litigant in contempt may approach the court to seek its condonation if so minded.

For the foregoing reasons, this court is persuaded to grant the relief sought by the applicants. The mere fact that the respondent has since furnished all the outstanding documents does not necessarily mean that he complied with the terms of the court order granted by CHITAPI J. That order was clear on the consequences that would befall the respondent's claims if it was not complied with within seven days of its service. The respondent has not demonstrated that he filed and served the outstanding documents within the period prescribed in the order by CHITAPI J. He is therefore in breach of that order.

In any event, no evidence was placed before this court to show that all the documents that the respondent was required to file and serve in terms of that court order were indeed filed and served even outside those seven days. The respondent and his legal practitioners are clearly taking the court for granted. Litigants must stand warned that a court will not countenance such a blatant disregard of its court orders. Orders of court, whether correctly or incorrectly granted, must be complied with unless they are set aside.[7]

As regards costs of suit, I see no reason why the general rule that costs follow the event should not be heeded herein. The applicants sought the granting of the order with costs on the ordinary scale. I am inclined to grant the order with costs on that scale.

[7] See *Culverwell* v *Berra* 1992 (4) SA 490 (W).

DISPOSITION

Resultantly it is ordered that:

1. The respondent's claims as plaintiff in case numbers HC 10410/14 and HC 10411/14 be and are hereby dismissed for want of compliance with the order issued by CHITAPI J on 16 June 2021 in case number HC 2211/21.
2. The respondent shall pay the applicants' costs of suit.

Wintertons, applicants' legal practitioners
Ngarava, Moyo & Chikono, respondent's legal practitioners