CHICHI CLOTHING MANUFACTURERS

(PRIVATE) LIMITED

and

E K SAGUTA (PRIVATE) LIMITED

and

DOC WATSON (PRIVATE) LIMITED

t/a BIRCHNOUGH BRIDGE HOTEL

and

ELLIOT SAGUTA CHICHI MAKUYANA

t/a CHICHI TRADING STORES

versus

COMMERCIAL BANK OF ZIMBABWE

t/a THE JEWEL BANK

and

AGRICULTURAL BANK OF ZIMBABWE LIMITED

and

THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE, 8 June 2010 and 2 May 2012

**Civil Cause**

*E S C Makuyana*, for the plaintiffs

*D Drury*, for the first defendant

*J Dondo*, for the second defendant

No appearance for the third defendant

GOWORA J: The first and second defendants have made an application for the dismissal of the plaintiffs’ claims against them, on the basis that there has been an abuse of the process of the court on the part of the plaintiffs. In addition, due to the absence of a legal practitioner acting on behalf of the first, second and third plaintiffs on the date scheduled for the trial before me, it is contended that the named plaintiffs were in default of appearance, and that therefore, in the event that I am not persuaded to dismiss the claim on the first argument advanced, I should dismiss the claims in respect of the three on the basis of default of appearance for trial. The background surrounding this application is the following.

In this matter the plaintiffs caused summons to be issued on 5 November 2004. At the time the plaintiffs were being represented by *Musunga & Associates* as the summons bears their name. On 24 December 2004 the first defendant filed a plea in abatement. 0n 6 January 2005 the second defendant filed a substantive plea to the summons and declaration. The first defendant then filed heads of argument on the plea in abatement and proceeded to have the matter set down for hearing. By the time the matter was heard the plaintiffs had changed their legal practitioners on not less than three occasions. In other words they were onto their fourth set of legal practitioners when the plea in abatement was heard. On 16 February 2006 this court dismissed with costs the first defendant’s plea in abatement.

In March 2006 the first defendant pleaded to the summons and declaration. The plaintiffs had on 13 March 2006 filed and served a notice to plead and bar upon the first defendant. On 23 March 2006 the plaintiffs filed an application for default judgment which was dismissed on the grounds that the first defendant had filed its plea prior to the plaintiffs barring the defendant. Thereafter the matter proceeded in terms of the rules and was referred to a judge in chambers to hold a pre-trial conference. In February 2007 the plaintiff’s legal practitioners renounced agency and on 1 March 2007 a new set of legal practitioners assumed agency on their behalf. On 13 October 2007 a new firm of legal practitioners assumed agency on behalf of the plaintiffs. On 23 October 2008 the legal practitioners filed a notice of set down for a pre-trial conference. The pre-trial conference was eventually held on 18 November 2008 and the matter was referred to trial. On 23 June the plaintiff’s legal practitioners renounced agency. On 31August 2009 the firm of legal practitioners which secured the dismissal of the plea in abatement resumed agency on the plaintiffs’ behalf. They subsequently renounced agency on 16 November 2009. The following day another firm of legal practitioners assumed agency. On 19 February 2010 a firm of legal practitioners filed an assumption of agency of behalf of the plaintiffs. On 27 April 2010 a new firm of legal practitioners assumed agency on behalf of the plaintiffs. Their notice of renunciation of agency is not filed of record.

On 10 November 2009 the parties appeared before PATEL J who gave certain directions and postponed the matter to 9 February 2010. A note by the learned judge is on record to the effect that the plaintiffs’ legal practitioners had renounced agency on 16 November 2009. Thereafter the file was referred to me and I occasioned the matter to be set down before me for trial on 8 February 2010. In the event I was unable to deal with the matter on the scheduled date and the parties were given 10 May 2010 as the date for trial.

The parties duly appeared at the court for trial. Whilst the fourth plaintiff appeared in person there was no representation for the first, second and third plaintiffs as being companies they could only be represented by a legal practitioner unless the alter ego had been given leave to represent them. I then gave directions to the fourth plaintiff to secure a legal practitioner to represent the plaintiffs and for that legal practitioner to file a notice of assumption of agency on or before 24 May 2010. The matter was postponed to 8 June 2010 for trial by consent to allow the plaintiffs to secure legal representation as aforesaid. On 4June 2010 the fourth plaintiff addressed a letter to the court requesting a postponement of the matter as he “was busy on my farm planting maize and wheat.”

On 8 June 2010 again there was no appearance for the first, second and third plaintiffs and they were held to be in default. The fourth plaintiff was in attendance. The defendants then moved for the dismissal of their claims on the grounds that they had failed to prosecute their claims. I requested counsel to furnish me with authorities that would assist me. I am indebted to Mr *Drury* for his written submissions filed on 24 February 2011. I have received no submissions from the second defendant. Submissions filed on behalf of the plaintiffs were only received by me on 25 August 2011.

Two issues fall for determination. The first is concerned with the alleged default of appearance of the first, second and third plaintiffs at the trial scheduled for hearing on 8th June 2010. The second is whether or not this court has the power in the exercise of its inherent jurisdiction to dismiss the plaintiffs’ claim on the grounds of abuse of process or failure to prosecute the claim.

What I first have to determine is the non appearance of the first, second and third defendants at the trial, in that they were not represented by a legal practitioner but by Mr Makuyana, the fourth plaintiff herein. At the initial hearing before me I asked the fourth plaintiff if he could represent the companies without leave of the High Court permitting him to do so. I requested him to secure legal representation for the companies so that they could properly be before the court. He did not do so. Ultimately it was contended on behalf of the first and second defendants that he was incapable of representing the companies and I should find them in default and barred as a consequence.

Mr *Drury* did not refer me to any authority in which the issue of a company being represented by an individual who is not a registered legal practitioner has been discussed within this jurisdiction. It is however trite that there exists a common law rule to the effect that a company can only be represented by legal practitioner in the superior courts. There is in fact a plethora of authority on the issue the leading authority being *Lees Import and Export* (*Pvt*) *Ltd* v *Zimbank* 1999 (2) ZLR 36. This is what was said by GUBBAY CJ in relation to challenge on the lack of constitutionality of the rule:

“This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation. To be preferred is one which serves the interests of the Constitution and best carries out its objects and promotes its purposes.

An application of this interpretive approach, with the legal consequences of the organic doctrine in mind, persuades me that the common law rule offends against s 18 (9) of the Constitution, certainly to the extent that it prohibits the duly authorised organ or alter ego of a company the right to appear in the person of the company before the High Court and the Supreme Court in this country. In short, the right given to “every person” under the constitutional mandate includes within its reach a corporate body appearing through its alter ego. In that sense, it is that body which is exercising the right.”

The learned Chief Justice stated that the view expressed in that judgment did not seek to undermine the rule of practice but merely provided an exception to it. It did not permit a company to appear before the courts through someone who was a mere director, officer or servant or agent of the company. Additionally it was held that the High Court had the power to regulate its proceedings and in this vein it had the power to grant authority upon a director or officer of the company to act on behalf of the company in legal proceedings.

It is common cause that the fourth plaintiff had never sought such authority. Consequently the fourth defendant did not have the capacity in *judicio* to appear on behalf of the first, second and third plaintiffs in the proceedings before me. It follows therefore that the first, second and third plaintiffs were in default of appearance at the trial. In my view, the defendants would have been entitled at that stage to seek a dismissal of the claim presented by the first, second and third plaintiffs to court. They chose instead to orally apply for dismiss the claim on the basis that the plaintiff had failed to prosecute their claim arms finality.

I turn therefore to the application for dismissal of the claim on the grounds of alleged abuse of process. It has been contended on behalf of the first defendant that this court has inherent power to regulate its proceedings and under exercise of this power it can dismiss an action where there has been an abuse of court process. This is a correct statement of the law. The High Court being a superior court with inherent jurisdiction can regulate its own processes in order to prevent abuse of those processes. This is a power which ought to be sparingly exercised and only in very exceptional cases and when the likelihood of the case succeeding stands outside the region of probability altogether and the case becomes vexatious because it is impossible. One of the leading authorities in Roman Dutch law on this aspect is the South African case of *LF Boshoff Investments* v *Cape Town Municipality* 1969 (2) SA 256. At 275B-D CORBETT J made the following comment:

“The power of the Court to set aside a proceeding on the grounds that it is frivolous and/or vexatious and/or an abuse of the process of the Court is one which ought to be sparingly exercised and only in very exceptional cases (see *Ravden* v *Beeten* 1935 C.P.D 269 at p 277). The proceeding must be obviously unsustainable and this must appear as a matter of certainty and not merely on a preponderance of probability (*African & Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555 (AD) at p 565).”

Although I have made specific reference to the above quoted authority, it is not the first case in which the courts in South Africa have had to contend with such an issue. The issue is not clear as reflected by the divergence of decisions that have emanated from the eminent jurists who have rendered judgments concerning the same. It is accepted by all that a superior court with inherent jurisdiction has the discretion and power to regulate its process and in the exercise of this discretion can act to stop an abuse of its process. It is also accepted that it is a power that should be sparingly exercised. It has been accepted that establishing that a litigant is guilty of abuse of court process is easier said than done. The courts have required in some cases that the proceedings sought to be set aside be obviously unsustainable as a matter of certainty and not on a preponderance of probabilities. Although the court will take into account the prejudice occasioned to a defendant due to delays on the part of a plaintiff in finalising his claim, that on its own is not a factor that the court should have regard to. The overriding factor is therefore whether or not the plaintiff is guilty of an abuse of court process. For purposes of this application the first defendant has set out in its written submissions the background surrounding the claim instituted by the first plaintiff and to which the other plaintiffs have been joined as parties. Stand 283 which was previously owned by the first plaintiff was sold in execution pursuant to a judgment of this court and transferred to the second defendant on 9 November 2000. Prior to that the first plaintiff had under Case No HC 4403/00 sought a provisional order to stop the sale. The provisional order was discharged on the return date. Thereafter the first plaintiff made an application under Case No HC 7648/00 to have the discharged order set aside. The plaintiff later withdrew the application. On 6 December 2000 the plaintiff filed an application to have the sale set aside. The application was withdrawn. These proceedings were then launched in November 2004, after a period of almost four years after the property had been sold and transferred. After launching the proceedings in question, the *lis* did not progress at a normal pace mainly due to the change of legal practitioners representing the plaintiffs. The first defendant has provided a list which it says is not exhaustive but as an indication of the length that the plaintiffs have been allowed to abuse the system. The list is as follows:

***Mavunga& Associates*-5 November 2004**

Renunciation of Agency by *Mavunga & Associates* on 4 February 2005

Assumption of Agency by *Ziweni & Company* on 8 February 2005

Renunciation of agency by *Ziweni & Company* on 29 November 2005

Assumption of Agency by *Mutamangira & Associates* on 30 November 2005

Renunciation of Agency by *Mutamangira & Associates* on 28 February 2007

Assumption of Agency by *Mananse & Manase* on 1 March 2007

Assumption of Agency by *V Nyemba & Associates* on 13 October 2008

Renunciation by *V Nyemba & Associates* on 23 June 2009

Assumption of Agency by *Mutamangira & Associates* on 31 August 2009

Renunciation of Agency by *Mutamangira & Associates* on 17 November 2009

Assumption of Agency by *Mutamangira & Associates* on 19 November 2009

Renunciation of Agency by *Mutamangira & Associates* on 13 January 2010

Renunciation by *Dururu & Associates* on 21 April 2010

Assumption of Agency by Gonese, Jessie *Majome & Company* on 27 April 2010

Assumption of Agency by *Muunganirwa & Company* on 24 August 2010

The contention by the plaintiffs is that on 8 June 2010 they could not have been in default because the representative, of the fourth plaintiff was in attendance. It is contended further that in the circumstances the representative had no option but to seek a postponement as the matter was complicated and a legal practitioner was required to assist. No attempt is made to explain the numerous delays occasioned to the finalisation of the matter through the changes in legal representation. Even when given an opportunity to appear in court, the plaintiffs’ representative could not see the need for the matter to be finalised.

The submission made in the heads of argument to the effect that the plaintiffs only knew of the transfer of the property in dispute in 2004 is not supported by the facts on the record. As has been adverted to earlier in this judgment, the first defendant had filed a special plea which was dismissed. The parties herein filed heads of argument in respect of the same. In those heads, it is contended on behalf of the plaintiffs that they had continuously opposed the sale of the property, effectively interrupting prescription. It was contended further that from the year 2000 this matter had been pending in the court one way or another thus rendering the special plea in abatement frivolous and ill-founded. In amplification of this argument, it was suggested that the cases instituted by the plaintiffs persistently over the period in question had in fact been a judicial interpellation to stay or interrupt prescription. To then argue, as is sought herein, that the plaintiffs only became aware of the transfer in 2004 is not only bending the truth but to abuse court process. The arguments on behalf of the plaintiff shift in terms of time frame and facts as befits the occasion. It does not assist the plaintiffs to try and hoodwink the court. The defendants have approached the court for relief based on alleged abuse of court process by the plaintiff. An explanation for the delay is required from the plaintiffs and this process needs candour on their part. Unfortunately I am being given a distortion of facts. The plaintiffs by failing to be candid with the court are not helping their cause.

It is also argued on behalf of the plaintiffs that the reason why the plaintiffs had no legal representation on 8 June 2010 was due to the fact that the legal practitioner had renounced agency at the last minute. Unfortunately this is not a reason that I can say to be persuasive. It may well be that the plaintiffs have not found it necessary to acquaint their legal practitioners with the history of the manner in which they were conducting their *lis*. They changed legal practitioners without batting an eyelid. I have had sight of notes written by my brother judge PATEL J on 10 November 2009. The plaintiffs were then directed to file an agreed bundle of documents by 22 November 2009. This was not done and even after I assumed conduct of the record it was never done. The directions I gave after the parties appeared before me were not complied with. Although I set the mater down for hearing on 8 June the plaintiffs’ representative without seeking the services of a legal practitioner to appear on the scheduled date wrote a letter to the Registrar seeking a postponement on the grounds that he was busy at his farm planting wheat and maize.

In *Sanford* v *Haley NO* 2004 (3) SA 296 (C) MOOSA J affirmed the principle that superior courts of inherent jurisdiction under the exercise of their discretion have the power to dismiss an action on the grounds of delay or abuse of court process but the discretion could only be exercised sparingly. He stated the prerequisites for the exercise of the discretion as being the following:

“The prerequisites for the exercise of such discretion are, firstly, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the deceased is seriously prejudiced by such delay. (*Gopal* v *Subbamah* 2002 (6) SA 551 (D).) The test for the dismissal of an action enunciated by IINNES CJ and reinforced by SOLOMON JA in the case of E Western Assurance Co is whether or not the plaintiff has abused the process of the court in the form of frivolous or vexatious litigation. Such test formulated by FLEMMING DJP in *Molala*’s case (*supra*) is whether the conduct of the plaintiff oversteps the threshold of legitimacy. The test is a stringent one. It is understandable that the relief will not easily be granted. It will depend on the facts and the circumstances of each case and on the basis of fairness to both parties. (Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* at 547.”)

It is common cause that before this *lis* the plaintiffs had instituted not less than six other sets of litigation in the High Court, viz; HC 4403/00, HC 7648/00, HC 12906/00, HC 10438/01, HC 5773/03 and HC 9352/04 all of which were concerned with the sale of the property in question and all of which were withdrawn. The current proceedings can only be described as having proceeded on a pace that cannot even be likened to that of a tortoise. At the time the matter was referred to me for trial, the summons was five years old. The property in question had been sold in January 2000, with transfer to the second defendant being registered in November 2004. The special plea in abatement was dismissed on 16 February 2006. The first defendant then filed its plea on 22 March 2006. A chamber application for default judgment against the first defendant filed on 22 March was dismissed on 1 August 2006. The first pre-trial conference was scheduled for hearing before a judge on 27 March 2007. It is common cause that this process was only concluded on 18 November 2008 when the matter was referred to trial. Thereafter the record shows that the matter was enrolled for hearing before my brother judge PATEL J on five occasions from 5 May 2009 to 8 February 2010. Initially set down for trial on 5 May 2009 the matter was postponed to 23 June 2009. The record reflects that on that date *Messrs V Nyemba & Assocaites* who had been acting for the plaintiffs filed a notice of renunciation of agency. The matter was then postponed to 1September 2009. On 31 August 2009 *Messrs Mutamangira & Associates* assumed agency. The matter did not take off as scheduled on 1September 2009 and was postponed to 10 November 2009. On that date it again failed to take off due to the shambolic state of the papers filed on behalf of the plaintiffs. The judge then gave the plaintiffs’ legal practitioners directions on the pleadings and the matter was postponed by consent to 9 February 2010. On 16 November 2009 *Messrs Mutamangira & Associates* renounced agency. When the matter came before me the plaintiffs had not complied with the directions given by his Lordship PATEL J on 10 November 2009 nor were they legally represented. I afforded them time to obtain legal representation but there was an evident lack of commitment on the part of the fourth plaintiff to seek counsel. Given the history of the case narrated above it seems to me that the defendants have established delay in the prosecution of the claim.

**The excuse**

There has been no explanation form the plaintiffs as to the failure to appoint a legal practitioner to act on their behalf on 8 June 2010. The fourth plaintiff seemed to be under some misapprehension that the court exists for his convenience. He advised the registrar in writing that he was seeking a postponement of the matter in order to carry out farming activities. Despite clear directions to him to secure the services of legal counsel by 24 May 2010 he was of the view that it was not of the moment and he could overlook what the court had directed and get a postponement to a date of his choice. Given the numerous delays occasioned to the *lis* as a result of the plaintiffs’ difficulties with their legal practitioners the attitude displays cannot be described in any other form except contempt of this court and its procedures. There was no attempt to give a reasonable explanation for the need to have the matter postponed further.

I note that the submissions filed on behalf of the plaintiffs appear to be focused on the fourth plaintiff. The legal practitioner who prepared the same has overlooked the first, second and third plaintiffs and has not made any representations as to their non attendance at trial on 8 June 2010.

Equally no effort has been made to explain the numerous postponements of the matter at the instance of the plaintiffs and the delays occasioned over the years due to the untimely renunciation of agency on the part of the legal practitioners acting for the plaintiffs. In *Kuiper & Ors* v *Benson* 1984 (1) SA 474 the Court had to consider an application such as the one before me. At 467G-477E GORDON J stated:

“The Transvaal Rules of Court (Rule 47) gives to the defendant the right to set down an action for trial if the plaintiff fails to do so. They may have good reasons for not wanting to revive such an old matter in a case of this kind, but the question arises as to whether, if they failed to do so, the Court should grant the extraordinary remedy of striking out the claim. In *Meyer* v *Meyer* 1948 (1) SA 484 (T) CLAYDEN J, referring to the remedies provided to a defendant by Rule 47 when a plaintiff fails to set a case down for hearing, stated that he was by no means convinced that the Court has an inherent power to dismiss an action for want of prosecution. However, it seems to me that the view accepted in the majority of cases is that the Courts do have such an inherent power. In *Scoeman en Andere* v *Van Tonder* 1979 (1) SA (O) BRINK J, after reviewing most of the authorities, came to this conclusion but stated at 305F:

‘The Court will, however, certainly in view of the Rules of Court, only apply its inherent power to bar the prosecution of an action in most exceptional cases.’”

This would accord with the views of INNES CJ, expressed in *Western Assurance Co* v *Caldwell*’s *Trustee* 1918 AD 262 at 273 (at foot of page):

“Now it is needless to say that strong grounds must be shown to justify a court in staying the hearing of an action. The courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action.”

It is noteworthy that there appears to be no similar case in the reports where relief was granted in an opposed trial action, purely on the grounds of delay. In my view the power to strike out the claim will be used only in exceptional cases, as stated in the cases referred to above, and then only where there has been a clear abuse of the process of Court.

In the present case, while I consider the plaintiff’s conduct reprehensible, I am unable to say that his action is so tainted as to amount to an abuse of process. Despite his delays, he had in fact consulted a number of attorneys, and whatever the causes of the problems with his attorneys and counsel may have been, I do not consider that the doors of the Court should, at this late stage, be closed to him. Should the case proceeds, the trial Court would be in a position to take all relevant factors into account, including the factor of prejudice to the defendants.

**Prejudice to the defendants**

As far as the first defendant is concerned, it is submitted that inherent prejudice has arisen. Staff employed by the defendant and who dealt directly with the fourth plaintiff have left employment. Suggestions that financial prejudice has also been occasioned through attendances by witnesses at court only for the matter to be postponed have not been challenged. It is also argued, which argument has not been countered, that due to the passage of time, memories fade and document tend to get lost so whatever witnesses may be available, due the length of time it has taken for this matter to be dealt with the first defendant has suffered further prejudice in that its defence to the claim may have suffered irreparably. Added to that is the extent to which the defendant has incurred legal costs which the plaintiffs will never pay, as the costs are as between legal practitioner and client. It was also contended that an award of costs made against the plaintiffs at the last abortive hearing before PATEL J have never been paid, let alone tendered.

In so far as the second defendant is concerned, it is suggested that it was an innocent purchaser who has occupied the property in question for a period in excess of ten years. The second defendant paid value for the property and has taken transfer. Against that is the dilatory nature by which the plaintiff and its legal practitioners have over the years dealt with the matter, such that it appeared that there was no will to complete the *lis*. A suggestion therefore that the action is frivolous and vexatious finds favour with me.

In the event there is clear evidence that the fourth plaintiff has abused court process in this case. He has been the primary mover of all court processes involving the dispute between the parties. He has represented the plaintiffs in every single litigation launched in connection with the sale of the property being claimed by the first plaintiff. He has been given directions by this court which he has with impunity ignored or refused to comply with those directions. I am persuaded that in his case, it is only just and equitable that the claim be dismissed with costs on the basis that there has been an abuse of court process.

The position is different in respect of the first, second and third plaintiffs. They were not before me on 8 June 2010. That said, the defendants have not placed before me any evidence to justify a finding by me that there has been an abuse of process on their part. I am therefore not prepared to dismiss the claim filed by them on that basis. However, they were in default of appearance on 8 June 2010. In the circumstances they were in default of appearance of court at trial. I accordingly dismiss their claim on the basis of default.

In the premises the claim by the plaintiffs is hereby dismissed. The plaintiffs are ordered to pay the defendants’ costs jointly, and severally, the one paying the others being absolved.

*Thodlanga & Associates* legal practitioners for the plaintiffs

*Gollop & Blank* legal practitioners for the first defendant

*Chinamasa, Mudimu & Dondo* legal practitioners for the second defendant