NMB BANK LIMITED
versus
MAXORCARTER (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 & 16 January 2015

Opposed application

T.C. Masara, for applicant
S. Chatsama, for respondent

MAFUSIRE J: *Ex tempore* I granted the order sought by the applicant. It was for the dismissal of respondent's application in HC1525/14 for want of prosecution. As I granted the order I berated the respondent's counsel for mounting and persisting with a patently spurious opposition. I lamented the fact that the applicant had not asked for costs of suit on the higher scale and *de bonis propriis.* I would have readily granted them. Here is what drew my ire.

The case had been a simple application for dismissal for want of prosecution in terms of Order 32 r 236 (4)(b) of the rules of this court. That rule reads:

> "**263. Set down of applications**
> (1) ……..
> (2) ……...
> (3) ……
> (4) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within one month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either –
>
> (a) set the matter down for hearing in terms of rule 223; or
>
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such order on such terms as he thinks fit."

The facts were straightforward. Following a judgment of this court in favour of the applicant, the respondent's immovable property had been sold in execution. The Sheriff had confirmed the sale. In proceedings under HC 1552/14 the respondent had applied to this court to set aside the decision of the Sheriff confirming the sale. The applicant had filed a notice of

opposition. The respondent had then filed an answering affidavit. Thereafter the respondent had done nothing further. For eight months the matter had lain dormant. Among other things, the respondent continued to occupy and utilise the property. The property had been turned into commercial lodges, offering accommodation to the public. It was then that the applicant had applied for dismissal for want of prosecution.

The opposition was spurious. The essential facts were admitted. The major ground of opposition, both in the notice of opposition and through submissions by counsel, was that the application to set aside the Sheriff's decision to confirm the sale had very strong prospects of success. That submission was hinged on the allegation that the advertisement of the property in the media had been so misleading that it had only attracted two bidders, one of them the applicant itself. As a result, the argument went on, the property had been sold for an unreasonably low price.

The other argument by the respondent was that the applicant could have itself applied to set down the main matter instead of mounting the dismissal application. I was implored to use my discretion and allow the main application to be argued on the merits. I was also implored to invoke the provisions of Order 1 r 4C and condone the respondent's failure to set down the main matter within the prescribed period. Mr *Chatsama*, for the respondent repeatedly brushed aside all my repeated attempts to pin him down to explaining why the respondent had slept, and was still sleeping, on its main application. He said he had conceded that point and was therefore not going to waste the court's time making submissions on it! When I asked him on what facts I would then have to predicate my exercise of discretion, or to invoke r 4C, Mr *Chatsama* went back to his argument on the prospects of success in the main matter. He exhorted me, allegedly in the interests of justice, to allow the main case to be argued. When I asked him what had prevented the applicant, even at that late hour, from setting down the main matter, especially after it had received the dismissal application, Mr *Chatsama*, submitted that the respondent had decided to await the outcome of this case!

It was like a merry-go-round; a dog chasing its own tail. The respondent's submissions were nothing but pious exhortations for me to dismiss the dismissal application. It had classically been sluggard. As McNALLY JA said in *Ndebele* v *Ncube*[1]:

> "The time has come to remind the legal profession of the old adage; *vigilantibus non dormientibus jura subveniunt* – roughly translated, the law helps the vigilant but not the sluggard."[2]

In the absence of any explanation why the one month rule prescribed in r 236(4) was not followed, there was nothing on which to exercise my discretion. The eight months delay, and the further delays that would inevitably ensue if I did not dismiss the main application, were highly profitable to the respondent. It was in occupation of the property. It was paying nothing by way of rent or consideration. Yet, in reality the property now belonged to the applicant, the successful bidder at the auction. The respondent's argument about the advert in the press being so truncated as to be misleading was spurious. I considered that advert. It had touched on the essential features of the property. It had adequately been informative. At any rate, good prospects of success tucked in a drawer somewhere are no good to the respondent. They ought to have been brought to court and ventilated there.

It was for the above reasons that I granted the application.

16 January 2015

V.S. Nyangulu & Associates, applicant's legal practitioners
Hogwe, Dzimirai & Partners, respondent's legal practitioners