

KILRIGHT INDUSTRIES (PVT) LTD  
versus  
LAMBLIGHT SYNDICATE  
and  
MINISTER OF MINES AND MINING DEVELOPMENT N.O  
and  
ACTING PROVINCIAL MINING DIRECTOR FOR  
MASHONALAND PROVINCE

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 19 February 2018 & 7 March 2018

### **Opposed**

Mr *T.R Tanyanyiwa*, for the applicant  
Mr *K Chisekerero*, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

MATANDA-MOYO J: This is an application for dismissal of an application for want of prosecution in accordance with r 236 (4) (b) of the High Court Rules. Applicant sought the dismissal of HC 10459/16 on the following grounds;

1. that over one month has lapsed since first respondent herein filed its answering affidavit,
2. that the first respondent has not set the matter down for hearing.

Further applicant averred that the application in HC 10459/16 lacks merit as applicant lacks the *locus standi* in *judicio* to bring such an application before this court. First respondent also lacks the legal authority to bring the above application, it is applicant's contention that the application is riddled with material disputes of fact.

First respondent opposed the application on the following grounds;

- a) that there is a similar matter pending before this court under HC 188/17 which involves same parties, same cause of action and same relief sought.
- b) That this application has been overtaken by events as first respondent has already taken steps to prosecute the application under HC 10459/16 by filing heads of argument. Such heads were filed and served upon applicant on 24 January 2017. The application was then set down for hearing and awaits allocation of a hearing date.

First respondent believes it has prospects of success in the main matter.

Rule 236 gives a judge hearing an application for dismissal for want of prosecution discretion to either dismiss it with costs or make such other order as it deems fit – see r 236 (3) (b).

The purpose of the remedy provided under rule 236 is to ensure that litigants pursue their matters and that there is finality to litigation. The court takes judicial notice that the huge figures represented as backlog constitute matters filed and abandoned by litigants. Rule 236 becomes pertinent in ensuring litigants who file matters before this court prosecute such matters to finality. The court should otherwise grant such applications unless the respondent has placed before the court material upon which the court can exercise its discretion in favour of the respondent. That discretion must take into consideration what is in the interest of justice.

The respondent herein submitted that it intends to prosecute its matter. In fact the respondent has since filed heads of argument and filed a notice of set down. The matter awaits allocation of a hearing date. The respondent also raised a pertinent issue that the present application was filed well after applicant had received the first respondent's heads of argument. The application for dismissal was filed on 25 January 2017. Heads of argument in the main matter were filed and served on 24 January 2017.

Once heads of argument are filed and served on the other party before an application for dismissal is made, such relief is no longer available to the applicant. It would be in the interest of justice for the matter to be finalized on the merits. Parties attempted to deal with the prospects of success. I am of the view that the merits of the matter be determined once and for all during the hearing on the merits.

Accordingly the application is dismissed with no order as to costs.

*G N Mlotshwa & Company*, applicant's legal practitioners

*Messrs, Hogwe, Dzimira & Partners*, 1<sup>st</sup> respondent's legal practitioners

*Civil Division of the Attorney General's Office*, 3<sup>rd</sup> & 4<sup>th</sup> respondents' legal practitioners