THE DADAYA MISSION TRUST
versus
ASSOCIATED CHURCHES OF CHRIST IN ZIMBABWE
and
LAMECK DAVID DUBE
and
DINGANI MOYO
and
CLINIC LAWRENCE HLABANO
and
SELO MASOLE NARE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 5 and 19 September 2018

Opposed Application

Z. Chidyausiku, for applicant
M. Sibanda, for first respondent

MUSAKWA J: The applicant is seeking a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*]. The application was prompted by a dispute arising from an amendment to the Dadaya Mission Trust Deed and the appointment of the second to fifth respondents as trustees.

From the onset, Mr *Chidyausiku* took the preliminary point that the first respondent is barred on account of filing heads of argument beyond the prescribed period. He moved that judgment be granted on an unopposed basis. The first respondent's heads of argument were filed on 28 August 2018 despite having been served with the applicant's heads of argument on 28 June 2018. Despite this bar against the first respondent, the applicant is equally in *mora* if regard is to be had to the developments preceding the hearing.

The present application was filed on 5 October 2017. No certificate of service was filed with the court. Nonetheless, a notice of opposition and opposing affidavit were filed on 31 October 2017. It is assumed that the opposition was filed within the prescribed period since the applicant did not take issue with that. The notice of opposition was served on the applicant on 1 November 2017. In turn the applicant filed its answering affidavit on 8 March 2018.

Then there was a lull culminating in a notice of set down at the behest of the applicant on 13 June 2018. The applicant's heads of argument were filed on 12 June 2018. As previously stated the applicant's heads of argument were served on the first respondent on 28 June 2018.

In the meantime, prior to the setting down of the present application, the first respondent in case number HC 9293/17 applied for dismissal of the same application for want of prosecution. That application has been opposed by the applicant and is yet to be heard. The application for dismissal was filed on 7 June 2018.

Arising from this conundrum, Mr *Chidyausiku* was asked whether the applicant was properly before the court in view of the late filing of its own heads of argument. Mr CHIDYAUSIKU was adamant that there was no time limit within which an applicant should file its heads of argument. He further submitted that there was nothing to hamper the applicant from setting down the matter despite the application for its dismissal for want of prosecution. He placed reliance on the case of *GuardForce Investments (Pvt) Ltd* v *Ndhlovu & Others* SC 24/16.

In *GuardForce Investments (Pvt) Ltd* v *Ndhlovu & Others supra* the appellant had default judgment granted against it after failing to file appearance to defend. The appellant filed an application for rescission of judgment on 3 May 2013. The respondent filed opposing papers on 9 May 2013. Then on 2 July 2013 the respondent applied for dismissal of the application for want of prosecution in terms of r 236 (3) of the Rules of The High Court. The application for dismissal for want of prosecution was served on the appellant and granted on 4 July 2013. It was noted by the late CHIDYAUSIKU CJ that the application for dismissal for want of prosecution was granted without the appellant being heard. I will revisit this issue later.

In the present matter Mr *Chidyausiku* sought to rely on the following excerpt from p 6-7 of the cyclostyled judgment in *Guardforce Investments (Pvt) Ltd* v *Ndhlovu and Others supra*-

> "The delay in this matter is flagrant in some respects. It is quite clear from the record that there was a lot of inaction by the appellant when action should have been taken. For instance, when the application for dismissal for want of prosecution of the application for rescission of the default judgment was filed, the appellant did not seek to have the application for rescission of the default judgment dealt with expeditiously.
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> **There is no rule of law which barred the appellant from proceeding with its application for rescission of the default judgment despite the making of the application for dismissal for want of prosecution. In fact under r 236 of the High Court Rules, when faced with an application for dismissal of an application, the High Court is enjoined to consider options other than dismissing**

the application for want of prosecution. The fact that the appellant sat around and did not attend to the setting down of the application for rescission of the default judgment is a factor that weighs heavily against the appellant. If anything, the chamber application ought to have triggered the appellant to attend to the finalisation of the application for rescission of the default judgment. The only way the appellant could have shown that it was serious about the application for rescission was to proceed to have the matter set down after it was served with the chamber application for dismissal for want of prosecution."

In *GuardForce Investments (Pvt) Ltd* v *Ndhlovu & Others supra*, the application for dismissal was served on the respondent's legal practitioners on 2 July 2013. Then on 4 July 2013 the application for dismissal was granted. CHIDYAUSIKU CJ held that the appellant was not heard before the application for dismissal was granted. It means that default judgment in that case was granted prematurely as the period within which the respondent was entitled to respond had not lapsed. That scenario is distinguishable from the present matter.

I am not persuaded that an applicant has no time limit within which to file heads of argument. This is because r 238 (1) and (1a) provides that-

"(1) If, at the hearing of an application, exception or application to strike out, the applicant or excipient, as the case may be, is to be represented by a legal practitioner—

(*a*) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he intends to rely on and setting out the authorities, if any, which he intends to cite; and

(*b*) immediately afterwards, he shall deliver a copy of the heads of argument to every other party and file with the registrar proof of such delivery.

[Subrule substituted by s.i. 192 of 1997]

(1a) An application, exception or application to strike out to which subrule (1) applies shall not be set down for hearing at the instance of the applicant or excipients, as the case may be, unless—

(*a*) his legal practitioner has filed with the registrar in accordance with subrule (1)—

(i) heads of argument; and

(ii) proof that a copy of the heads of argument has been delivered to every other party; and

(*b*) in the case of an application, the pages have been numbered in accordance with paragraph (*c*) of subrule (1) of rule 227."

Therefore, an application in which a party is legally represented shall not be set down unless heads of argument have been filed and served on the respondent. This rule must be read together with r 236 (4) which provides that-

> "(4) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either—
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> (*a*) set the matter down for hearing in terms of rule 223; or
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> (*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 other order on such terms as he thinks fit."

The above sub rule is the counter to Mr *Chidyausiku*'s submission that there is no time limit within which an applicant can file heads of argument. It would make no sense that a respondent is given a time limit within which to file and serve heads of argument failure of which he is barred whilst no consequence befalls an applicant who commits a similar infraction.

The other aspect to consider is whether an applicant who is faced with an application for dismissal for want of prosecution can anticipate that application by setting down the application whose dismissal is sought. Again Mr *Chidyausiku* placed reliance on the remarks by CHIDYAUSIKU CJ in *GuardForce Investments (Pvt) Ltd* v *Ndhlovu & Others supra* which I have quoted earlier on. In *GuardForce Investments (Pvt) Ltd* v *Ndhlovu & Others supra* whilst CHIDYAUSIKU CJ observed that the appellant did not seek to have the application whose dismissal was sought heard expeditiously after the filing of the application for dismissal. It is not clear if the appellant had by then filed heads of argument.

In the present application the applicant has sought to defeat the application for dismissal by setting down the main application despite the late filing of its heads of argument and despite the pending application for dismissal. In the process the applicant sought to bar the first respondent on the basis that it filed its heads of argument out of time. Whilst the first respondent filed its heads of argument out of time, this infraction is a sequel to that of the applicant. It is not in dispute that the applicant only filed its heads of argument after the first respondent had applied for dismissal for want of prosecution.

In the case of *Melgund Trading (Private) Limited* v *Chinyama And Partners* 2016 (2) ZLR 547 DUBE J dealt with a similar situation where the respondent had sought the set down of an application whose dismissal for want of prosecution was then sought by the applicant. Concerning the conduct of a party who causes an application whose dismissal is sought to be set down or to file an answering affidavit, DUBE J had this to say at p 552-

> "It is not a defence for a respondent who has been served with an application for dismissal for want of prosecution to plead that he subsequently made arrangements for the application to be set down. Once a litigant has been served with an application

> for dismissal in terms of r 236 (3) he cannot file any other process in pursuance of the proceedings under scrutiny. The application for dismissal has to be dealt with first. Once an application for dismissal for want of prosecution has been filed, it must be determined on the merits unless it is withdrawn or the bar is uplifted by consent. If the courts were to allow a respondent who has failed to comply with the requirements of r 236 (3) (b) to jump and set down the application complained against to defeat the application for dismissal, this would be tantamount to the courts allowing respondents to pull the carpet from under the feet of applicants. The action that a respondent takes after an application for dismissal has been made is of no consequence. The only option is to oppose the application for dismissal and let it be dealt with on the merits."

The decision in *Melgund Trading (Private) Limited* v *Chinyama And Partners supra* was appealed against. However, on 4 July 2017 it was ordered by consent that the appeal be dismissed.

I find the dicta by DUBE J quite apposite. The present application cannot be heard until the application for dismissal for want of prosecution has been determined.

In the result it is ordered that the matter be postponed *sine die*. The applicant shall pay the first respondent's costs.

Dube Manikai & Hwacha, applicant's legal practitioners
Vundhla-Phulu & Partners, first respondent's legal practitioners