

CLEMENT TAKURA CHIKATI
versus
CROWHILL FARM (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 May 2019 & 28 June 2019

Opposed application

Z.T. Zvobgo, for the applicant
D. Ndakwena, for the respondent

MANGOTA J: The applicant applied for dismissal of the respondent's application for rescission of judgment. It alleged that the application should be dismissed for want of prosecution.

The events which preceded this application run in the following order:

- (i) On 20 May, 2015 the applicant obtained default judgment against the respondent;
- (ii) On 18 May, 2018 the respondent applied for rescission of judgment- and
- (iii) On 21 June, 2018 the applicant served its notice of opposition upon the respondent which, it alleged, did nothing for more than one month as a result of which it filed this application.

The applicant insisted that the respondent violated r 236 (3) (b) of the High Court Rules, 1971. It, therefore, moved me to grant its application as it prayed for it in its draft order.

The respondent opposed the application. It raised one *in limine* matter which it abandoned during submissions. It stated, as a reason, for its failure to file the answering affidavit, that its Managing Director, one Mwandikudza Bayiseni Sithole, who was dealing with the matter was not at work when the notice of opposition was served upon it. It alleged that he had gone on leave. He went on leave in June 2018, according to it. Mr Sithole, it averred, failed to give instructions to the legal practitioners who represented it to proceed with the matter. These, it alleged, tried to reach him to get instructions without success. It insisted that the default judgment which was the subject of its application was granted in error. It was,

according to it, entered without its knowledge of the same as the summons which related to the case were not served upon it. It denied that it made any settlement offers to the applicant. It averred that the persons who purported to act on its behalf did not have its authority to do so. It said the same were fraudsters who sold its land to third parties. It stated that it had a genuine concern which warranted the court to grant indulgence to it so that it proceeds with its application for rescission of judgment. It stated that the granting of this application to the applicant would be prejudicial to it. It moved me to dismiss the application with costs.

Rule 236 of the High Rules 1971 is apposite. It allows the country's system of justice delivery to move forward at a faster pace than it normally does. Its time lines enable the court to remove from its workload unnecessary cases which litigants file as a matter of course. It allows the court to focus its attention more on deserving cases than otherwise.

Rule 236 (3) of the rules of court, for instance, offers a discretion to the respondent who has filed his opposing papers to an application. He can set the matter down for hearing or apply to dismiss the applicant's case for want of prosecution if the latter does not file its answering affidavit or set the matter down for hearing within one month of his receipt of the respondent's notice of opposition. In the exercise of his discretion, however, the respondent must notify the applicant of the course of action which he intends to take.

It was in the spirit of r 236 (3) (b) that the applicant which was the respondent under HC4644/18 filed this application. It moved that the respondent's application for rescission of judgment be dismissed for want of prosecution. It alleged that the respondent did not prosecute HC4644/18 for three consecutive months after its receipt of its notice of opposition.

Whether or not HC 4644/18 should be dismissed does, in a large measure, depend on the reasons which the respondent is able to advance for its inaction. Those reasons must be read together with all the factors which the Supreme Court was pleased to lay down as a guiding rod towards the determination of such an application as the present one. It stated in *Guardforce Investments (Pvt) Ltd v Sibongile Ndlovhu and Ors*, SC 24/16 that:

“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.”

The respondent correctly conceded the delay which occasioned its prosecution of HC 4644/18. It received the applicant's notice of opposition on 21 June, 2018. It should have filed

its answering affidavit or set HC 4644/18 down for hearing on or before 21 July, 2018. It did nothing from 21 June, 2018 to date.

The answering affidavit which the respondent purported to have filed in October, 2018 appears at p 48 of the record. It is not an affidavit at all. It is neither dated nor signed nor commissioned. It is totally defective. It is, therefore, a nullity which does not advance its case at all. The same was not issued out of the court.

The respondent, it is evident, has not prosecuted HC 4644/12 for twelve (12) months running. It has not done so from 21 June, 2018 to date. The delay which occasioned its inaction is very inordinate.

Paragraph 15 of the respondent's opposing papers constitutes its reason for not filing its answering affidavit within the time-frame which the rules of court prescribe. The reason, however, made no sense. It could not have the court believe that its managing director went on leave for an indefinite period of time. Nor was it suggesting that Mr Sithole remained unconcerned about a matter which was so dear to its heart for the duration of his leave. It failed to acquit itself on why it did not take advantage of the development of technology which is in abundance the world over to reach its managing director and request him to either return to work and deal with HC 4644/18 or give a mandate to one other director of the respondent to act for, and on behalf of, the respondent in his absence.

The fact that one Ozias Bvute who is a director in the respondent purported to depose to its answering affidavit in October, 2018 exposed the lie which the respondent made up its mind to tell. It became evident that the respondent was being economic with the truth when it tried to explain away its inaction by the alleged absence of Mr Sithole from work. It was only during the hearing of the application that it abandoned its line of argument and conceded that it did not have any explanation for not having prosecuted HC 4644/18 from 21 June, 2018 to date. The concession which the respondent made at the eleventh hour weighed heavily against it. It revealed its propensity to tell a lie as a way of explaining away a difficult situation it finds itself in. As a litigant, it should have been candid with the court.

It was very disquieting to observe that the respondent filed an opposing affidavit which told a lie about itself. It was further disquieting to note that it persisted with the lie which it told right up to the stage that the application was heard. It was inexcusable for it to hone up at the eleventh hour when it realised that it could not escape from the lie that it had entangled itself into.

The court takes a very serious view of a litigant who makes his mind to build his case upon a lie. NDOU J whose remarks I fully endorse expressed his displeasure in respect of such a litigant. He stated in *Leather Tread Zimbabwe (Pvt) Ltd v Smith*, HH 131/03 that:

“...if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all.”

In stating as he did, the learned judge was merely acknowledging what Hoffman and Zeffert stated on the subject in their *South African Law of Evidence* 3rd ed, p 472 wherein the learned authors said:

“If a litigant lies about a particular incident, the court may infer that there is something about which he wishes to hide.”

It is my view that the respondent intended to hide its ineptitude when it told the lie which it later admitted to have told. It realised that it had no explanation at all for the delay which related to its prosecution of HC 4644/18. It realised that it sat on its laurels for a very inordinate period of time. It made up its mind to tell a story which it hoped would persuade me to find for it. The story, unfortunately for it, made no sense at all. It left it with no option but to tell the truth which it should have told on its receipt of this application.

Given that the respondent was prepared to lie on the above-stated aspect of the case, the question which begs the answer is was it telling the truth when it alleged that the applicant did not serve HC 1172/15 upon it. The other question which flows from the same set of circumstances is was it telling the truth when it denied that it made settlement offers to the applicant.

The answers to the above questions cannot be decided either way. They remain in the balance. The first question remains so for the simple reason that the respondent did not state its address of service with any particularity. The first address which was given was number 90 Nigel Phillip Road, Eastlea, Harare. The other addresses which the respondent gave were number 22 Bays Water Road, Highlands, Harare and Crowhill Site Office, Borrowdale, Harare.

One could not tell if the respondent was being truthful when it stated that it did not receive the summons which was served at number 90 Nigel Phillip Road, Eastlea, Harare. *A fortiori* when it gave the Highlands and Borrowdale addresses as some of the places where the summons could have been served. The fact that it told a lie on some instance persuades me to entertain the probability that it also told a lie on the issue which related to service of summons upon it at the address which is mentioned in the sheriff's return of service of 13 April, 2015.

In so far as the second question is concerned, the applicant attached to its application four letters which its legal practitioners exchanged with Mushoriwa Pasi Legal Practitioners. It also attached to the same two letters which its legal practitioners exchanged with Ngarava Moyo & Chikono legal practitioners. Both Mushoriwa Pasi and Ngarava Moyo & Chikono Legal Practitioners said they were representing the respondent. They wrote, each in turn, with a view to settling the respondent's indebtedness to the applicant. It is these correspondences which prompted the applicant to state that the respondent made settlement offers to it.

The respondent denied having ever instructed the two sets of legal practitioners to approach the applicant and/or make any settlement offers to the latter on its behalf. It, however, did not produce any evidence which showed that the team of legal practitioners was acting on a frolic of its own. Nothing prevented it from challenging the law firm's authority to act for and on its behalf as it should have done. It could easily have addressed a letter to each law firm requesting the latter to produce the authority upon which it acted when it made offers of settlement to the applicant.

The respondent's statement which was to the effect that it did not write to the law firms as it should have done because it did not want to interfere with police investigations was neither here nor there. The fact of the matter is that its legal practitioner made that statement from the bar. He gave inadmissible evidence which he did not substantiate. He produced nothing which showed that the matter which related to the two law firms' conduct had been reported to the police for investigation. The statement does not, therefore, advance the respondent's case at all.

The applicant proved, on a balance of probabilities, that:

- (i) the delay which occasioned the respondent's non prosecution of HC 4644/18 was very inordinate;
- (ii) the respondent did not have any explanation for the same;
- (iii) the respondent's prospects of success on the merits are next to nothing - and
- (iv) the continued existence of HC 4644/18 on the court's roll remains very prejudicial to it.

The application is, therefore, granted as prayed in the draft order.

Dube, Manikai & Hwacha, applicant's legal practitioners
PTG Attorneys, respondent's legal practitioners

