THE COMMISSIONER GENERAL OF POLICE
and
THE TRIAL OFFICE (CHIEF SUPERINTENDENT KARURU)
versus
MAVIS NYAPWERE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 May 2019 and 31 July 2019

**Application for Dismissal for Want of Prosecution Rule 236 (3) (b) of High Court, Rules 1971**

*D. Jarucha,* for the applicant
*C. Damiso,* for the respondent

CHITAPI J: The first and second applicants are the first and second respondents in case No. 9114/16 (the main case) and the respondents herein are the applicants. The respondent who is police officer as applicant in the main case filed an application in this court on 8 September, 2016. In the main application aforesaid, she sought a review of disciplinary proceedings conducted against her by the second applicant and endorsed by the first applicant as respondents therein. That application was opposed by the first and second applicants by notice and opposing affidavits filed on 23 September, 2016 and served on the respondent herein's legal practitioners on 27 September, 2016. The respondent did not progress the main application and neither filed a replying affidavit nor set down the application. In short the matter has remained dormant in the Registry of this court until the applicants herein filed the present application for dismissal of the main application for want of prosecution on 24 October, 2017 which date is more or less a year later since the filing of the notice of opposition.

Rule 236 (3) (b) of the High Court rules provides for dismissal of court applications for want of prosecution at the instance of a respondent who may file a chamber application against the applicant where the latter has within one month of the filing of the notice of opposition and opposing affidavit by the respondent not progressed his or her case by filing an answering affidavit or set the application for hearing. The judge seized with such an application may dismiss the application with costs or make such other order on such terms as he thinks fit." The

judge before whom the application for dismissal is placed has a discretion whether or not to dismiss the application or give on such times as appear proper and in the interest of justice a reprieve to the applicant to continue his or her litigation. Generally speaking, courts and court rules provide applicants reasonable latitude to control the pace of proceedings. This is manifest in the rules and the court or judge providing for time spans within which ensuing steps in the litigation process should be taken. The time lines must be utilized for the intended purpose and in good faith. They should be used *inter alia* to get proper legal counsel, to engage in possible settlement discussions gather, evidence and prepare for trial. The applicant should not use the latitude or control given in the time spans to frustrate the respondent and vice-versa. Rule 236 (3) (b) itself is very generous in giving the applicant a whole month after the filing of the respondent's opposing papers to either reply to them or set down the matter for hearing. The rule is very generous because whilst in the court application, the applicant calls upon the respondent to respond within 10 days of service of the application, the applicant has no prescribed short time line for filing an answering affidavit save that in terms of the proviso to r 234 (1) the answering affidavit should be filed not less than 10 days before the date of hearing. That is the only qualification. The further control which the court rules impose in terms of r 236 (3) (b) is to allow that at least a month should lapse before the respondent can trigger the "prosecute or get off the pot" r 236 (3) (b). By enacting r 236 (3) (b) the rule giver simply meant to emphasize that there should be a limit to how far the courts should tolerate an applicant who takes undue time to progress his or her litigation.

Having indicated that the court has a discretion to either dismiss the application or grant such order as the court thinks fit where there has been inaction by the applicant as postulated in r 236 (3) (b), little value will be obtained from reference to other decided cases since the exercise of a judicial discretion which is to be exercised judiciously is case determined in that the circumstances of each case will inform how the discretion may be exercised. Previously decided cases are however important to the extent that they may lay down the principles which the courts follow in determining such applications where the applicant as in this case has opposed the application.

A party who seeks to be condoned for a failure to comply with the rules seeks an indulgence from the court. An indulgence should not be given on a platter because to do so would render the rules of court which are law in themselves superflous yet the rules are a tool for orderly case management and justice dispensation. In short therefore good cause should be

demonstrated or established by the applicant resisting a dismissal for want of prosecution as to why the court should indulge him or her and condone the non-compliance with court rules. The applicant's counsel referred to two judgments of this court namely *Karegwa* v *Mpofu* HB 56/15 where it is stated:

> "courts have adopted a very strict approach in matters where applicant has failed to file his answering affidavit or set the matter down for hearing. The court usually looks at the reasons for failing to act timeously. Whether failure to act is the result of an utter disregard of the rules of court and prescribed time limits, the courts are extremely reluctant to give any further indulgence to the defaulting party."

In *Moon* v *Moon* HB 94/05 being the second case referred by to by applicants' counsel the court held that the applicant who resists an application for dismissal for want of prosecution must present a reasonable explanation for the default and that on the merits the party has a *bona fide* case, which, *prima facie* carries some prospects of success.

The respondents counsel referred to the South African Supreme Court case of *Cassimjee* v *Minister of Finance* SC 45/11. The case is apparently is reported in 2014 (3) SA 198 (SCA). It is stated by BORUCHOWITZ AJA as follows in para 11: -

> "There are no hard and fast rules as to the manner in which the discretion is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action, second, the delay must be inexcusable, and, third, the defendant must be seriously prejudiced thereby. Ultimately the inquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefore and the prejudices, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases, the delay is inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendants' inactivity and failure to avail itself not remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial."

The Canadian case of 0690860 *Manitoba Ltd* v *Country West Construction Ltd* 2009 BCCA 535 (CanLII) provides persuasive authority in relation to setting out principles which courts apply in deciding an application for dismissal for want of prosecution. The considerations set out therein are listed as:

(a) the length of the delay and whether it is inordinate

(b) the reasons for the delay and whether the delay is excusable

(c) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be remedied for trial and at its reactivation by the plaintiff; and

(d) whether on balance justice requires the dismissal of the action.

In the case *Scotfin Ltd* v *Mtetwa* 2001 (1) ZLR 249 at 250 D-E, CHINHENGO J in reference to applications made under rule 236 (3) (b) stated:

> "The primary intention of the Law maker is to ensure that matters brought to the courts are dealt with due expedition. But in considering the application, the judge can make an order other than dismissal if the respondent has opposed the application and shows good cause why the application should not be dismissed."

I do agree with CHINHENGO J's *dicta* which as I understand it is to the effect that there is no discretion for a judge to exercise if the application is not opposed. If the application was properly served, the papers are in order and there is no opposition then the judge should simply dismiss the application. The learned judge was stating the obvious. In the event however that the application is opposed then various consideration come into play and the reference made by the learned judge that the respondent must "show good cause" why the application should not be dismissed simply means that the court will consider various other factors as would in the interests of justice justify the court to make other orders other than dismissal.

In my view, from a consideration of the *dicta* by judges in various jurisdictions, the correct approach to dealing with an application for dismissal for want of prosecution is the one expressed in the *Cassimjee* case (*supra*) namely that there are no hard and fast rules regarding the manner of exercising the discrection to dismiss an application for want of prosecution. Anything further than that would result in stifling the discretion and once this is so then there is no discretion to talk about or the discretion becomes a limited or qualified one. The court or judge should in dealing with such an application always bear in mind that a dismissal for want of prosecution is a remedy which *inter alia* is available to the defendant or respondent to shake off and overcome the abuse of court process by an uninterested or stiff necked recalcitrant troublemaker type plaintiff who is out to terrorise the respondent with no *bona fide* intention to see commenced litigation concluded.

In the exercise of the discretion whether to or not to dismiss an application for want of prosecution, the court or judge should also have regard to constitutional provisions which may come into play. The constitution of the country is the supreme law and any law, practice or conduct which is inconsistent with the constitution is deemed invalid to the extent of the inconsistency. This court as with the Constitutional and Supreme Court has in terms of s 176 of the constitution an inherent right to protect and regulate its process and develop the common and customary law by applying the provisions of the constitution and taking into account the interests of justice. The key considerations when a court exercises its powers therefore is to

give effect to the interests of justice. In an application for dismissal for want of prosecution the court must consider whether the interests of justice will be served by dismissing the case for want of prosecution or by granting an order other than dismissal.

A further constitutional consideration is for the court to have regard to every person's right to a fair hearing as provided for in s 69 of the Constitution. In particular, s 69 (2) provides as follows:

> "(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, traditional or other forum established by law."

The right to a fair, speedy and public hearing being available to "every person" means that it is equally available to both the applicant/plaintiff as much as it is to the respondent/defendant. In this regard, r 236 (3) (b) should be construed in a manner that advances and gives effect to, as opposed to stifling or limiting the right in s 69 (2) as above quoted. See *DF Scott (EP) (Pty) (Ltd)* v *Golden Valley Supermarkets* 2002 (6) SA 297 (SCA) @ 301 G. However, emphasis may be placed on the right and on the provisions of s 86 (3) which forbids the law maker from passing a law which limits the right to a fair trial, the right is not absolute. See *Giddey N.o VJC Barnard and Partners* 2007 (5) SA 525. The right is subject to regulation as to how it can be exercised. A dismissal for want of prosecution is a regulation which does not derogate from the right to a fair hearing because its grant in effect is in the nature of an absolution from the instance as opposed to a judgment on the merits. It protects *bona fide* litigants, the court process and justice administration.

I therefore determine this application bearing in mind the jurisprudence on applications for dismissal for want of prosecution as discussed above. The delay by the respondent to progress her application given the 30 days provided for in the rules to set down the application as discussed herein leads to a reasonable inference that she had lost interest and intent to proceed with the litigation sought to be dismissed to finality. This however, is not the end of the matter. I have indicated that the right to a speedy and fair trial within a reasonable period is exercisable by both the applicant as much as by the respondent. The respondents did not invoke their right to a fair hearing by invoking the dismissal for want of presentation procedure within a reasonable period either. Both parties sat on the case for the one year or so post the filing of the opposing affidavit. Whilst the respondent could as a matter of reasonable inference be said to have lost interest in the application, the applicants were content to also sit on their rights to invoke r 236 (3) (b). In the intervening period the applicants appear to have shelved

the matter and did not even demand that the respondent should further its litigation. In a case where the respondent delays inordinately to invoke the provisions of r 236 (3) and applies for dismissal for want of prosecution, it should not cry prejudice suffered by it. A respondent who is prejudiced by the failure of the applicant to timeously prosecute his or her application to finality would reasonably be expected to take steps to remedy the prejudice. Rule 236 (3) (b) was not intended to promote inaction by either of the parties but to protect the respondent from vexatious litigations and the abuse of court process. When both the applicant and respondent are complicit in delaying the disposal of the case, the respondent, as applicant in an application for dismissal for want of prosecution which has inordinately been delayed in its filing should justify or explain the delay. A failure to do so leads to the inference that the respondent acquiesced in the delay. The court or judge will in such a case be justified in the interests of justice to refuse the application for dismissal and give such order as would ensure that the litigation is advanced further, subject however to the litigation or dispute in the main case being meritorious.

In *casu,* the applicants did not explain their own delay in filing this application. They did not allege any prejudice which the respondent's inaction caused them either actual or potential. They simply alleged that the respondent filed the main application to derail administrative proceedings and delay justice and that there should be finality to litigation. Prejudice cannot be inferred. It should be pleaded and facts which establish it set out. It is axiomatic that the applicants appreciated the need for them to be pro-active in furthering the speedy resolution of the dispute. In para 5-2 of the applicants affidavit, she stated, "… The doctrine of finality to litigation demands that once legal proceedings have been instituted before this honourable court, parties have an obligation to see to it that litigation is taken to its finality within the prescribed limits as set out in the Rules." (own underlining). The dependent does not however explain its own delay to bring finality to the litigation nor that the applicants suffered prejudice by the inaction of the respondent. In the eyes of the court, both litigants have slept on their rights in this application and are equally culpable in regard to delay in having the litigation expeditiously or speedily brought to finality. Neither party is justified to cry foul in the light of the unexplained inaction by the applicant in making this application. For her part the respondent in her curt opposing affidavit averred that her legal practitioners sat on the matter. Such a plea cannot in the circumstances have excused her inaction because one year of inaction means that she also did not follow up on her application with her legal practitioners.

Had it been that the applicants were not equally culpable for the delay as discussed, I would not have been persuaded that the respondent's excuse was reasonable particularly so as her legal practitioners did not offer any explanation for the inaction. See *Paul Gary Friendship* v *Cargo Carriers and Anor* SC 1/13 and Viking Woodwork (Pvt) Ltd 1998 (2) ZLR 249 (S).

Having determined that both parties sat on their rights and abused the court process by not timeously complying with the rules of court, I must determine the prospects of success of the main application. This is important because there is need to protect the process of the court. It would not be in the interests of justice and public policy to saddle and clog the court system with clearly unmeritious and underserving cases. Where such cases can be disposed of through intervening applications as an application for dismissal for want of prosecution, despite there being culpability for delay by both applicant and respondent, the court still has a discretion to dismiss the delayed or stagnated litigation if there are no prospects of its success.

I am in this application humstrung in making a decision on prospects of success because both the litigants did not advert to the issue of prospects of success in their affidavits. It would be a misdirection for the court to address and make a determination on an issue not raised in the papers or argued by the parties for the court to determine. I will therefore leave the issue hanging but would admonish counsel to be always wary that the law of evidence and procedure remains a mine field which explodes in the face of the uninitiated legal practitioner. It is not a walk in the park. Legal practitioners are advised to always research the law on a particular procedural matter before putting pen to paper. All that was required was for counsel to just google and research on principles which inform a decision to dismiss a case for want of prosecution. Once the principles had been grasped, the affidavits of fact should then have been drafted to deal with those principles. There was a lack of aptitude and astuteness by the drafters of both the founding and opposing affidavits in not dealing with prospects of success of the main application. The court was left in limbo as to what to determine in regard to the prospects of success. Equally there was no explanation for the delayed inaction by both parties.

Lastly, I need to address the issue of the balance of convenience. In this case, the parties have perfunctorily dealt with this application. The applicants' affidavit does not address facts which assist the court to make an informed decision in the matter. The respondent gets the benefit by default of the applicants' shortcomings in that the founding affidavit on which the application stands or falls is glaringly inadequate and suffers from a kwashiorkor of facts and lacks depth. The respondents opposing affidavit is not any better either. A grant of a dismissal

for want of prosecution in the circumstances of this case would not be in the interests of justice and the application must fail.

In the result, I make the following order which denies either party costs because of ineptitude by both –

a) the application for want of prosecution be and is hereby dismissed with no order as to costs.
b) The respondent in the event that she intends to continue the prosecution of case No. HC 9114/16 shall within 10 days of this order take such steps as the rules permit consequent on the filing of the notice of opposition and opposing affidavit to progress the prosecution of the applicant.
c) In the event that the respondent fails to comply with para (b) application HC 9114/16 notwithstanding the order made in para (a) shall be deemed dismissed for want of prosecution.

*Civil Divisions of the Attorney General's Office*, applicants' legal practitioners
*Coghlan, Welsh & Guest*, respondents' legal practitioners