CITY OF MASVINGO
versus
PINNACLE PROPERTY HOLDINGS Private Limited

HIGH COURT OF ZIMBABWE
ZISENGWE J
HARARE, 11, 27 November 2019

Opposed Application

J. Mpoperi for the applicant
M. Ndlovu for the respondent

ZISENGWE J: This is an application brought in terms of order 32 r 236 (3) (b) of the High Court Rules, 1971 for the dismissal of a matter (being the respondent's application in case number HC 4275/19) for want of prosecution.

The factual background facts chronology of events leading up to this application are not only common cause but also fairly straight-forward and are essentially to the following effect. The dispute between the parties centres around an agreement of sale entered into between them, which agreement of sale is in respect of a piece of immovable property situate in Masvingo urban. The respondent in the present matter filed a court application for a declaratory under case No. HC 4275/19 seeking an order that the aforementioned agreement of sale be declared valid and the repossession of that piece of immovable property by the applicant be declared null and void.

That court application was issued by the Registrar of the High Court on 22 May 2019 and served on the present applicant on the same day. Upon receipt of the application, the applicant filed its Notice of opposition and opposing affidavit. These were issued by the Registrar on 4 June 2019 and served on the respondent on 7 June 2019. Thereafter the respondent neither filed its answering affidavit nor set down the matter for hearing within the one month period something it needed to do to avoid the provisions in order 32 r 236 (3) of the High Court Rules. This then prompted this current application for dismissal of the matter by the applicant.

That the respondent was required to file its answering affidavit or set down the matter on or before the 7th of July 2019 (the date on which the one month's period expired) is common

cause. Equally undisputed is the fact that the applicant filed this application for dismissal for want of prosecution on 19 July 2019.

This application for dismissal apparently galvanized the respondent into action who reacted by filing its answering affidavit on 25 July 2019 (some 18 days out of time) before filing its heads of argument and having the matter set down for hearing. This belated flurry of action on the part of the respondent did not deter the applicant who soldiered on with this current application for dismissal regardless.

The respondent opposes this application contending in the main that the filing of its answering affidavit and the setting down of the matter, albeit belatedly, should sway the court to exercise its discretion in its (i.e. respondent's) favour. They claim in this regard that the applicant's application for dismissal has been "overtaken by events"

Order 32 r 236 (3) provides as follows:

> "Where the respondent has filed a notice of opposition and an opposing affidavit and within one month thereafter, the applicant has neither filed an answering affidavit nor 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
> (b) make a chamber application to dismiss the matter for want of prosecuting once the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit.

That the court has a discretion to grant or dismiss the application is hardly in dispute. That much is clear not only from a reading of the plain text of the rule but also from the various cases decided on the point. What is in dispute, however is whether the court from the facts of the present case should exercise this discretion in favour of the respondent and dismiss the application.

In the case of *Guardforce Investments (Private) Limited* v *Sibongile Ndlovu and 2 Ors* SC 24/16, CHIDYAUSIKU CJ (as he then was) had this to say regarding the exercise of that discretion.

> "The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking into account 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."

I will proceed to deal with each of these in turn as they relate to the present case.

Regarding the length of the delay, the court pointed out during the hearing of the application as it does now that this as a relatively short delay of approximately 18 days. Counsel for the applicant readily conceded as much. Sight however is not lost that it is the launching of this current application which jolted the respondent with action. The fact however remains that the 18 day delay cannot be regarded in the scheme of things as being inordinate.

The reason for the delay is however a different kettle of fish. The respondent offers none. Instead of proffering an explanation for failure to act timeously, respondent accuses applicant of unethical conduct suggesting that the applicant at the very least should have warned it of the imminence of this application should it not file its answering affidavit or set down the matter in compliance with r 236 (3). Needless to say this particular contention is without merit. There is no obligation reposed on the applicant to fore-warn the respondent of the imminence of such an application.

Counsel for the applicant on the other hand relied *inter alia* on an excerpt from the case of *NMB Bank Ltd* v *Maxorcarter (Pvt) Ltd* HH-38-15 in support of its application. In that case the judge remarked in the context of the facts of that case, thus:

> "In the absence of any explanation why the one-month rule prescribed ibn r 236 (4) was not followed, there was nothing on which to exercise my discretion."

It was therefore argued that the absence of an explanation for the delay is fatal to the respondent's case. I did not, however, understand the court in that case as having suggested that in all instances where there is an absence of an explanation for the delay or where there is a unsatisfactory explanation, then the court will automatically, without having due regard to the other relevant factors grant the application for dismissal. I pause here to observe that in that case the delay was for some eight months and further that the inaction stood to benefit the respondent who remained in occupation of some premises in circumstances where he was not legally entitled to do so. That case is distinguishable from the present not least because in the present case the inaction cannot be construed as benefiting the respondent.

Although it is not for the court to speculate as to the reasons for respondent's inaction, one can only surmise that it was either through inadvertence, oversight or plain negligence. It is however pertinent to note that the absence of a satisfactory explanation for the delay does not *ipso facto* lead to the granting of the order sought in terms of r 236 (3) (b), for indeed the court is required to consider all the relevant factors. In this regard CHIDYAUSIKU CJ had this to say at p 6 of the *Guardforce investments* case (*supra*)

> "Dealing with the delay and the explanation for the delay, there is no doubt that there was a delay in this matter. However, the delay and the explanation thereof in this matter alone cannot form the basis for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for rescission for want of prosecution. This is a serious misdirection."

Regarding prospects of success on the merits: The parties are embroiled in a contractual dispute over the purchase by respondent of a certain commercial piece of land owned by the applicant in Masvingo. Without going into unnecessary detail the following are the skeletal facts leading to the dispute. In 2007, the applicant published an advertisement in a newspaper inviting all interested parties to tender for the development of a hotel on a commercial stand, measuring almost 20 000 square metres. Respondent successfully bid for same culminating in an agreement of sale being entered into as between the parties. The agreement of sale specifically had as one of its key terms that the respondent had to commence the development a hotel to the value of not less than US$5 million within a period of nine months.

For one reason or other respondent did not construct that hotel and therein lies the problem. This is because in August 2018 sought to repossess the said stand invoking clause 6 of the agreement of sale (the clause stipulating that respondent was required to commence development within 9 months from the date of allocation of the stand), and clause 18 which deals with the termination of contract in instances of breach.

Aggrieved by such termination of contract and repossession of the stand, the respondent then brought an application for an order setting aside the termination of the contract and the repossession of the stand. In this regard the respondent contends *inter alia* that the applicants conduct terminating the contract ran contrary to the express requirements of the contract which enjoined it (i.e. applicant) to give notice to respondent, which notice, so the argument goes, was not given. The upshot of the respondent's argument in this regard being that repossession of the property which is not preceded by termination (properly communicated) constitutes a legal nullity.

As far as the issue of delay in constructing the hotel is concerned the respondent points out that the applicant contributed to the delay in failing to service the land in question on time, only completing that process in 2012. They further point out that in a letter 3 February 2012, applicant gave an implied waiver of the nine months period.

Another issue raised by the respondent in the main application is the failure by the applicant to repay respondent 90% of the purchase price as stipulated in clause 18 of the agreement of sale.

Having considered the nature of the respondent's case in the main matter, I am of the considered view that the respondent in that application does raise some reasonably arguable legal questions on the validity of the termination and/or repossession of the property in question. He enjoys reasonable prospects of success.

As far as the 3rd factor is concerned; namely the balance of convenience and possible prejudice to applicant caused by the other party's failure to prosecute its case on time; I am of the respectful view that at worst the applicant only endured a momentary delay in the hearing of the main application.

Incidentally, the matter has already been set down and would by now have been heard before CHAREWA J. It was only held in abeyance pending the outcome of this application. The court cannot turn a blind eye to the swiftness with which the respondent has moved not only to file its answering affidavit and heads of argument but also to set down the matter for hearing: This speaks to the seriousness with which it attaches to the main application.

In the final analysis for the reasons outlined above, the respondent's failure to furnish reasons for its failure to act on time notwithstanding, I am inclined to grant the order sought. The applicant will be allowed to pursue its case in the main application. However respondent's dilatoriness will not be without consequence as he will be ordered to meet the costs attendant to this particular application for dismissal.

In the result it is ordered as follows:

1. Application be and is hereby dismissed.
2. Respondent is hereby ordered to pay applicant's costs for this application.

Mutamangira & Associates, applicant's legal practitioners
Saratoga Makausi Law Chambers, respondent's legal practitioners