BERNARD CHIGUTEI
versus
MARIA NHAU
and
CITY OF HARARE
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 7 October 2015

Opposed Matter

N Bvekwa, for the applicant
W Sengweni, for the respondent

TSANGA J: Two matters involving the same parties, HC 237/14 and HC 238 /14 were placed before me as opposed matters for dismissal for want of prosecution in terms of r 236 (3) (b) of the High Court Rules 1971. The applications had initially been made as chamber applications under the relevant rule but had been referred to the opposed roll upon notices of opposition having been filed.

Case **HC 237/14** sought to dismiss case **HC 7022/08** which centred on confirmation of a provisional order granted under an urgent chamber application. Case **HC 238/14** sought to dismiss for non-prosecution to finality case **HC 209/09** which was an application for rescission of judgment. I granted the orders sought in both cases on 16 July taking into account the circumstances pertaining to the non litigation to finality of the matters as alleged by Applicant. My written reasons for so doing have been sought for purposes of appeal. These are they.

The factual background to the two cases

Under **HC 209/09,** the judgment sought to be rescinded by first respondent was one that was granted to applicant under **HC 3230/08**. It was granted in default on 20 August 2008 by Mtshiya J as a default judgment in the following terms:

"**IT IS ORDERED THAT:**

a) The 1st Respondent signs all papers necessary to pass cession of the rights, title and interest in Stand Number 7374 Budiriro 4 Township to the Applicant within ten (10) days of service of this order at her *domicilium citandi et executandi* failing which the Deputy Sheriff, Harare, be and is hereby authorised to sign such papers on her behalf.
b) The 1st Respondent and all those claiming rights of occupation through her be and are hereby evicted from Stand 7374 Budiriro 4 Township.
c) 1st Respondent pays costs of this application on the level of legal practitioner and client."

Essentially, it therefore authorised the first respondent's eviction from certain premises known as House No. 7374, Budiriro 4 Harare. This was property allegedly bought by Bernard Chigutei. The foundational basis of the application for rescission by the first respondent, Maria Nhawu, was that she had not been served with the application under **HC3230/08**. Her application for rescission of judgment was filed on 16 January 2009 under **HC209/09**.

It is this application for rescission of judgment made under **HC 209/09** which the applicant, Bernard Chigutei, alleged in **HC238/14**, had not been prosecuted. He therefore sought dismissal of **HC209/09** on the basis that he filed his notice of opposition to the application on 26 November and that this was served on the first respondent[1] on 29 of January 2009. Thereafter, the first respondent as the applicant had neither filed an answering affidavit nor set the matter down for hearing. Whilst the applicant could have set the matter down for hearing himself, the rules are clear that applying for dismissal is also an option that can also be chosen.

In her opposing affidavit to the dismissal for want of prosecution, the first respondent, primarily averred that she had since filed a notice of set down in that matter (i.e. **HC 209/09**) and that it was essentially the court that was now delaying the matter. She stated that she too was expecting the court to give her a set down date.

[1] His application also cited the City of Harare as 2nd Respondent and the Deputy Sheriff as 3rd Respondent. The 2nd and 3rd Respondents were not represented at the hearing having been largely cited in their official capacities.

Regarding the second matter **HC7022/08,** also the subject of dismissal for want of prosecution by Applicant under **HC 237/14**, this was an urgent chamber application which had been instituted by the first respondent on 11 December 2008 for stay of execution. It followed the grant of the default judgment to applicant in **HC3230/08** in August 2008. The first respondent had become aware of this judgment because of a writ of ejectment from the property in dispute. She obtained a provisional order for stay of eviction. The provisional order granted in 2008 in **HC7022/08** was in the following terms:

> "Pending the outcome of this matter the 3rd Respondent[2] be and is hereby ordered not to evict the applicant from house No 7374 Budiriro 4 Harare.
>
> That if the eviction has already been effected that eviction be and is hereby reversed".

The final order for which confirmation has not been sought was as follows:

"**Terms of Final order sought**

That you show cause to this honourable court why a final order should not be made in the following terms:

1. That the default judgment granted in HC 3230 /08 be and is hereby rescinded and set aside.
2. That the 3rd Respondent be and is hereby ordered not to evict the Applicant from House no. 7374 Budiriro 4 Harare.
3. That the 2nd Respondent[3] be and is hereby ordered not to effect change of ownership of the property in question and to reverse same should change of ownership have already been effected.
4. That the 1st Respondent be and is hereby ordered to serve upon the Applicant an application HC 3230/08 within 7 days.
5. That the applicant in this matter is allowed to file her opposing affidavit in terms of the Rules of this Court upon being properly served with application HC 3230/08.
6. That the Provisional order be served upon the Respondents by the Deputy Sheriff.
7. That the 1st Respondents pay the costs."

It was the applicant's case under **HC 237/14** that he had filed his notice of opposition and affidavit to the above mater on 8 January 2009 and served these on the first respondent on 9 January 2009. He further averred that the first respondent had neither filed an answering

[2]The Deputy Sheriff.
[3] The City of Harare

affidavit nor set the matter down for hearing in terms of the rules hence his quest for dismissal for want of prosecution.

As in her response to **HC 238/14**, the first respondent filed an opposing affidavit to the application for dismissal under **HC 237/14**, again basically averring that she had **since filed a notice of set down and that it was the court delaying the matter**. Applicant filed an answering affidavit to the effect that first respondent had not done anything for six years to pursue the matter and that the record has been perused and that no application to set down the matter had been filed. Applicant accordingly filed his heads of argument for dismissal and set the matter down for hearing.

The hearing of the applications

The two matters were set down for hearing on 10 March 2015. The return of service indicated that the Sheriff had experienced great resistance from the first respondent in accepting service. However, she availed herself on the hearing day as a self-actor and indicated that she needed to consult a lawyer. Accordingly, the matter was postponed to 25 March 2015 albeit with the grudging consent of the applicant.

On 25 March 2015 she was represented at the hearing by Mr *W Sengweni* from Legal Aid Directorate. He indicated that he had an application to make. He explained that he had only assumed agency the previous day and had formed the opinion that the matter was complicated. He therefore expressed his desire to make an application for postponement so as not to render a shoddy service to his client and the court. Again, the applicant voiced his concerns at the delay on the basis that the matter had been postponed for 15 days and first respondent could have sought assistance in good time instead of waiting until the 11th hour. After all, as he emphasised, his major complaint before he court was about delay. Cognisant that the inconvenience to the Applicant could not be cured by an order of costs since the first respondent was being represented by Legal Aid Directorate, but alive to the ultimate need to do justice between the parties, I agreed to a further postponement. It being end of the judicial term, the matter was reset for hearing for the 16th of July 2015 when opposed matters were again before me, giving the first respondent and her counsel three months and two weeks to put their house in order.

At the hearing on 16 July, Mr *Sengweni* had still not prepared any heads of arguments for either of the two matters despite the fairly lengthy intervening period. The postponement on 25 March had been specifically at his behest to enable him to familiarise himself thoroughly with the status of the matter and what needed to be done. His reason for not filing any heads was that he was of the view that the matter overall could be resolved without the need for a hearing. Applicant disagreed. The failure to file heads of argument by Mr *Sengweni* meant that he was barred. No application for the upliftment of the bar was made by him on behalf of the first respondent in both these matters.

Given the postponements previously granted, not surprisingly applicant's stance was that the applications for dismissal should be heard on merit. In granting the dismissal for want of prosecution of the two matters as prayed for, I took into account the first respondent's own explanation in the opposing her affidavits, that she had since filed notice of set down and was simply awaiting a court date. This was untrue as there was no proof that either of the matters had been set down. The first respondent was clearly merely out to buy time. The crystallisation by Chinengo in *Scotfin* v *Mtetwa* [4] of the purpose of r 236 of the High Court Rules, 1971 on dismissal for want of prosecution was instructive in my decision. As he put it:

> "I think however the overall consideration for the judge is to exercise his or her discretion in such a manner as would give effect to the intention of the law maker. The primary intention of the law maker is to ensure that matters brought to the court are dealt with due expedition. But in considering the application the judge can only make an order other than dismissal if the respondent has opposed the application and shows good cause why the application should not be dismissed."

Whilst the first respondent had opposed the application they were barred from failure to file heads of argument by their legal representative. But even if they had not been barred there was absolutely no evidence to support the averment in the opposing affidavit that notices of set down had been filed in both matters.

I have also had sight of the respondents' grounds of appeal. They have nothing to do with the matters that were before me, which, in essence were dismissals for want of prosecution. I was not hearing the actual application for rescission nor the confirmation of the provisional order. It was not for me to address the merits of the application for rescission

[4] *Scotfin v Mtetwa ZLR (1) 2001 249* at *p250 D-E*

which is what firs respondent appears to have appealed against. I was hearing the matter of delay in the prosecution of the two matters.

The first respondent's argument for opposing the dismissal was clear. It was her unsubstantiated claim that she had already set to both matters down for hearing. I was indeed satisfied that the two matters **HC7022/08** and **HC209/09** had not been disposed to finality with due speed. The matter in **HC7022/08** had not been pursued since the obtainment of the provisional order. There was also no evidence of the matter having been set down as claimed. The rescission matter in **HC209/09** had also not been pursued since the filing of the application by the first respondent.

A problem will not go away simply because a litigant has neglected to follow it up in the hope that the matter will simply fizzle away or because it is to their seeming advantage to let sleeping dogs lie. It is the responsibility of self-actors to take active measures to pursue legal help in arguing their matters to finality. In far too many cases such is this , the evidence is there that the party concerned will have sought some help in drafting the papers but is clearly not prepared out of self-serving interests to have the matter argued to finality. Having ultimately sought counsel, the matter was still handled lethargically. My reasoning was that the court ought not to sympathise with such parties where the indications are that they have no interest whatsoever in taking the matter to finality perhaps because they see some advantage in having current occupation of the property.

In essence, I granted the dismissal for want of prosecution in both matters because the applicant had indeed shown that the first respondent was in wilful neglect of prosecuting these matters to finality. Moreover the respondent was barred and there was no application made for upliftment of bar in either of the two matters.

Bvekwa Legal Practice, applicant's legal practitioners
Legal Aid Directorate, 1st respondent's legal practitioners