KIMLEY ROW INVESTMENTS (PVT) LTD
versus
CITY BRIGHT SERVICES (PVT) LTD
and
ALFRED TUNGADZI
and
BARBRA GENI TUNGADZI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 7 October 2015 and 14 October 2015

Opposed Application

P. C. Paul, for the applicant
B. Chideme, for the respondent

MATHONSI J: This application is made in terms of r 236 (4) of the High Court of Zimbabwe Rules, 1971 on the basis that the respondents have not prosecuted an application which they filed in HC 4497/14 within the time provided by the rules. For that reason the applicant seeks a dismissal of that application for want of prosecution.

Rule 236 (4) provides:

> "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.
>
> (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 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."

So the respondent has an election where an applicant has not acted in one way or the other to have the matter set down within one month of filing an answering affidavit, either to set the matter down or to approach a judge in chambers for the dismissal of the application for want

of prosecution. It is a choice available to the respondent where the applicant has not done anything for a period of one month after filing an answering affidavit and is meant to move the matter forward or to finality instead of leaving it stagnant. See *The Permanent Secretary, Ministry of Higher and Tertiary Education* v *College Lecturers Association of Zimbabwe & Ors* HH 628/15.

In this matter the respondents filed an urgent chamber application for a stay of execution on 3 June 2014 in HC 4497/14. They obtained a provisional order on 6 June 2014. The present applicant then filed a notice of opposition contesting the confirmation of the provisional order on 6 June 2014. Although in terms of r 236 (3) the respondents had one month within which to file an answering affidavit, they did not do so. The applicant put them on terms to do so by letter dated 15 July 2014. It was only after the threat of making an application for dismissal for want of prosecution that the respondents filed their answering affidavit, albeit belatedly on 24 July 2014.

In terms of r 236 (4) the respondent should have set the matter down, a process which involves the filing of heads of argument, the pagination of the court record and the request for a set down which should be submitted to the registrar. Again the respondents did not do that even after the applicant's probing by letter of 29 July 2014. The rusty old train of the respondents taking its good old time to deliver justice only romped home months later on 8 September 2014 when heads of argument were filed. Even then, nothing was done to have the matter set down at all until this application was filed 5 months later on 6 February 2015.

In opposing the application the respondents have dwelt extensively on the merits of the main application, in particular why the applicant should be prevented from executing the consent order made in its favour after it was allegedly paid in full. On the crux of the present application it is stated in the opposing affidavit of their legal practitioner, *Maxwell Mavhunga*, that the failure to file the consolidated index (paginate the record) and set the matter down was not deliberate or willful on their part. This is because the matter was being handled by a professional assistant who left the firm in October 2014, without proper handover of his files. The respondents insist that the applicant will not suffer any prejudice if the matter were to be set down now especially as their legal practitioner has already been given instructions to do so.

To crown it all the respondents have made a counter application, legendary by its brevity, seeking leave to set their application down for argument. No explanation is proffered as to why

this was not done in terms of the rules. No condonation is sought for failure to comply with the rules.

In my view what has to be determined is whether there has been a failure to comply with the rules triggering the right of the applicant to seek a dismissal of the application for want of prosecution. If there has been such non-compliance, whether the respondents are entitled, in response to such an application, to leave to set the matter down despite the non-compliance.

I have already stated that r 236(4) gives the respondent an election where the applicant has failed to set the matter down within one month, to either set the matter down himself or make a chamber application for the dismissal of the application for want of prosecution. Where the respondent has elected to seek a dismissal r 236(4)(b) gives the judge a discretion to either order a dismissal with costs or to make such other order as he deems fit.

It is the making of such other order the judge deems fit which requires further consideration. Does that give the judge the leeway to dismiss an application made in terms of that rule where the applicant has failed to comply with the time frame for setting the matter down? I think not. This is because the rule gives the respondent a remedy to have the matter dismissed upon failure to comply. Where the respondent has sought that remedy, which he is entitled to, it would not be a judicious exercise of the judge's discretion to refuse that remedy in favour of some other obscure order not defined by the rules. Doing so would negate the remedy given to the respondent.

Even if I were wrong in that conclusion, I would still not grant the respondents the relief that they seek in their counter application for the simple reason that they have not made a case for it. Korsah JA, made the crucial point in *Makaruse* v *Hide and Skin Collectors (Pvt) Ltd* 1996(2) ZLR 60 (S) 65 D – F that:

> "By virtue of the power conferred on this court by r 4 *supra* to condone any non-compliance with the rules, none of the provisions of the rules are strictly peremptory. 'The rules are, however, there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced, in my view to persuade a court to act outside the powers provided for specifically in the Rules': per Botha J (as he then was) in *Moulded Components* v *Coucourakis & Anor* 1979 (2) SA 457 (W) at 462 – 3. Thus the inherent power to prevent abuse of the machinery of the court is a power which has to be exercised with great caution, and only in a clear case: *Hudson* v *Hudson*, *supra* at 268. Non-compliance of the rules will only be condoned upon good cause shown by the applicant. There must be a reasonable and acceptable explanation for the failure to comply with the rules, and the applicant for condonation must also show reasonable prospects of success. See *General Accident Insurance Co SA Ltd* v *Zampelli* 1988 (4) SA 407 (C) at 411 C – D"

The failure by the respondents to comply with the rules was blatant. They have not proffered a reasonable explanation for such failure. They have not even sought condonation for such failure. I would therefore not countenance condoning their non-compliance. Even the counter application they have made, lacks *bona fides* coming as it does in response to an application for dismissal and without a reasonable explanation for non-compliance.

I am satisfied therefore that the applicant is entitled to the relief of dismissal of the application for want of prosecution

Accordingly, it is ordered that:

1. The application in HC 4497/14 is hereby dismissed for want of prosecution.
2. The provisional order made on 6 May 2014 in favour of the respondents is hereby discharged.
3. The respondents shall bear the costs jointly and severally the one paying the others to be absolved.

Wintertons, respondents' legal practitioners
Mavhunga & Associates, applicants' legal practitioners