ORDECO (PVT) LTD
and
BRIGHTON GWAVAVA
and
DEBRA CHAMBARA
versus
DAVID GOVERE
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 24 November 2016 & 13 January 2017

Opposed Application

G Nyengedza, for applicants
N Bvekwa, for the first respondent

TSANGA J: On 24 November 2016, I granted an application for dismissal for want of prosecution made in terms of rule 236 (3) (b) of the rules of the High Court, 1971. The fuller reasons for so doing have been requested and these are they.

The background to this application for dismissal for want of prosecution lay in the sale of two properties to second and third applicants as the highest bidders. The sale was pursuant to obtainment of a judgment by Ordeco, as the judgment creditor, and the first applicant herein, in case no HC 9257/12 (HH 173/13). The judgment was against the first respondent herein, David Govere. The first property, described as stand No. 39 Midlands Township of Midlands, Harare was sold to Brighton Gwavava, the first applicant, on 31 July 2015 as the highest bidder. The second property, described as stand 783 Bannockburn Township of Stand 1 Bannockburn Township, was sold to Debra Chambara, the third applicant, in September 2015.

David Govere filed an application seeking to set aside the sale of the two immovable properties under HC 11609/15 on 26 November 2015. Applicants filed their notice of

opposition to the application to set aside on 17 December 2015. As of 18 March 2016, the first respondent, David Govere had not yet filed an answering affidavit when generally the rules require that the answering affidavit be filed within 10 days of receipt of notice of opposition. Consequently, an application was filed by applicants for dismissal of the case for want of prosecution. It was opposed. Mr *Bvekwa* as David Govere's lawyer, took responsibility and averred in his sworn statement that since there had been numerous litigation in the matter, it may have escaped him that he had not filed the next set of documents. He adopted the view that the matter could have been set down by the other side as permitted by the rules of court, if indeed the intention was to finalise the matter expeditiously as claimed. Fundamentally, he regarded the application as unnecessary if not overzealous, on the basis that he should have been approached as a matter of courtesy by the other practitioner to rectify the over sight instead of rushing to file for dismissal. He therefore sought the dismissal of this matter with costs on a higher scale.

The applicants' counsel filed heads of argument to this matter on 13 April 2016 whilst Mr *Bvekwa* filed his as first respondent's counsel on the 4 May 2016. The matter was accordingly heard on 24 November 2016. In persisting with his quest for dismissal of the matter for want of prosecution, Mr *Nyengedza* drew the court's attention to what he described as "factually incorrect averments from a leading practitioner," which had been made by Mr *Bvekwa* in his heads of argument, and, which he deemed to have a fundamental bearing on why dismissal should be granted.

In seeking dismissal of this application which he manifestly considered as overzealous, Mr *Bvekwa* had confidently asserted as follows in para 2 of his heads of argument which he had filed on 4 May 2016:

> ***"Sight must not be lost of the fact that the main matter only awaits allocation of a hearing date after all necessary documents were filed and a date of hearing applied for"*** (My emphasis)

The gravamen of Mr *Nyengedza's* complaint was that despite this brazen assertion by Mr *Bvekwa*, in reality no additional papers had been filed in the main matter as of 4 May 2016. The answering affidavit was only filed on 17 May 2016, with heads of argument being eventually filed on 9 June 2016. Set down was ultimately applied for on 15 July 2016. Simply put, Mr *Bvekwa*'s assertion on behalf of first respondent on the status of the case was palpably false at the time.

In addition, in emphasising that the matter should be dismissed for want of prosecution, Mr *Nyengedza* also bemoaned the "appetite to mislead" which had now come to characterise the first respondent's case. To bolster this observation regarding this emergent trend, he drew the court's attention to Ordeco's founding affidavit in which the following averments were made regarding Mr Govere's devious actions with regard to the sale of stand 783 Bannockburn Township to the third applicant, Debra Chambara:

> "Sometime in September 2015, albeit out of time, the 1st Respondent attempted to file an objection. However, the filed papers were fatally defective as the 1st Respondent sought to mislead the 2nd Respondent (the Sheriff) by deposing to an affidavit wherein he deceptively passed himself off as the director of 1st Applicant and that the objection was being filed on behalf of 1st applicant. This was untruthful and the height of dishonesty".

The fraudulent objection having been unearthed, Ordeco averred that Mr Govere had then withdrawn it and that the third applicant, Debra Chambara had been confirmed as the purchaser of the property in question. Mr Govere's prior actions now coupled with his lawyer's untruthful statements regarding the status of the application, are what led Mr *Nyengedza* to observe this "penchant to mislead". Moreover, he argued that the matter as a whole lacked merit particularly given that the objections were made after the sales had been concluded.

In his heads of argument, Mr Bvekwa relied extensively on the case of *Founders Building Society* v *Dalis (Pvt) Ltd and Ors* 1998 (1) ZLR 526 for his standpoint that the application was unnecessary. In that case Gillespie J had opined as follows:

> "…Many attorneys, seeing an oversight or irregularity of this nature from a colleague whom they regard as a peer, would take the trouble and courtesy to address the errant opposite number a memorandum drawing attention to the cause for complaint and calling upon him or her to regularise the matter. Such an attitude is to be expected, not just from a few but from all legal practitioners. It is part of the duty that a legal practitioner has to other lawyers. This duty is put in a nutshell: 'Every legal practitioner has a duty to behave fairly and honestly towards other legal practitioners .The legal practitioner on the other side is only trying to do his best for his client and it is desirable that legal practitioners cooperate as much as possible'."

By purporting to represent that the case was well ready for hearing at a time when he knew very well it was not, Mr Bvekwa had no real belief in what he was espousing which was the duty to act fairly and honestly. He did not deny the veracity of the complaint. Instead, Mr *Bvekwa*'s explanation in response was that at the time of preparing the heads of argument, the papers were ready though not yet filed and that this is what he had meant to say. He argued that in any event, the dates for hearing had indeed since been applied for and

Sheriff's' fees have been paid. In essence, he therefore saw no need for this court to play hard ball about the issue since the matter was indeed now ready for hearing.

In deciding whether to grant the order for dismissal, I took into account that each particular case is evaluated on its facts against the backdrop of factors such as the delay, given the public interest in the expeditious resolution of the litigation, and, the court's need to manage its docket. Also critical, is the excuse given for the delay in prosecuting the matter. The availability of a less drastic sanction is also to be considered as is the prejudice likely to be suffered by the other party. Equally relevant is that the court also takes into account any abuse of court process that may have a bearing on the matter.

I was also cognisant of the fact that public policy favours the resolution of cases on merits. As explained in the case of *Stanford* v *Haley No* 2004 (3) SA at p 300 B regarding the court's hesitancy in exercising its power to dismiss:

> "The courts will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. **The court will exercise such power in circumstances where there has been a clear abuse of process of court**". (My emphasis)

A three month delay for something that is supposed to be done within a ten day time limit from receipt, constitutes delay. The reason for the delay in this case was said to be an oversight on the part of the lawyer and yet even when the oversight became known, there was still delay.

The filing of the application for dismissal should have been sufficient to alert Mr *Bvekwa* to the urgency of the matter. Upon gaining awareness of the application for dismissal for want of prosecution, Mr *Bvekwa* clearly did not behave nobly by misleading the other side that he had already minimised prejudice to the applicants by filing the necessary papers and setting the matter down the for hearing. In other words, even with the full awareness of the application for dismissal, there was still further delay in filing the necessary papers which was patently inexcusable neglect. To cover the delay up with an underhand lie made in the heads of argument, was in my view a clear abuse of court process. It is not a practice that the courts should encourage nor condone. If, as Mr *Bvekwa* argued, that he had merely intended to say the papers had been drafted then that is what he should have said in his papers. This is not what he professed in writing. Having a draft which one intends to file, and, the actual filing of the final papers, are two different things. There can be no mistaking the meaning which he intended to convey when he asserted in his heads that the only thing that remained

was the setting of the hearing dates. A court's decision must be grounded in principle and not on the basis of compromise in the face of conduct which is clearly an antithesis to that expected of counsel. It is the duty of counsel to ensure that important filing deadlines are met as that is after all what they are paid to do. See *Ndebele* v *Ncube* 1992 (1) ZLR 288 at 290 C-E and *Chimunda* v *Zimuto* SC 76-2014 whereby the growing practice of beguiling the courts with "appeals for charity rather than justice" was clearly condemned.

I also agreed with Mr *Nyengedza* that fundamentally, the main matter lacks merit. Having bought the property through a sale which was confirmed by the Master in accordance with the rules, before the first respondent lodged his application in HC 11609/15, I was of the view that the applicants would indeed be seriously prejudiced by accommodating Mr *Bvekwa*'s lackadaisical and underhand manner in seeking to deal with the application. Time is of essence where there has been a sale. Understandably purchasers are keen to see finality to proceedings especially regarding any arising disputes. A party who disputes the sale and then proceeds to treat such dispute with less than its deserved urgency whether on their own accord or on the part of their practitioner, clearly act to prejudice the purchaser. Such conduct also raises doubt as to the genuineness of their claim.

My granting of costs on a higher scale was against the backdrop of misinformation when Mr Bvekwa knew fully well that Mr Govere had not filed an answering affidavit at the time. Counsel in my view was aiding and abetting Mr Govere in frustrating the applicants at his own pace.

On these facts and circumstances of this case and on the basis of fairness to both parties, I accordingly granted the order for dismissal for want of prosecution as prayed.

Scanlen and Holderness Applicants' Legal Practitioners
Bvekwa Legal Practice: First Respondent's Legal Practitioners