THANDIWE SITHOLE

versus

HAPPYMORE SITHOLE

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, 27 March and 6 April, 2017

**Opposed Application**

*S. Mahuni* for the applicant

Respondent in person

CHITAKUNYE J: This is an application in terms of s 236 (4) of the High Court Rules, 1971 for the dismissal of an application for setting aside a Will for want of prosecution.

On 6 July 2015, the respondent filed an application under case number HC 6330/15 seeking to set aside the Will of the late Diana Magobeya which had been accepted by the Master of the High Court for purposes of the administration of the estate late Diana Magobeya. On 28 July 2015, the applicant filed her opposing affidavit stating the basis for her opposition to the relief respondent was seeking.

The respondent duly filed his answering affidavit on 2 September 2015. Thereafter the respondent did not apply for the setting down of the matter. As at the time of filing this application on 29 July 2016, the respondent had not set down the matter for hearing.

Rule 236 (4) provides that:

“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.”

It is clear that where an applicant has not acted to set down the matter within one month after filing the answering affidavit the respondent has an election to either set the matter down or to apply for the dismissal of the matter for want of prosecution. As aptly noted by Mathonsi J in *The* *Permanent Secretary of Higher and Tertiary Education* v *College Lecturers Association of Zimbabwe* *& Ors* HH 628/15, the rule is meant to move the matter forward or to finality instead of leaving it stagnant.

In *casu*, it is common cause that after filing the answering affidavit on 2 September 2015, the respondent did not set the matter down for hearing within the one month. In fact the respondent had not made any effort to set the matter down as at 29 July 2016 when the present application was filed. It was in such circumstances that the applicant elected to file this application in terms of r 236 (4) (b) for the dismissal of the respondent’s application. The applicant alleged that in failing to set the matter down for such a long time the respondent had demonstrated that he filed the application in HC 6330/15 without any intention of pursuing the application to its logical conclusion.

On 16 August 2016 the respondent filed his opposing affidavit. The sole reason he advanced for the failure to set down the matter was that since 2nd September 2015 he had been trying to raise money to seek assistance in the drafting of heads of argument. He thus pleaded for the court’s indulgence whilst he tried to raise money to seek assistance in drafting the heads of arguments.

It is apparent that respondent was not disputing that he failed to comply with the rules; his contention is for mercy whilst he seeks money to get assistance to draft heads of argument. In as far as non-compliance is admitted the applicant was within his rights to seek a dismissal of the application for want of prosecution.

The onus is thus on the respondent to sway this court not to grant the application for dismissal. In terms of r 236 (4) (b) a judge dealing with a case of such non compliance may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit. I am of the view that for a judge to make any other order the respondent must proffer some compelling reasons or explanation as would sway the judge from granting the dismissal. It cannot just be on mere say so.

In *Makaruse* v *Hide and Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) at 65 D-F Korsah JA opined 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 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 411C-D.”

In *casu*, the respondent lamentably failed to show good cause for the failure to comply with the rules. It is pertinent to note that the rules of this court do not require a self actor to file heads of argument. It is only where a party is to be represented by a legal practitioner that the rules require the filing of heads of arguments. In this regard r 238 (1) provides that:

“If , at the hearing of an application, exception or application to strike out, the applicant or excipient, as the case may be, is to be represented by a legal practitioner—

1. before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he intends to rely on and setting out the authorities, if any, which he intends to cite;”

In this case, as a self actor the respondent was not obliged to file heads of argument and so the excuse of seeking finance so as to seek assistance to draft heads of argument is without merit.

As further confirmation of the respondent’s lack of seriousness, it was only after being served with the notice of set down for this particular application and when the day of set down had approached that the respondent said he borrowed some money to file a notice of set down in HC 6330/15. It was only on the date of this application’s hearing (27 March 2017) that the respondent filed a notice of set down in HC 6330/15. Such a belated attempt cannot save his cause at all. Had he been serious surely he would have made such effort upon being served with the current application and sought court’s indulgence on that basis. But to wait till the day of hearing to file a notice of set down in the application that is sought to be dismissed is clearly not helpful to his cause. It only serves to confirm his lack of *bona* *fides.*

It may also be noted that even on the merits, the respondent does not seem to have a good case in his application for the setting aside of the will. The grounds for challenging the Will are speculative and not grounded in concrete facts. He alleges in the main that:

“6. I say it is a purported will or so called Will because:

(a) its handwritten and the signature on the will does not appear like our late mother’s;

(b) it was not registered or authenticated by any authority;

(c) the said will looks like a letter of complaint by our late mother about the behaviour of us her children;

(d) I fear there is great connivance by our aunt Emily Magobeya (Mbengano) who once claimed the property to be hers and I reported her to Cashel Police, OB256/13

7. The Will gave everything which our mother left behind to one Gertrude Chibisa our eldest sister.”

The above merely shows bitterness at the Will purportedly having bequeathed most of the property to the eldest sister.

In terms of the Wills Act, [*Chapter 6:06*] some of the aspects alluded to are not relevant when the Master is considering whether to accept a document as a will or not.

For instance there is nothing wrong with a Will being handwritten; there is no requirement that a Will must be registered or authenticated by some authority; and there is nothing wrong with a Will that purports to bequeath most of the assets to one person.

The respondent does not dispute that the document purported to bequeath property to the eldest sister.

Apart from the above the respondent could not allude to any particular features that would invalidate the Will.

I thus conclude that the applicant has made her case for the dismissal of the application in HC 6330/15 for want of prosecution.

Accordingly it is hereby ordered that:

1. The application filed by the Respondent under case number HC 6330/15 be and is hereby dismissed for want of prosecution.
2. The respondent shall pay costs of this application on the ordinary scale.

*Mahuni & Mutatu*, applicant’s legal practitioners