ITAI VALERIE PASI
and
WILLOUGHBY'S INVESTMENTS (PVT) LTD
versus
STALAP INVESTMENTS (PVT) LTD
and
ZIMRE HOLDINGS (PVT) LTD
and
DOUGLAS MAMVURA
and
RAMSWAY INVESTMENTS (PVT) LTD
and
CFI HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 30 April 2018 and 23 May 2018

Opposed Matter

ABC Chinake, for the applicants
T. Mpofu, for the respondents

MUZOFA J: This application is made in terms of r 236 (3) (b) of the High Court Rules, 1971 on the basis that the respondents have not prosecuted an application they filed in HC 11164/17 within the period provided in the rules. To that extent the applicant seeks a dismissal of that application for want of prosecution.

The first to fourth respondents filed a court application on the 30th of November seeking various declaratory orders and interdicts in respect of an extra ordinary general meeting held by the fifth respondent.

The applicants were served with a copy of the court application on the 1st of December 2017. The notice of opposition and opposing affidavit was filed on 15 December 2017 and served

on the respondent on the same day. One affidavit was not served on the respondent, it was subsequently served on the 21st of December 2017.

According to the applicant from the 15th of December 2017 the respondents failed to file an answering affidavit or to set down the matter within one month as provided in the rules. In order to ensure finality in the matter the applicants filed this application.

The first to fourth respondents opposed the application. Nothing was filed by the fifth respondent. The grounds for opposition are that the applicants did not place the respondents in *mora* prior to filing this application, that the one month envisaged by r 236 (3) (b) had not lapsed, there was no inordinate delay and that as on 27 February 2018 the answering affidavit and heads of argument in case HC 11164/17 had been filed and the matter ready for hearing. As such the court should exercise its discretion in favour of allowing the matter to be disposed on the merits.

Rule 236 (3) (b) provides;

> "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 –
> (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."

The import of the rule is to manage the process to finality by giving the non defaulting party to take charge of the litigation with a view to finalise the matter. The applicant has two options either to set down the matter or make an application for dismissal as *in casu*.

Mr *Chinake* for the first to fourth respondents submitted that the applicant should have placed the respondents in mora by letter, to avoid such an application. No authority was cited in support of this submission. I do not agree with the submission as stated by Mr Chinake. The wording of the rule is clear, there is no requirement that the application be preceeded by a letter, although that would be good practice.

The absence of a letter placing respondent in *mora* cannot in itself defeat such an application. Reading into the rule that a letter is a prerequisite to the application would distort the one month timeline since the letter can be written any time after the one month thereby denying the applicant the option to exercise his rights in terms of the rule at the lapse of one month. I find no merit in the submission.

The next issue for determination is whether the one month had lapsed to trigger this application. For the respondent, it was submitted that it had not lapsed since a computation from 21 December excluding weekends and holidays did not add up to a month.

Mr Mpofu for the applicant submitted that section 33 (6) of the Interpretation Act provides that where time is reckoned within a month it shall be constructed as a reference to one calendar month. I was referred to the cases of *Paruk* v *Hyne & Company* 27 NLR 838, and *Tiopaizi* v *Bulawayo Municipality* 1923 AD 317 where that interpretation was adopted. To that extent the calendar month should be construed as the corresponding date of the following month.

In *casu* although the filing of the notice of opposition and opposing affidavit was filed on 15 December. It was on 21 December that the respondent was in receipt of all the affidavits to enable it to make a decision either to file an answering affidavit or set the matter down. I will therefore accept that the effective date was 21 December.

In the *Tiopaizi* case (*supra)* the court had to determine the computation of a month's notice in a labour dispute. The employee was given notice on the first of December terminating his employment on the 31st of December. In concluding that there was a month's notice INNES CJ related to the computation of a calendar month.

He noted the two methods of computation of a month. The civil mode of calculation (*civiliter)* where "the reckoning is *ad dies* and no account is taken of broken units; the whole of the first day is included and the whole of the last day is excluded." In that method a calendar month reckoned from 1 December would expire at midnight on the 31st.

The second method as per INNES CJ which the court can direct where there are special circumstances is the direct and exact calculation (*naturaliter*). "The result of adopting that basis would be that notice given on the first of one month would terminate at the corresponding moment on the first of the following month."

It would seem the general rule is that the civil mode of computation should be used unless there are special reasons to adopt the *natulaliter* method. In this case service was effect on 21 December which is not the beginning of a month. It is only rational to adopt the *natulaliter* method. It is inconceivable to compute the number of days for a month because the months themselves are of unequal length. What is required is a reasonable period.

In casu therefore the one month ran from the 21st December to midnight the 21st January. On the 22nd of January this application was filed, r 236 (3) (b) had been triggered.

The r 236 (3) (b) having been triggered should the court automatically grant it. I think not. Part (b) of the said rule is couched in terms that gives the court a discretion thus

> "… the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

The use of the term may, shows that granting the order is not peremptory. I am fortified in this conclusion even by the terms that the judge may make such other order as he thinks fit. It brings in a consideration of the circumstances and using her judicious discretion the judge make an appropriate order, in my view the application is not granted on the asking.

I was referred to the case of *Kimley Row Investments (Pvt) Ltd* v *City Bright Services (Pvt) Ltd and Others* HH 792/15 where MATHONSI J at p 3 of the cyclostyled judgment said;

> "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.. 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."

I respectfully disagree with this position. The wording of the rule gives the Judge a discretion to exercise to make an appropriate order that means the application can be dismissed.

As stated before, the court has a discretion, and this finds authority in a line of cases by this court like *African Star Diamonds (Pvt) Ltd* v *Nyamuchanja and Anor,* HH 313/17, *Zuva Petroleum (Pvt) Ltd* v *Greendale Service Station (Pvt) Ltd and Anor* HH 391/15, *Kimley Row Inv. (Pvt) Ltd* v *City Bright Services Pvt Ltd and Ors* HH 792/15, *Scotfin* v *Mtetwa* 2001 (1) ZLR 249.

The court has to determine whether the explanation by the respondent is reasonable or that good and sufficient cause for the delay has been established.

According to Lovemore Madzinga's opposing affidavit, representing the first and second respondents on 21 December a supporting affidavit was served on its legal representatives. The legal representatives' law firm was closed from midday on the 21st of December to the 3rd of January 2018. The legal practitioner dealing with the matter was on leave. To that extent the inaction was not an abandonment of the litigation.

It is trite that where blame for inaction is attributed to the legal practitioner, the so blamed party should file an affidavit confirming the position or admitting fault *Diocesan Trustees, Diocese of Harare* v *Church of the Province of Central Africa* 2010 (1) ZLR 267, *African Star Diamonds (Pvt) Ltd* (*supra*).

In this case, the explanation is by the first and second respondents' representatives that the office was closed. No business was taking place at the law firm of their legal representative office. I did not hear Mr *Mpofu* to contradict this fact. He in fact insisted that the legal practitioner should have filed an affidavit. In my view the fact of the closing of the offices is not intrinsic to the legal practitioner. It is evident to anyone especially the clients who happen to be the respondents.

This is different from a situation where the explanation for inaction is privy to the legal practitioner only. I accept that the explanation by Lovemore Madzinga is valid for the purposes of this case.

The explanation is reasonable particularly taken in the context of the period of delay. It was only a day. The delay was not inordinate, I do not see an intention by the respondents to abandon the prosecution of the matter.

It is not in dispute that as of the date of argument, all the requisite pleadings had been filed and the matter had been set down for hearing.

Mr *Mpofu* raised various issues in respect of the set down of the main matter. This court shall not delve into them since they are not properly before it, this is a simple application for dismissal. The right court is that dealing with the main matter.

From the foregoing, in light of a reasonable explanation for the delay, the application cannot succeed.

Accordingly the following order is made.

1. The application for dismissal of case number HC 11164/17 be and is hereby dismissed.
2. There shall be no order as to costs.

Mushoriwa Pasi Corporate Attorneys, applicants' legal practitioners
Messrs Kantor & Immerman, respondent's legal practitioners