EDWICK NGWERUME
versus
CHIPO MASAWI
and
TICHAONA MASAWI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 January 2018 and 1 February 2018 & 7 February 2018

Chamber Application for dismissal for want of prosecution

S.T Mutema, for the applicant
N.A.M. Nhemachena, for the respondents

CHITAPI J: The applicant filed an application for dismissal of Case No. HC 1182/17 for want of prosecution pursuant to the provisions of order 32 r 263 (3) and (4) of the High Court Rules 1971. On 14 September 2017 I dealt with the matter in chambers and issued an order which the Registrar recorded in the following terms and issued to the parties.

IT IS ORDERED THAT

1. The decision on the application for dismissal for want of prosecution is hereby stayed.
2. The first and second respondents shall within 10 days of service upon them of this order take such steps as are provided for in the rules of court to advance their application failing which **this** (sic) application shall be deemed dismissed.
3. The costs of this application shall be in the cause.

The applicant's legal practitioners wrote a letter to the Registrar requesting for reasons for my order and indicated that they were under instructions to note an appeal against my order.

Upon perusal of the record and in particular the order which the Registrar typed out and issued out to the parties, the order did not make sense and I could not figure out how I could have ordered as detailed in para 2 of the order.

What was clear in my mind was that instead of granting the application for dismissal, I had stayed my decision and directed the first and second respondents to take steps to progress their main application within 10 days of service of my order upon them. If the first and second respondents did not do so then the main application was to be deemed as dismissed.

I exercised a discretion not to dismiss the main application rightly out or summarily because the first and second respondents filed a notice of opposition and an opposing affidavit to the application on 5 September 2017 following service of the dismissal application upon them. In the opposing affidavit, the first respondent averred that the second respondent who is her husband was seriously ill in the intervening period and had passed on the 4th April 2017. The first respondent was under emotional and psychological stress and had to attend to customary issues and obligations which arise when a spouse has passed on. She also averred that she delayed in filing the answering affidavit because of the issues which she had to deal with. She also had to arrange for the registration of the second respondent's estate and appointment of the executor who would be substituted as the second respondent.

In the absence of a rebuttal of the first respondent's averments, I considered that the reasons advanced for not timeously filing the answering affidavit of the first and second respondents or setting down the main application for hearing had merit. I therefore reasoned that the interests of justice would be served by granting the first and second respondents a further extension to comply with the rules of court. This is what motivated the order which l made. In terms of order 32 r 4 (b) of the High Court Rules, 1971 where a judge is considering an application for dismissal for want of prosecution, the judge has to exercise a discretion whether or not to grant the order for dismissal. The discretion is exercised judicially taking into account the facts and circumstances of each case and in particular the defaulting party's explanation for inaction and the reasonableness of the explanation. Other facts like the length of the delay in the light of the explanation are also considered. The judge in exercising the discretion aforesaid may "make such other order on such terms as he thinks fit." Justice would not have been served in this case if I had summarily dismissed the main application in the light of the misfortune which befell the respondents, being the death of

one of them and, the occurrence being an act of nature. It must follow in my judgment that rule 236 (4) (b) is permissive rather than directory. A dismissal for want of prosecution is a drastic remedy whose effect is to remove the matter from the roll of pending matters. An order of dismissal should therefore be granted where the circumstances of the conduct of the defaulting party point to a clear intention not to pursue his or her rights. Where such intention is not apparent or cannot be inferred, I would suggest that the more justiciable approach should be to give the defaulting party a directive to comply with, following which if there is default, the dismissal is then ordered. The discretion given to the judge therefore provides for a window where the progress of litigation is both party and judge driven.

I have indicated that the order issued by the Registrar did not make sense in paragraph 2. It purported that should the first and second respondents fail to comply with my directive to take further steps to progress their application, the application for dismissal of their suit would be deemed dismissed. When l checked the original handwritten order which I issued, it clearly indicated that it was in fact the main application which would be deemed dismissed in the event that my directive was not complied with. The Registrar mistakenly read the word "**their**" as "**this**".

On noticing the error, it became necessary to correct the error in the order. Where a judge notes an error in a judgment or order, the judge may in terms of r 449 of the High Court Rules correct the error. Rule 449 (1) (b) provides that the judge or court may inter-alia correct any judgment or order "in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission."

Rule 449 allows the court or judge to exercise the powers of revisitation of its judgment or order. The rule is an exception to the *functus officio* principle. Rule 449 can be invoked by the court *mero motu* or upon the application of any party affected by the judgment or order. The powers of revisitation of the judgment can only be exercised after notification of the intended actions by the judge to all interested parties.

In casu, I decided to act *mero motu* to correct the patent error which arose through a typing mistake by the Registrar. I invited counsel for the parties to chambers and advised them of my intention to correct the order issued by the Registrar and the reasons for the correction. Counsel *S T Mutema* for the applicant and *N. A. M Nhemachena* for the respondents appeared in chambers on 30 January, 2018. They did not object to the correction and both of them admitted that the order

as drafted by the registrar and issued did not in paragraph 2 make logical sense. I accordingly corrected the order in paragraph 2 by deleting the word "**this**" and substituting it with "**their**". The above constitutes my reasons for judgment as requested by the applicant. For the avoidance of doubt, I record as follows;

1. The order issued by the Registrar on 14 September, 2017 shall stand subject to the correction to para 2 wherein the word "this" is deleted and substituted with "their" so that it reads as follows:

   The first and second respondents shall within 10 days of service upon them of this order take such steps as are provided for in the rules of court to advance their application failing which their application shall be deemed dismissed.

Stansilous & Associates, applicant's legal practitioners
Muvingi & Mugadza, 1st and 2nd respondents' legal practitioners