

REPORTABLE (19)

GUARDFORCE INVESTMENTS (PRIVATE) LIMITED

v

**(1) SIBONGILE NDLOVU (2) THE REGISTRAR OF DEEDS N.O.
(3) THE DEPUTY SHERIFF**

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GOWORA JA & MUTEMA AJA
BULAWAYO, JULY 28, 2014 & MAY 31, 2016**

A P de Bourbon, SC, for the appellant

J T Tsvangirai, for the first respondent

No appearance for the second and third respondents

CHIDYAUSIKU CJ: The High Court dismissed the appellant’s case on the ground of want of prosecution. The appellant appeals against that judgment. The second and third respondents are in default. I shall refer hereinafter to the first respondent as “the respondent”.

The background of the case is as follows.

On 1 November 2006 the appellant bought a piece of land from the respondent. The land the subject matter of the agreement of sale is described in the agreement of sale as “subdivision B of Lot B Upper Rangemore measuring 8,1191 hectares and held by the Seller (the respondent) under Deed of Transfer No. 3050/04 situate in the District of Bulawayo”. The purchase price was ZW\$17 million. The appellant paid the purchase price in full and the property was transferred into its name on 19 June 2007. Nothing further happened until

10 December 2012 when the respondent filed an application in the High Court alleging that the appellant had breached the agreement of sale by refusing to transfer to her the homestead built on the property in terms of the agreement. On 13 February 2013 the respondent issued another summons seeking a declaration that the agreement of sale between the parties was a nullity. The appellant did not file an appearance to defend and a default judgment was entered. In terms of the default judgment, the agreement of sale was declared null and void and the appellant was ordered to facilitate the transfer of the property back to the respondent. The appellant then filed an application for the rescission of the default judgment on 3 May 2013. The respondent filed her opposing papers to the application for rescission on 9 May 2013. Nothing further was done until the respondent filed a chamber application for the dismissal of the application for rescission of the default judgment for want of prosecution in terms of r 236(3) of the High Court Rules, 1971 on 2 July 2013. The application for dismissal for want of prosecution was served on the appellant's legal practitioners on 2 July 2013. The application for dismissal for want of prosecution was granted on 4 July 2013, that is, two days after having been filed and served on the appellant. The appellant was not heard before this application was granted. The appellant filed another application for rescission of judgment, this time seeking rescission of the 4 July 2013 judgment. The respondent consented to having the judgment in respect of the application for dismissal for want of prosecution rescinded and the application for rescission of the 4 July 2013 judgment was granted. The appellant then filed its opposing papers and the matter was considered on the merits. The application for the rescission of the default judgment for want of prosecution was dismissed. Aggrieved by this judgment, the appellant filed the present appeal.

In her heads of argument the respondent raised a point of law, which she argued went to the root of the matter and its determination could dispose of this matter one way or the

other. She submitted that the agreement of sale between the parties was null and void for want of compliance with s 39(1)(b)(i) of the Regional Town and Country Planning Act [Chapter 29:12] (“the Act”).

Clause 14(b) of the agreement of sale between the parties provides as follows:

“It is noted that the Purchaser has agreed to allow the Seller to retain the homestead in the event of a subdivision permit being issued, as a remainder measuring 8000 square meters.”

The respondent alleges that this provision contravenes s 39(1)(b)(i) of the Act and therefore renders the whole agreement of sale null and void.

Section 39(1)(b)(i) of the Act provides as follows:

39 No subdivision or consolidation without permit

(1) Subject to subsection (2), no person shall —

(a) ...; or

(b) enter into any agreement —

(i) for the change of ownership of any portion of a property; ...”.

The respondent relied on the case of *X-Trend-A-Home (Pvt) Ltd v Hoselaw (Pvt) Ltd* 2000 (2) ZLR 348 (S). In that case it was held:

“... s 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for the change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited.”

The respondent further submits that the same principle was followed in *Tsamwa v Hondo and Ors* 2008 (1) ZLR 401 (H) at 402B, wherein it was held:

“On the evidence before this court, the fact is that at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is what the section in question prohibits. Any purported agreement for the change of ownership of a portion of a property is therefore null and void *ab initio* by virtue of the provision in s 39(1)(b)(i). It follows therefore, in my view, that the agreement in this matter is null and void *ab initio*.”

In order to determine the point *in limine*, one needs to interpret clause 14(b) of the agreement of sale and decide whether it in any way contravenes s 39(1)(b)(i) of the Act.

In regard to the point *in limine*, *Mr de Bourbon* made the following submission. He submitted that the agreement of sale did not contravene s 39(1)(b)(i) of the Act and therefore was not illegal. He argued that the respondent sold the whole of subdivision B of Lot B Upper Rangemore measuring 8,1191 hectares to the appellant. Clause 14(b) of the agreement of sale related to a contemplated future subdivision, which would give the respondent the right to retain the homestead built on the land measuring approximately 8,000 square metres.

I am persuaded by *Mr de Bourbon's* submission. A proper reading of the agreement of sale reveals that the stand was sold as a whole. The ceding of the homestead was an indulgence the parties agreed on after the completion of the sale. It does not detract from the fact that the land had been sold as a whole. There was no sale of a subdivision in the absence of a permit, as contended by the respondent. The respondent did not sell the land minus the homestead. She sold the land with the homestead. Upon completion of the sale of the land, the ceding of the homestead to the respondent in the event that a permit to subdivide the land was issued out in the future was agreed on. In the absence of that permit, the whole land remained wholly owned by the appellant, with the respondent having no right vested in it. It

would appear that the permit was issued out in 2011, but the certificate from the Surveyor-General was only issued on 29 January 2013.

In fact, it is on the basis of this interpretation of clause 14(b) of the agreement of sale that the respondent issued out the first legal proceedings against the appellant.

Accordingly, I am satisfied that the agreement of sale itself does not fall foul of the Act. In the result, the point of law raised *in limine* is answered in favour of the appellant.

I now turn to deal with the appeal against the dismissal by the court *a quo* of the application for rescission of the default judgment for want of prosecution.

The respondent applied to have the appellant's case dismissed for want of prosecution in terms of r 236(3) of the High Court Rules, which provides as follows:

“236. Set down of applications

(3) 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 discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration –

- (a) the length of the delay and the explanation thereof;

- (b) the prospects of success on the merits;
- (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time.

Dealing with the delay and the explanation for the delay, there is no doubt that there was a delay in this matter. However, the delay and the explanation thereof in this matter alone cannot form the basis for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for rescission for want of prosecution. This is a serious misdirection.

The delay in this matter is flagrant in some respects. It is quite clear from the record that there was a lot of inaction by the appellant when action should have been taken. For instance, when the application for dismissal for want of prosecution of the application for rescission of the default judgment was filed, the appellant did not seek to have the application for rescission of the default judgment dealt with expeditiously.

There is no rule of law which barred the appellant from proceeding with its application for rescission of the default judgment despite the making of the application for dismissal for want of prosecution. In fact under r 236 of the High Court Rules, when faced with an application for dismissal of an application, the High Court is enjoined to consider options other than dismissing the application for want of prosecution. The fact that the appellant sat around and did not attend to the setting down of the application for rescission of the default judgment is a factor that weighs heavily against the appellant. If anything, the chamber application ought to have triggered the appellant to attend to the finalisation of the

application for rescission of the default judgment. The only way the appellant could have shown that it was serious about the application for rescission was to proceed to have the matter set down after it was served with the chamber application for dismissal for want of prosecution.

The appellant's non-compliance with the High Court Rules is twofold. First, the appellant failed to have the matter set down or file an answering affidavit within the prescribed time. Second, after the chamber application for dismissal for want of prosecution was filed, the appellant still did not attend to the finalisation of the application for rescission of the default judgment. In this regard, the court *a quo* commented as follows:

“The first respondent's explanation is that at all material times its intention was to set the matter down for hearing, but due to the pressure of work this was not done. It is apparent, however, that even after the lapse of eight months no answering affidavit or heads of argument had been filed.”

The appellant contends that the application for dismissal of the application for rescission of the default judgment stood dismissed as a result of the order of the High Court dismissing the application on 4 July 2013. However, what the record does not show is the exact date when this order was set aside by consent. The appellant has not placed before this Court any document showing the date of such setting aside and this omission leaves this Court in an invidious position. I simply cannot tell when this application was set aside. This date is pertinent in the calculation of the time between the filing of the opposing affidavit in the application for rescission matter and the time when the application for rescission was set down, if at all it was. This works against the appellant.

The above position notwithstanding, the following factors are relevant to the final determination.

The appellant wrote to the respondent a number of times concerning the issue and even intimated that it was open to an out of court settlement. An abortive urgent chamber application was filed by the appellant and it appears that it was dismissed for want of urgency. Dismissal of this matter was an irregularity. The matter should simply have been struck off the roll. Dismissal of the matter suggests that the merits of the matter were considered when all that the court was required to determine was whether or not the matter should be heard on an urgent basis.

The vigorous opposition to the application for dismissal for want of prosecution also shows to some extent that the appellant really intended to proceed with the application for rescission of the default judgment.

The delay in finalising the application for rescission of the default judgment in the main matter is explained by the appellant's legal practitioner, Mr Norman James Pattison. Mr Pattison sent a message to his secretary and instructed her to convey the message to Mr Stephen Jonathan Collier, a junior legal practitioner in his firm. The message had specific instructions on the way forward regarding the application for rescission of the default judgment. The instruction was to prepare a brief to counsel for him to prepare heads of argument just in case the respondent intended to have the matter dismissed for want of prosecution. Mr Collier misunderstood the instruction, leading to the failure to comply with the instruction. Mr Collier thought that the message he received related to a different matter involving the same parties that Mr Pattison was handling. This explanation did not go down well with the learned judge in the court *a quo*, who commented as follows:

“The excuse proffered by the first respondent’s legal practitioner is that he was too busy and delegated the matter to a junior legal practitioner by sending a text message to his legal secretary. This, in my view, is not a reasonable and satisfactory explanation. I take this approach for the reason that if the legal practitioners were to claim that they were too busy and so they failed to act on their matters the justice delivery system would be severely compromised.”

Two issues emanate from this finding.

First, the judge took exception to the delegation to a junior legal practitioner. It appears the court *a quo* assumed that the junior legal practitioner was less competent and that the senior partner, in so delegating to the junior legal practitioner, did not take the matter seriously. In my view, this appears to be a misdirection for the following reason. The junior legal practitioner is also a qualified legal practitioner capable of following instructions given to him. There is no evidence on record to show that the junior legal practitioner was less competent than would be expected. The issue here is one of misunderstanding the message sent to Mr Collier by Mr Pattison. The explanation that the junior legal practitioner misunderstood the instruction is not necessarily unreasonable. This error does not necessarily involve negligence. It is within the realms of human error.

Second, the court *a quo* took umbrage at the fact that communication between the legal practitioners took the form of text messages. In this day and age I see nothing wrong in the use of text messages to facilitate communication between people. To take umbrage at the use of text messages, as the court *a quo* did, is a misdirection. The instruction sent to Mr Collier through a message on Mr Pattison’s secretary’s cellphone was received but regrettably misunderstood. Mr Pattison was himself not able to deal with the matter and so delegated it to another legal practitioner, a reasonable course to follow in the circumstances.

The court *a quo*'s aversion to the use of the text message is apparent. This is what the learned judge had to say:

“Where the legal practitioner fails to act, he has a duty to the court to give a credible and convincing explanation why he failed to act timeously. It is clear that the first respondent’s legal practitioner, in delegating an important matter to a junior legal practitioner, was taking a casual approach to the matter. He did not speak to the legal practitioner but transmitted a text message to a secretary, who was then expected to relay the information to the junior lawyer.”

Mr Pattison for all intents and purposes wanted the matter to be dealt with by counsel. This shows, if anything, that the matter was not being taken lightly. The learned judge considered this irrelevant in coming to the conclusion that there was no reasonable explanation for the non-compliance with the rules of court. In my view, the judge erred in this respect.

What the appellant’s senior legal practitioner did in this case does not amount to an unreasonable explanation for the failure to comply with the High Court Rules. In my view, the actions of Mr Pattison were reasonable enough in the light of the intended goal.

The court *a quo* in dismissing the application relied on the case of *Beitbridge Rural District Council v Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190 (S), where it was held in part that:

“Whilst it is true that the fault was largely that of the appellant’s former and present legal practitioners who failed to protect the appellant’s interests, that fact, in my view, does not assist the appellant. This court has, on a number of occasions, clearly stated that non-compliance with or a wilful disdain of the rules of court by a party’s legal practitioner should be treated as non-compliance or a wilful disdain by the party himself.”

This case quite clearly refers to a matter where there has been wilful disdain of the High Court Rules by the legal practitioners.

In the present case, the legal practitioner made arrangements for the matter to be finalised. The fact that the judge *a quo* preferred that the legal practitioner should have acted differently matters not. The fact that arrangements were made, though not properly carried out, shows that there was no wilful disdain of the Rules. One cannot prescribe how a legal practitioner should instruct his junior. As long as the manner of the communication gets the job done, that should be satisfactory. The junior legal practitioner in this case got the message. That is all that really matters in this case. The court *a quo* ought not to have taken an overly punctilious view of the manner in which the message was conveyed.

In the result, I come to the conclusion that although there was a delay in this matter, the explanation for the delay was reasonable.

I now turn to the issue of the prospects of success on the merits.

Counsel for the appellant submitted that the agreement of sale between the parties is valid. It does not fall foul of s 39(1)(b)(i) of the Act. I am in agreement with this submission. Given this situation, the appellant has almost an unassailable case on the merits.

It would be a gross injustice if a litigant with such good prospects of success on the merits is denied a day in court, in particular in a case where it has not been shown that there has been a wilful disdain of the High Court Rules.

Again, failure by the court *a quo* to consider the prospects of success on the merits is a misdirection, justifying the setting aside of the judgment of the court *a quo*.

I now turn to deal with whether the respondent will suffer any prejudice.

The founding affidavit to the chamber application for dismissal of the application for rescission of the default judgment for want of prosecution does not in any way detail how the respondent would be prejudiced by the delay in this matter. In other words, the respondent failed to bring herself squarely within the confines of what has to be proved for an application under s 236(3) of the Rules to succeed.

These are application proceedings. The evidence is as is on the papers. Even where there is a delay, the evidence will remain in the current form, unlike in actions where the testimonies of witnesses are pertinent. In those cases, delay would be more prejudicial than in application proceedings.

It would also be prejudicial to the respondent not to dismiss the application for rescission of judgment for want of prosecution where it is clear that the application sought to be dismissed is doomed to fail on the merits anyway. The prejudice would be in being made to take a long legal route when a shorter and cheaper one is available.

In casu, it is the appellant who has good prospects of success on the merits. Therefore dismissing the respondent's application is not prejudicial to the respondent.

The respondent, around December 2012, sought specific performance from the appellant regarding the transfer of the homestead or an 8000 square metre subdivision. The

respondent then changed her mind and sued for the cancellation of the agreement of sale when she issued summons out of the High Court. It is that summons which went undefended.

As I have already stated, as a matter of law the respondent could not approbate and reprobate at the same time. On this basis alone, it is conceivable that the respondent lost her right to seek cancellation of the agreement of sale by virtue of having sought to enforce the agreement of sale in the first place and those proceedings are before the court. A definitive finding will have to be made by the court dealing with the application for rescission of the default judgment.

Finally, the judgment of the court reveals that the court *a quo* did not consider the issue of prospects of success on the merits. This is a serious misdirection which justifies the setting aside of the judgment of the court *a quo* and sets this Court at large.

I also wish to note in passing that the handling of this matter by the High Court leaves a lot to be desired. The chamber application for dismissal of the application for rescission of judgment for want of prosecution was served on the appellant on 2 July 2013 and it was granted on 4 July 2013 without the appellant being given an opportunity to defend the matter. This is most irregular. The appellant had not had time to properly consider the matter. Sanity prevailed when this order was set aside by consent. It must also be noted that the default judgment in this matter was handled by the same judge who subsequently attended to the initial granting of the chamber application which was later set aside by consent and the final order appealed against herein. This to me is very unsatisfactory. It is highly undesirable that the same judge should preside over several applications between the same parties.

Taking into account all the above, I would allow the appeal to succeed and make the following order -

1. That the appeal be and is hereby allowed with costs.
2. That the order of the court *a quo* be set aside and in its stead the following is substituted –
 - “1. The application for dismissal of the application for rescission of the default judgment for want of prosecution be and is hereby dismissed;
 2. The respondent be and is hereby permitted and directed to file its heads of argument in case no. HC 1116/13, the application for rescission of judgment in the main matter, within ten days of the date of the handing down of this order.”
3. That this matter be heard by a judge other than the one who handled this matter before.
4. That costs be costs in the cause.

GOWORA JA: I agree

MUTEMA AJA: (Deceased)

Webb, Low & Barry, appellant’s legal practitioners

Dube-Tachona & Tsvangirai, first respondent’s legal practitioners