**G & P INDUSTRIES (PVT) LTD**

**And**

**FITZ GERALD & DES REAL ESTATE**

**Versus**

**KWEKWE CONSOLIDTED GOLD MINES (PVT) LTD**

**And**

**THE REGISTRAR OF DEDS N.O.**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 21 JANUARY & 23 JUNE 2022

**Opposed Application**

*A. Dracos* for the applicants
*A. Mutatu* for the 1ST respondent

**TAKUVA J:** This is an application for dismissal of an action instituted under HC 1799/16 for want of prosecution.

**Background**

First applicant is the owner and holder of title in respect of certain piece of land being stand 1584 Que Que Township situate in the District of Que Que in extent 5, 3267 hectares (hereinafter referred to as the property) The 1st respondent issued summons under HC 1799/16 on the 3rd of October 2016 seeking the following relief:

"a. An order compelling 1st and 2nd applicants to stop selling residential stands on 1st respondent's claims namely Chicago registration number G3041, Orion registration number 7718, November registration number 4177 and Phoenix West parallel registration number B479.
b. An order compelling second respondent to cancel the Deed of Transfer number 1339/85 which is registered in favour of first applicant and transfer same to the first respondent.

c. Costs of suit on the legal practitioner and client scale to be borne by first and second applicants jointly and severally."

The gist of 1st respondent's case was that it was the holder of mining claims which are not defined with the requisite specificity and particularity. Further, it sought an interdict barring 1st and 2nd applicants from proceeding with their lawful acts.

The relief sought was opposed by 1st and 2nd applicants. In time a plea was entered which was responded to with a replication. The 1st respondent's replication was filed on the 6th day of July 2017. Since then nothing happened until applicants filed this application for dismissal of suit under HC 1779/16 for want of prosecution. The application is based on the common law and or section 176 of the Constitution of Zimbabwe (Amendment No. 20) Act of 2013 citing that this court has the inherent power to regulate its process.

Further, applicants grounded their application on the reason that there had been inordinate delay in prosecuting the matter under HC 1779/16 and as such had suffered prejudice. The proceedings under HC 1779/16 were instituted on the 3rd of October 2016. Therefore as at the hearing of this matter it will be at least four (4) years after the suit was instituted. It is also applicants' contention that 1st respondent does not deny that there has been such an inordinate delay. This delay has not been explained by the 1st respondent.

Upon the hearing of this case, the parties resolved their points *in limine* as follows: The application for condonation by 1st respondent was not opposed and was therefore granted. The second issue relating to 1st respondent's authority was abandoned. Thirdly, the stage that the action matter has reached was agreed as the filing of replication documents. Paragraph 6.2 of the 1st respondent's affidavit must be expunged from the record as it contained evidence that is not in the opposing affidavit. Finally, the application for upliftment of a bar was not opposed and was accordingly granted by consent.

On the merits, the applicant's point is that the validity of the application is not, a point *in limine* but a point relating to the merits. Applicants argued on the merits that they have satisfied the following requirements;

(a) That there has been inordinate delay.

(b) That this inordinate delay is inexcusable;

(c) That the defendants (applicants herein) are likely to be seriously prejudiced by the delay.

Applicants relied on a number of decided cases to support their argument. As regards the question of prejudice, once it is accepted that the applicants own the property and that there are no endorsements on it, any potential prejudice to be suffered is there for anyone to see. First, applicant cannot possibly proceed to invest in the property with the main matter pending. In respect of the balance of convenience, applicants submitted that 1st respondent stand to lose nothing if the present application is granted. First respondent has failed to prove its claim to the property by attaching any documentary evidence.

These, according to the applicants are not signs of a serous litigant and owner of property. Accordingly applicants prayed that the application be allowed with costs of suit.

The 1st respondent opposed the application on the following grounds;

1) The application is defective
2) The balance of convenience favours the 1st respondent
3) There is no prejudice being suffered by the applicant if any, it is self-created
4) The 1st despondent has high prospects of success in the main matter

In reality there are only two issues *in casu*. The 1st is whether or not the application is defective. The second issue is whether or not the requirements for a dismissal of an

action matter have been met. The crux of the matter is that both parties failed to discover after replication had been made. The matter was left to rot in the Registrar's Office for more than four years until the applicants filed the current application.

**The law**

That this court has inherent jurisdiction to regulate its own process has been put beyond doubt by the provisions of section 176 of the Constitution of Zimbabwe (Amendment No. 20) Act 2013 (the Constitution). The section states;

> "176. **Inherent Powers of Constitutional Court, Supreme Court and High Court**
>
> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to decide the common law, the customary law, taking into account the interest of justice and the provisions of this Constitution."

See also A. C. Cilliers, C. Loots and H. C. Nel; Herbstein and Van Winsen, *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, fifth edition, 2014, Juta & Co. Ltd t page 49 where the learned authors relate to section 173 of the South African Constitution which is similar to our section 176.

While it is accepted that the old High Court Rules 1971 and SI 212 of 2021 make no provision for the dismissal of action proceedings for want of prosecution – *Anchor Ranching (Pvt) Ltd* v *Beneficial Enterprices (Pvt) Ltd & Anor* 2008 (2) ZLR 246 (H), the rules of procedure of this court are used for the purposes of administering justice and not of hampering it. Further, where the rules are deficient, this court can go as far as it can in granting orders which would assist to further the administration of justice. See *Nkoweni* v *Bezuidnout* 1927 CPD 130; *Universal City Studios INC* v *Network Video (Pty) Ltd* 1986 (2) SA 734; *Permanent Secretary Dept of Welfare Eastern Cape* v *Noxmza* 2001 (4) SA 1184 (SCA).

In this jurisdiction, it is now accepted on authority of section 176 of the Constitution and the common law that an application of the present nature is proper and advances the interests of justice – see *Rio Zim Ltd* v *Nigel Dixon Warren N. O* HH-192-20 where this court per DUBE-BANDA J remarked;

> "The High Court has the inherent power, both at common law and in terms of section 176 of the Constitution to protect and regulate its own process. This power includes the right to prevent an abuse of its process in the form of frivolous or vexatious litigation. An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action."

On the other hand the following legal principles evolve from the decided cases.

1. In *ex parte Millsite Investments Co. (Pty) Ltd* 1965 (2) SA 582 (&) VIERA J while addressing the inherent power of the court to regulate its process in terms of the Constitution and the common law stipulated that; "The inherent power is not merely one derived from the need to make the court order effective and to control its own procedure, but to hold the scales of justice where no law provides directly for such a given situation."(my emphasis)
2. In *Osthuizen* v *Road Accident Fund* 2011 (6) SA 31 (SCA) the court held that; "the court ought to be cautious about the exercise of their inherent power to regulate their procedure – that power <u>should be exercised sparingly and not as a matter of course. This is because the Rules are there to regulate the practice and procedure of the courts in general terms</u> and <u>strong grounds would have to be advanced to persuade the court to act outside the powers specifically provided for in the Rules."</u>(my emphasis)

3. In *NEDBANK Ltd* and *V. W. Sqirana N. O.* HC-1203-2018, the court outlined the principles thus;

> "… the courts can only do so when confronted with procedures and rules of court that do not provide a mechanism to deal with a particular problem. The court will, in that case be entitled to fashion the means to deal with the problem in order to enable it to do justice between the parties. Where there is a mechanism or alternative remedy available to a party, it is not in the interests of justice for the High Court to exercise its inherent jurisdiction. In other words, there must be a lacuna in the law." (my emphasis)

The provisions of r47 (10) and (11) are also relevant to the question of whether or not this application is properly before the court.

Sub-rule (10) states;

> "(10) If a party fails to make discovery under this rule or having been served with a notice under sub-rule (5) fails to give notice of a time for inspection or fails to permit inspection as required by that sub-rule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection and the judge may grant or refuse the order as he considers appropriate.
>
> (11) If a party fails to comply with an order made in terms of sub-rule (10), the party in whose favour the order was made may make a further chamber application for the dismissal of the party's claim or the striking out of his or her defence, as the case may be, and the judge may give judgment in default against the defaulting party." (my emphasis)

Applying the law to the facts, it appears to me that;

(1) Inherent jurisdiction should be invoked where no law provides directly for a given situation. Put differently, it is only where there is no remedy provided in the rules or Act that one looks outside these rules and Act for a remedy.

(2) The court ought to exercise caution when invoking its inherent power to regulate its procedure.

(3) That power must be exercised sparingly because it is the role of the rules to regulate the practice and procedure of the courts.

(4) Cogent grounds would have to be presented to persuade the court to act outside the powers specifically provided for in the rules.

Where there is a mechanism available to a party it is not in the interests of justice for this court to exercise its inherent jurisdiction. As indicated before, there has to be a *lacuna* in the law.

In the present case, the 1st applicant had recourse in terms of rule 47 (10) and (11). Unfortunately, it also waited for 4 years doing nothing when it could have acted to move the matter forward as stipulated in the rules. Either party could have caused this matter to be dismissed for want of prosecution in terms of sub-rule (11). As such 1st applicant should have exhausted other remedies available in the rules in order to finalise the matter. Quite clearly, there was no lacuna that warranted its resort to the Constitution or common law. The Constitution only provides a remedy where there is no other remedy in the rules.

In my view r47 has nothing to do with which party is *dominus litis* in that it says "A party to a cause or matter may require any other party thereto, by notice in writing to make discovery on oath within ten days of all documents …" (my emphasis). This must be done at the close of pleadings unless a judge directs otherwise. *In casu* therefore any party could have served the required notice to the other thereby triggering the procedure in sub-rules (10) and (11). I am not convinced that the 1st applicant acted on its part in seeing the matter to finality. These remarks also apply to the 1st respondent which failed to prosecute its case within a reasonable time. While this may be common cause, the question is what should have followed

upon this failure? The answer, it seems to me is that 1st applicant should have resorted to the provisions of r47 (10) and (11) of the rules of this court.

Resultantly, I am not persuaded that the 1st applicant adopted the correct procedure in seeking dismissal of an action for want of prosecution in terms of s176 of the Constitution and the common law. In view of this finding, I do not consider it necessary to venture into an examination of the rest of the requirements that applicants have to satisfy, for doing so will simply be an academic exercise.

As regards costs, I do not believe that it is fair and just to order applicants to pay 1st respondent's costs in light of its conduct.

Accordingly, it is ordered that;

1. The application for dismissal of an action for want of prosecution is hereby dismissed.
2. Each party is to bear its own costs.

*Honey & Blankenberg c/o Tanaka Law Chambers*, applicant's legal practitioners
*Mutatu & Partners, c/o Mutatu, Masamvu & Da Silva Gustavto Law Chambers*, respondents' legal practitioners