E. A FUNDIRA TRUST

Versus

REGIS MINING SYNDICATE

And

ROBERT CHIPWANYIRA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 23 & 30 SEPTEMBER 2021

Opposed Application

H. Muromba, for the applicant
C. Mugambiwa, for the respondents

KABASA J: This is an application for the dismissal of the respondents' application filed under case number HC 1425/16 for want of prosecution. The application is in terms of Order 32 Rule 236 (3) (b) of the High Court Rules, 1971.

The background facts are these: The respondents filed a court application seeking a declaratur of mining rights and cancellation of the special mining grant SG 5751 issued in favour of the applicant. The application was filed on 7th June 2016 and served on the applicant in 2017. The applicant duly filed a notice of opposition together with an opposing affidavit and served same on the respondents on 8th June 2017. The respondents did not file an answering affidavit nor was the matter set down. On 27th October 2020 the applicant then filed the present application for dismissal of the respondents' application.

The application is opposed. In opposing the application, the respondents acknowledged that no answering affidavit was filed after the applicant's notice of opposition and opposing affidavit were filed. They equally acknowledged that there was a long period which lapsed since the filing of the notice of opposition. The delay was attributed to financial challenges. Litigation being a costly exercise the respondents lacked the financial muscle to prosecute the application. However, heads of argument and a notice of set down were now being attended to with a view to prosecute the application which is sought to be dismissed.

The application under HC 1425/16 is meritorious in that the respondents were prospecting for gold by virtue of a prospecting licence and were in the process of obtaining a mining claim. The applicant obtained a special grant over the same area ahead of other applications, which was irregular and improper. The application therefore seeks to have that special grant nullified, so the respondents contended.

At the hearing of the matter counsel for the applicant submitted that the respondents have no desire to prosecute the application which is sought to be dismissed. This is demonstrated by the fact that from 2016 to present, that is 2021, that matter has not been

prosecuted to finality. The reason for the inaction was given as lack of funds and yet such funds immediately became available when the respondents were served with the application for dismissal. An answering affidavit was then filed and the matter again stalled until the respondents were served with a notice of set down for the application for dismissal. Only then were heads of argument filed in HC 1425/16.

At the time the prospecting licence respondents were using on this land was granted the land was farm land and no notice was given to the farm owner as required at law. The area was subsequently reserved in terms of section 35 of the Mines and Minerals Act, Chapter 21:05 which had the effect of ceasing whatever rights respondents accrued by virtue of the prospecting licence. The respondents have no rights to speak of and consequently there are no prospects of success in HC 1425/2016.

The respondents are merely using HC 1425/16 as a ruse to interfere with applicant's operations thereby prejudicing the applicant.

In response counsel for the respondents conceded the inordinate delay in the prosecution of HC 1425/16 and equally conceded that the explanation thereof has no merit.

Counsel however argued that the respondents are exempted from the reservation because they are holders of a mining location as envisaged by the proviso to section 35 of the Act. The applicant could therefore not have a special grant granted ahead of the respondents and that is the argument sought to be advanced in the application under HC1425/16.

With these submissions, the question to ask is whether the applicant has made a case for the dismissal of the respondents' application filed under HC1425/16.

I propose to consider the requirements to be met in such an application before I answer this question.

In *Guardforce Investments (Pvt) Ltd* v *Sibongile Ndlovu & 2 Others* SC-24-16 CHIDYAUSIKU CJ had this to say:

> "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.

I propose to look at each of these in turn:

a) The length of the delay and the explanation thereof:

There is no doubt the delay is inordinate. Since 2016 the matter stalled due to a failure by the respondents to prosecute the matter. They were galvanized into action upon receipt of the application seeking to dismiss their matter. Even then such action appeared to be half-hearted, as if to just "silence" the applicant for a while longer, and this is evident from the undisputed fact that the respondents only filed an answering affidavit and did not file heads of argument. The answering affidavit was filed on 20th November 2020 after receipt of

the application for dismissal on 27th October 2020. Nothing further was done until the applicant filed heads of argument *in casu* which were served on the respondents on 30th November 2020. The respondents then filed their own heads of argument for the present matter and the matter which is sought to be dismissed on 15th September 2021, almost a year later. This speaks to an unacceptable level of lethargy inconsistent with a litigant who desires to have their matter finalized.

The reason for the lethargy does not stand up to scrutiny. Miss Mugambiwa's concession that the respondents failed to meet this first requirement was therefore properly made.

Were this the only requirement the matter would have ended there. However these factors are not to be taken in isolation. As CHIDYAUSIKU CJ stated in the *Guardforce* case (*supra)*:

> "… the delay and the explanation thereof … cannot form the basis for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application …"

The same remarks apply *in casu*. The other factors also have to be considered in deciding whether or not to dismiss the respondents' application.

b) The prospects of success on the merits

The respondents took issue with the grant of a special grant to the applicant for an area they argue they had a prospecting licence for and were in the process of seeking the grant of a mining location.

It is important to note that in the opposing affidavit, the 2nd respondent categorically stated that he had a prospecting licence and had "complied with all the requirements for a mining claim and all that was left was for us to be issued with one". The fact is the respondents did not have a registered mining claim as at the time they filed the application. The papers placed before me do not show that they now have one. There is no dispute that the area was reserved in terms of section 35 of the Mines and Minerals Act. This section reads:

35 (1) "The Mining Commissioner may, and, if so instructed by the Secretary on the authority of the Minister, shall, reserve by notice posted at his office any area against prospecting and pegging, and all rights possessed by the holder of any prospecting licence or exclusive prospecting order to prospect for and peg minerals shall cease and may not be exercised within such area as from the date and hour of the posting of such notice or such later hour or later date and hour as may be specified in such order .

Provided that the holder of a mining location other than an exclusive prospecting reservation, within any such area shall retain and may exercise all rights lawfully held by him which existed at the date and hour as from which such notice takes effect in terms of this subsection."

Mining location is defined in section 5 (1) as "a defined area of ground in respect to which mining rights, or rights in connection with mining, have been acquired under this Act or which were acquired under any previous law …"

As already alluded to earlier on in this judgment the 2nd respondent stated that he held a prospecting licence and was in the process of obtaining a mining claim. He therefore cannot be said to have been the owner of a mining location as envisaged in the proviso to section 35. Efforts to acquire certain rights do not endow the applicant with such rights until such rights have been bestowed on them after due process.

That said, since it was not disputed that this area was reserved and equally there being no contestation regarding the lifting or revocation of such reservation or that such reservation was for a specified period as envisaged in section 35 (2), it follows therefore that the holder of any prospecting licence's rights were ceased when the reservation was posted.

Counsel for the respondents' submission that the respondents enjoyed the rights of the owner of a mining location is not borne out by the papers filed of record. There was no mention of that anywhere in the papers, including in the heads of argument which were filed after the applicant's and in which the point was made that because of the section 35 reservation, whatever rights the respondents possessed ceased upon the posting of the reservation. If there was any truth in the assertion that they fall under the proviso, such would have been mentioned, it being a crucial issue in light of the respondents' claim under HC 1425/16. The only conclusion to be drawn from this is that the issue of exemption is an afterthought meant to bolster a meritless argument. Since they do not fall under the exemption stipulated in the proviso to section 35 it means that their prospecting rights ceased when the reservation notice was posted in terms of section 35.

Miss Mugambiwa also submitted that the applicant's special grant lapsed and was not renewed. She submitted that this special grant lapsed in 2016. If that is so, why seek to lethargically prosecute a matter whose relief you have in a way obtained since the contested special grant has lapsed and was not renewed?

The 2nd respondent deposed to an affidavit wherein at paragraph 11 thereof he stated that:

> "The effect of dismissing our application would be to leave him with the special grant and that cannot be allowed to stand."

This assertion is not consistent with *Miss Mugambiwa's* submission that the special grant lapsed. Since it lapsed in 2016 and was not renewed as per counsel's submission, why clog the courts with a matter that has to all intents and purposes been overtaken by events? Why seek to challenge a special grant that no longer exists? What stops the respondents from proceeding with the process they commenced in seeking to have the mining claim registered? I pose these rhetorical questions so as to demonstrate the zero chances of success of HC1425/16.

It was Mr. *Muromba's* argument that the respondents are prolonging the application in HC 1425/16 because it creates room for them to interfere with the applicant's operations. The area under contestation is within the applicant's farm. Given *Miss Mugambiwa's* submissions, such an assertion appears to hold water.

Mr. Muromba had also argued that in terms of section 38 (2) of the Act, the respondents, before exercising any of their rights under a prospecting licence had to give notice to the occupier of the land in person or by registered letter addressed to the occupier. Such notice was not given and so this lack of compliance affects any prospects of success the respondents could have in the application for a declaratur.

Miss Mugambiwa did not address this point, not in the heads of argument nor at the hearing. The point was therefore not controverted.

What then are the prospects of success in the matter in HC 1425/16? From the submissions made I see no prospects of success to warrant allowing that matter to trudge on with the lethargy that has been exhibited from its genesis in 2016.

> "There is no rule of law which barred the applicant 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 r235 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." (per CHIDYAUSIKU CJ in the *Guardforce* case *supra*).

In casu, the respondents heeded this advice and so prosecuted, with much prodding from the applicant, to file an answering affidavit and heads of argument. The question is, to what end? Unlike in the *Guardforce* case where the prospects of success were bright, *in casu* there are no prospects of success for the reasons already alluded to. Shall matters be allowed to clog the system just for the sake of it? I think not.

The balance of convenience and the possible prejudice to the applicant favour the granting of the application for dismissal.

Why should the applicant still live with the prospect of interference based on the prosecution of a matter which the respondents, possibly inadvertently, have demonstrated has all but been overtaken by events on the ground? With the submission that there is no longer a special grant to talk about, the court should not allow an application which seeks to vacate that which has already been vacated. *In casu* such vacation having occurred through the lapse of the special grant due to effluxion of time and its non-renewal.

All the factors to be considered in an application of this nature favour the applicant. I now go back to answer the question I posed earlier, which is, has the applicant made a case for the relief sought. The answer is in the affirmative.

But for the fact that the respondents did awake from their slumber and did not oppose the application whilst still doing nothing to prosecute the matter being sought to be dismissed, I would have acceded to the prayer for costs at a punitive scale.

I am consequently not persuaded to mulct the respondents with punitive costs.

In the result I make the following order:

The application succeeds, with costs.

The application filed in case number HC 1425/16 be and is hereby dismissed for want of prosecution, with costs.

The respondents shall pay these costs at the ordinary scale.

Kantor & Immerman c/o Coghlan & Welsh, applicant's legal practitioners
Hlabano Law Chambers, respondents' legal practitioners