EDNAH MARANGE
versus
WALTER MUTOWO

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 1 April 2021, 16 June 2021.

Opposed Application

Applicant, in person
Respondent, in person

DUBE J

1. The applicant brought an application in terms of s 236(4) (b) of the High Court Rules, 1971, (the Rules). She seeks an order for dismissal of the respondent's case on the premise that he failed to pursue an application he filed by neglecting to set it for hearing entitling her to apply for dismissal for want of prosecution.
2. Rule 236(4) stipulates as follows;

   "(4) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, 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.''

3. Where an answering affidavit has been filed in response to an opposing affidavit, an applicant is expected to set down the matter within a month after the answering affidavit has been filed and served on the other party. Failure to do so, the other party has an option to either to set down the matter for hearing or apply for dismissal of the matter.
4. The purpose of r 236(4) is to ensure that matters are expeditiously dealt with and brought to finality. In Scotfin *Ltd* v *Mtetwa* 2001(1) ZLR 249@250 D-E, the court stated as follows;

   '' Rule 236 … was intended to ensure the expeditious prosecution of matters in the High Court. The rule was deliberately designed to ensure that the court may dismiss an application if the principal litigant does not prosecute its case with due expedition. ''See also *The Permanent Secretary, Ministry of Higher and Tertiary Education* v *College Lecturers Association of Zimbabwe & Ors* , HH 628/15.

5. Litigants must not be sluggish in prosecuting their cases as this has the effect of prejudicing the other party, clogs the courts and creates an impression of backlogs. Failure to prosecute cases expeditiously attracts the censure of the courts.

4. However, the power to dismiss an application for want of prosecution should be sparingly exercised and only in deserving cases. In exercising this power, the court must always bear in mind that every litigant has a right not just to have his day in court but to a fair trial .Every litigant has an entitlement to have matters of law as well as of fact decided according to the ordinary rules of procedure, which includes the full opportunity to present his or her case to the court. While every litigant has an entitlement to these rights, his conduct must not be prejudicial to the interests of the other party. A balance must be struck between the interests of the parties as well as those of the administration of justice.

4. The approach to applications for dismissal for want of prosecution was laid down in *Makaruse* v *Hide and Skin Collectors (Pvt) Ltd* 1996(2) ZLR 60 (S) 65 D – F as follows;

"By virtue of the power conferred on this court by r 4 supra to condone any non-compliance with the rules, none of the provisions of the rules are strictly peremptory. 'The rules are, however, there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced, in my view to persuade a court to act outside the powers provided for specifically in the Rules: per Botha J (as he then was) in *Moulded Components v Coucourakis & Anor* 1979(2) SA 457(W) at 462 – 3. Thus the inherent power to prevent abuse of the machinery of the court is a power which has to be exercised with great caution, and only in a clear case: *Hudson* v *Hudson*, supra at 268. Non-compliance of the rules will only be condoned upon good cause shown by the applicant. There must be a reasonable and acceptable explanation for the failure to comply with the rules, and the applicant for condonation must also show reasonable prospects of success. *See General Accident Insurance Co SA Ltd* v *Zampelli* 1988(4) SA 407(C) at 411 C – D"

5. A respondent in an application for dismissal for want of prosecution must tender a reasonable and satisfactory explanation for the failure to prosecute the matter under spotlight. He must sway the court not to order dismissal of the matter. In order to do so, he must explain the non- compliance with the rules and advance strong reasons why the court must not dismiss his application.

6. In addition to the explanation for the delay, the applicant must address both the merits of and demerits of the claim and the defence. A court dealing with an application for dismissal, whilst entitled to have a sneak peak at the merits of the application sought to be dismissed, must not approach the question of the merits as if it is determining the matter sought to be dismissed conclusively on its merits. The occasion of the hearing

of an application for dismissal for want of prosecution is not one deserving full ventilation and a decision to be made on the merits of the matter. The court should be alive to the fact that it is not settling the dispute in the matter sought to be dismissed and ought to focus on the pleadings and desist from dwelling on the probabilities of the case. In a case where an application presents legitimate questions of fact or law that are arguable, contentious, or the court has some reservations, difficulty or doubt, it is not appropriate to order dismissal of the application.

7. The court has an entitlement to dismiss a matter where it is groundless and there is no likelihood that it will succeed. Where the claim is genuine and finds support on the pleadings filed, the claimant must be given an opportunity to prosecute his claim. All the court is required to decide is whether or not there are triable issues on both the facts and the law.

7. The approach to be followed is the same as in an application for rescission of a judgment or order. Good cause must be shown why the application should not be dismissed for want of prosecution. The court is required to consider these aspects cumulatively. See *Karengwa V Mpofu HB 56/15; Cho v Mau* HH 744/04

8. Reference in s236 (4) (b) to the fact that the judge "may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit'', has the effect of conferring on the court a discretion either to allow or dismiss the application after considering the circumstances of the default and the merits of the applicant's case. Rule 236 confers on the court wide discretionary powers which must be exercised judiciously.

9. The chronicle of actions taken after the filing of the application by the respondent is as follows; on 11 May 2020, the respondent filed an application for a *declaratur*. The applicant filed a notice of opposition on 2 May 2020 followed by the respondent's answering affidavit filed on 28 May 2020. No further action was taken until the applicant filed this application on 21 December 2020. The applicant was required to have set the matter down after he filed an answering affidavit. The respondent being a self-actor was not legally required to have filed heads of argument before setting down the application. He filed heads of argument on 29 March 2021 after the applicant had filed her application for dismissal.

6. The respondent defends the application .He took up a number of points *in limine* which will be dealt with in seriatim. The respondent averred that the applicant has relied on incorrect rules rendering the application for dismissal improperly before the court. He submitted that the dispute is of a commercial nature and ought to have been brought under the Commercial Court Rules, S.I 123\2020 which became effective on 1st June 2020 and not the High Court Rules.
7. The Commercial Court Rules which were initially supposed to come into effect on effect on 1st June 2020 were suspended in terms of S.I 249/2020. The practice is that all matters filed in terms of the Commercial Court Rules, are to continue in terms of the High Court Rules as ordinary civil matters. The point fails.
8. The other point raised is that applicant failed to disclose that she misrepresented that she had sold the house and that she had engaged him for an amicable resolution of the dispute resulting in his continued occupation of the premises and withdrawal of the application sought to be dismissed. The respondent also submitted that the applicant has not been candid with the court as she did not disclose that she wanted to charge rentals in United States dollars and he disagreed with the level of the rentals suggested. He averred that the applicant is misleading the court as the initial reason for terminating the contract of lease was for her to personally occupy the house but has now proffered different reasons for terminating the lease. The last three points deal with the merits of the application for a declaratur and were not properly raised as preliminary points in this application.
9. The respondent accepts that he is in breach of the rules. The issue is whether the respondent has shown an entitlement to set the matter down despite the non-compliance. The respondent's explanation for the noncompliance with the rules is that he was unable to take any action to get the matter set down immediately after the 25th of May 2020 because of the lockdown that was introduced after the outbreak of the Covid 19 pandemic. He says that the lockdown restricted movement of people and he failed to pursue the matter. He had no clearance letter and was unable to get into town to seek legal advice, file heads of argument and set the matter down. He started to pursue his application after the lockdown was briefly lifted. The parties were also actively engaged in an out of court settlement.
10. The applicant did not contest the challenges faced by the applicant. The respondent failed to set the matter down within a month as stipulated by r236 (4). There was a delay of 7 months .The applicant was entitled to apply for dismissal for want of prosecution. The

Covid 19 pandemic ushered an era where people live in fear of contracting the Covid 19 disease making it difficult for people to move around freely. Further, the legal restrictions to movement periodically placed on people make it difficult for people to conduct day to day business. The respondent's explanation that he was unable to pursue the application due to the restrictions placed by the lock down is plausible and acceptable.

11. This dispute arises out of a lease agreement entered into by the parties in respect of a residential premise in 2012. The first lease period ran from 1st May 2012 to 30 April 2013, renewable annually. The lease agreement expired and has been renewed annually ever since. There seems to have been a series of other leases after that. The respondent averred that he has been religiously paying the agreed rentals in terms of the lease agreement.

12. The respondent received a letter from the applicant dated 28 September 2019 giving him three months' notice to vacate the leased premises. He challenges the notice to terminate the lease agreement on the basis that it is not in compliance with the'' lease period for 1st May to 30 April 2020 which was still running and terminating it effective 31 December 2019 would be premature and therefore unlawful .

13. The respondent contended that he was not been given the requisite 3 month notice period at the end of the lease that expired on 30 April 2020. He maintained that the notice period was supposed to run from 1st May 2020 to 31 July 2020. He seeks an order declaring that the applicant's termination of the lease agreement and attempts to evict him are "arbitral'' and therefore illegal and *null and void.* He wants the applicant to be ordered not to interfere with attempts and efforts by him and his contractors such as transporters and prospective landlords to facilitate the vacation of the leased premises.
14. In the next breath, he says that he was unable to move to a new place because he was unable to collect money from his debtors to pay his rentals due to restrictions imposed by the lockdown in 2020. The applicant insists that he must move when it is impossible to do so .He expresses a willingness to move out of the premises. Some of the stories he tells are quite nonsensical and irrelevant for the purposes of determination of the dispute.
15. According to the applicant the 2012 lease expired in 2015 when the parties signed a new lease. The respondent refused to abide by its terms leading to her giving him a verbal notice to vacate, on 1 June 2019. It is then that she gave him notice to vacate the

premises based on the 2012 lease as per his demand of September 2019.She contended that all the notices he was given expired before the lockdown came into effect in December 2019. He has no basis to remain in the premises because he failed to vacate the premises when the notice period lapsed and has lost the right to remain in the premises. The applicant argued that clause 1 of the lease agreement makes provision for cancellation of a lease by either party on three months' notice and that no question of arbitrariness comes in. She contended that the respondent's application for a declaratur is baseless.

16. A notice to vacate with reasons for the notice was served on him and he actually served the notice period but refuses to vacate. The respondent fell into the error of thinking that he could not be given notice to vacate the premises before the lease agreement expired. The points raised by the applicant against the respondent's case on the merits shows that the respondent's case is evidently untenable.
17. The order sought is meaningless and confusing. Whilst I am cognisant of the fact that the respondent is a self-actor, he failed unable to explain what he meant when he said that the termination was ''arbitral. '' If it was his intention to speak to an arbitrary termination, it is unclear why the said termination would be said to be arbitrary and the implications of such a termination at law. It is unclear why the notice to vacate is said to be illegal and arbitrary. The court is not sure what legal position will be required to declare. It is unlikely that the respondent's application for a declaratur will if allowed to continue, succeed.
18. Whilst the respondent is complaining that the applicant had no entitlement to give him notice to vacate the premises and that the notice was ''arbitral'', he shows a preparedness to move out of the premises and actually seeks the assistance of the court in that respect. It is unclear why it should find that the notice to vacate is illegal and arbitrary. The respondent's case does not present genuine questions of fact or law that are arguable, .Effectively, there is no real or debatable question of law or fact for the court to try. The respondent is just being vexatious. The applicant has shown an entitlement to the order sought.

ACCORDINGLY, it is ordered as follows;

1. The application for dismissal for want of prosecution of case number HC 2521/07 be and is hereby granted with costs.
2. The application filed under case number HC 2521/07 be and is hereby dismissed with costs.

Applicant, in person
Respondent, in person