**JONKERSHOEK TRADING (PVT) LTD**

**Versus**

**NTOBIZODWA GASTINA MPOFU**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 JANUARY 2023 & 25 JANUARY 2023

**Opposed chamber application**

*Ms. R M Nyamutowa,* for the applicant
*V E Ndlovu,* for the respondent

**DUBE-BANDA J:**

1. This is a chamber application for dismissal for want of prosecution in terms of r 59 (15) (b) of the High Court Rules, 2021. The applicant seeks to dismiss an application for rescission of judgment filed under cover of case number HC 637/21 (main application). The order sought is couched in the following terms:

   a. That the respondent's court application for rescission of judgment under Case No. 637/21 be dismissed for want of prosecution.
   b. Each party to bear its own costs of suit.

2. The application is opposed by the respondent.

**The background**

3. This application will be better understood against the background that follows. On the 4th October 2018 this court (Per TAKUVA J) in a matter between Jonkershoek (Private) Limited v Lot Mpofu *t/a* Happy Valley Mine & Ntembi Gastinn Mpofu (HC 1937/18) ordered the respondent and others to pay the applicant the sum of $32 745.50. And on the 12th September 2019 this court (Per MAKONESE J) granted an order for civil

imprisonment against the respondent and others and suspended it on condition the debtors pay monthly instalments in the sum of US$1000.00 or the equivalent at the interbank rate until the sum of US$32 750.50 was paid in full. On 28 May 2021 the respondent as the applicant filed a court application for rescission of judgment (HC 637/21). On 17 June 2021 the applicant as the respondent filed a notice of opposition and an opposing affidavit. On the 16 September 2021 the applicant filed this application seeking the dismissal for want of prosecution of the application for rescission of judgment. The applicant avers that respondent has not within one month of filing the notice of opposition filed an answering affidavit nor set down the main application for a hearing. It is against this background that the applicant launched this application seeking the relief mentioned above.

**The law**

4. The application dismiss the application for rescission of judgment is anchored on r 59 (15) of the High Court Rules, 2021 which provides as follows:

> 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."

5. In G*uardforce Investments (Pvt) Ltd v Ndlovu & Ors* SC 24 /16 the court set out the factors relevant for consideration in such an application. The court held thus:

> The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration- the length of the delay and the explanation thereof; the prospects of success on the

merits; the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time.

See: *Dube v Premier Medical Investments (Private) Limited and Another SC* 32/2022

6. It is on the basis of these legal principles that this application must be viewed and considered.

**The application of the law to the facts**

*The length of the delay and the explanation thereof*

7. In the application for rescission of judgment the applicant filed its notice of opposition and opposing affidavit on 17 June 2021. This application was filed on 16 September 2021. At the time of filing of this application, the respondent had been out of time for a period approximating two months. At this stage the delay was not inordinate.

8. The respondent contends that at the relevant period the country was under a national lockdown as a result of Covid 19 Regulations. As a result of the Covid 19 Regulations the courts were dealing with urgent matters only. The application for rescission of judgment was not an urgent matter whose processes could be filed during the lockdown. I agree. This is however not the end of the inquiry. The court resumed full operations on the 6 September 2021. The respondent did not take any further steps to prosecute the application for rescission of judgment until this application was filed on the 16th September 2021.

9. The respondent contends further that she had instructed her legal practitioners to hold a round table conference with the applicant with a view of resolving the controversy between them. Although the attempt to reach out and hold a round table conference is admitted by the applicant, it does not appear that the respondent attended to this issue with a measure of diligence and seriousness. I say so because she says her legal

practitioners waited for formal communication from the applicant's legal practitioners to no avail. It was incumbent on the respondent to push for the convening of the round table conference. Not just sit and wait for formal communication from the applicant's legal practitioners. In the circumstances of this case I take the view that the explanation of the delay is unreasonable.

10. To compound matters for the respondent, this application was filed on the 16 September 2021 and the hearing was on the 18 January 2023, a period approximating 1 year four months in between. During this period the respondent did not take any further steps to prosecute the application for rescission. In G*uardforce Investments (Pvt) Ltd v Ndlovu & Ors* SC 24 /16 the court said:

> 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.

11. As was said in the G*uardforce Investments (Pvt) Ltd v Ndlovu & Ors* SC 24 /16 case, the respondent's non-compliance with the rules is two-fold. First, she 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 respondent still did not attend to the finalisation of the application for rescission of the default judgment. These are factors that weigh heavily against the respondent. If anything, the chamber application ought to have triggered the respondent to attend to the finalisation

of the application for rescission of the default judgment. The only way the respondent 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. She did not.

*The prospects of success on the merits*

*12.* In resisting an application for a dismissal for want of prosecution, the respondent must show that the main application that is sought to be dismissed has prospects of success. It is a trite principle of our law that a litigant must lay out or plead a basis for the opposition in the opposing affidavit. As the application stands or falls on the founding affidavit and the facts alleged in it, the opposition stands or falls on the opposing affidavit and the facts alleged in it. See: *Chiangwa And 7 Others v AFM in Zimbabwe And 7 Others* SC 67 of 2021; *Austerlands (Pvt) Ltd & Ors* v *The Sheriff of Zimbabwe & Ors* 2006 (1) ZLR 372 (S).

13. My view is that the *onus* is on the applicant to persuade the court that it is entitled to the relief sought in this application. However once the applicant shows that the respondent has not within one month of filing the notice of opposition filed an answering affidavit nor set down the main application for a hearing, the evidential burden shifts to the respondent to combat a *prima facie* case made by the applicant. The respondent must adduce evidence to show *inter alia* that the main application has prospects of success on the merits. The opposing affidavit must speak to the prospects of success of the main application. In *casu* the opposing affidavit is silent about the prospects of success of the application for rescission of judgment. There is absolutely nothing in the opposing affidavit for this court to consider regarding the prospects of success on the merits.

14. The respondent attempted to deal with the aspect of prospects of success on the merits in the heads of argument. Evidence cannot be adduced through heads of argument. Heads of argument play a different role in litigation. They ought to articulate the best

argument available to the litigant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. See: *S v Ntuli* 2003 (4) SA 258 (W) para 16. Therefore an attempt to introduce the aspect of prospects of success in the heads of argument is unhelpful. It does not rescue the respondent's opposition. In the circumstances the fact that there is no evidence speaking to the prospects of success of the application for rescission of judgment weighs heavily against the respondent.

*The balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time*

15. Again in resisting the application the respondent must adduce evidence to show that the balance of convenience favours him and that there is no possible prejudice to the applicant caused by his failure to prosecute his case on time. There is no aorta of evidence in the opposing affidavit alluding to this critical requirement. In the circumstances this court cannot find that the balance of convenience favours the respondent, and that there is no prejudice to the applicant caused by the respondent's failure to prosecute the main case on time. Again this is a factor that weighs heavily against the respondent.

16. In the circumstances the applicant has proved that it is entitled to the relief it seeks in this application. The application must succeed. The applicant has not asked for costs against the respondent, and no costs shall be awarded.

In the result, I order as follows:

i. That the respondent's court application for rescission of judgment under cover of case No. HC 637/21 be and is hereby dismissed for want of prosecution.

ii. That each party bears its own costs of suit.

*Ncube-Tshabalala Attorneys,* applicant's legal practitioners
*Makiya & Partners*, respondent's legal practitioners