

**WEST NICHOLSON YOUTH MINING ASSOCIATION**

**Versus**

**MPUMELELO NYONI**

**AND**

**FOSTINA SITHOLE**

**AND**

**PAUL GWANANGARA**

**AND**

**NATSAI FAITH NCUBE**

**AND**

**JOSEPHAT CHIHEYA**

**AND**

**ARNOLD NOYO**

**AND**

**SIPHO MOYO**

**AND**

**FARVIC CONSOLIDATED MINES (PVT) LTD**

**AND**

**TICHAONA MAKAZA N.O**

**(In his capacity as THE PROVINCIAL MINING DIRECTOR  
MATABELELAND SOUTH N.O)**

**IN THE HIGH COURT OF ZIMBABWE**

**MAKONESE J**

**BULAWAYO 2 APRIL 2019**

### **Opposed Application**

**MAKONESE J:** On the 8<sup>th</sup> of March 2019 a chamber application for dismissal for want of prosecution was placed before me. I granted the order on 2<sup>nd</sup> April 2019.

I have been requested to provide reasons for the decision. These are my reasons.

A Chamber Application for dismissal for want of prosecution is governed by the provisions of order 32 Rule 236 (4) (b). The rule provides as follows:

- “4. Where the applicant has filed an answering affidavit in response to the respondent’s opposing affidavit but has not, within one month thereafter set the matter down for hearing, the notice, 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.”

It is settled at law that in exercising its discretion in terms of Rule 236 this Court should be guided by considerations of the interest of justice and finality to litigation.(see **Mashangwa and Others vMakandiwa HH 40/19 HC 1774/18**)

The Court in**African Star Diamonds (Pvt) Ltd v Muchanja& Others HH 313-17** stated thatRule 236 is one of the remedies available to a litigant who wishes to overcome an abuse of court process by an uninterested applicant. Further, in **ScotfinMtetwa 2001(1) ZLR 249 AT 250 D-E** the Court reasoned that:

“Rule 236, as amended by s 7 of the High Court (Amendment) Rules 2000 (No. 35, 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 the case with due expedition. The rule gives the judge discretion either to dismiss the matter or to make such orders as he may consider to be appropriate in the circumstances.”

In**Melgund Trading (Private) Limited v Chinyama& PartnersHH-703-16**the Court further reasoned that:

“An application for dismissal of prosecution brought in terms of r 236 assist in putting to an end to proceedings that are instituted and not attentively followed up. There is a huge backlog of applications in the court. The situation is compounded by litigants who file applications in these courts and neglect to pursue them. Rule 236 is a suitable mechanism to assist in case management.”

HB 13.20  
HC 507/17  
XREF 2631/18, 2180/18

The Court in **Ndlovu v Chigaazira HB 104/05** took the view that there is a need to enforce Rule 236 to ensure finality is brought to legal proceedings. The Court also stated that where failure to act was as a result of an utter disregard of the rules of the court and prescribed time limits, the courts should be extremely reluctant to give any further indulgence to the defaulting party. The court rules have through rule 236 provided for an avenue or mechanism to speedily allow matters that are unopposed to be dealt with. (see **Khan v Muchenje & Another HH146/2013**)

The respondent filed an application for a declaratur on the 3<sup>rd</sup> of October 2018 under case No. 2631/18. On the 15<sup>th</sup> October 2018 the applicants filed their Notice of Opposition and opposing affidavits. The notice of opposition and opposing affidavits were served on the respondent's legal practitioners on the same date. On 28<sup>th</sup> November 2018 answering affidavits were filed by the applicants. Notwithstanding such filing, respondents failed to file Heads of Argument in accordance with the Rules of the court. The respondents failed to take steps to set the matter down for finalization. A period of 3 months elapsed and applicants took a decision to apply for dismissal for want of prosecution.

The Rules of this court clearly provide in Rule 236 (4) (b) that the court may dismiss the application for want of prosecution where a party fails to file Heads of Argument or set the matter down within the prescribed time limits..

For these reasons, I granted the order sought as prayed in the Draft Order.

*Joel Pincus Konson & Wolhuter*, applicant's legal practitioners  
*Ncube and Partners*, 1<sup>st</sup> – 7<sup>th</sup> respondents' legal practitioners