

- (1) HC 4339/19
(2) HC 1737/19
(3) HC 1473/19
Ref.:HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

(1) PATRICK MAVROS
versus
PALCHIN ASSOCIATES (PVT) LTD
and
FABIAN MUSEKIWA GOMBE
and
ANANIAS CHIMUPENGO GOMBE
and
CITY OF HARARE DIRECTOR OF WORKS

(2) PALCHIN ASSOCIATES (PVT) LTD
versus
FABIAN MUSEKIWA GOMBE
and
ANANIAS CHIMUPENGO GOMBE
and
CITY OF HARARE DIRECTOR OF WORKS
and
PATRICK MAVROS

(3) PATRICK MAVROS
versus
FABIAN MUSEKIWA GOMBE
and
ANANIAS CHIMUPENGO GOMBE
and
CITY OF HARARE DIRECTOR OF WORKS
and
PALCHIN ASSOCIATES (PVT) LTD
and
ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 30 January & 4 March 2020

Opposed Application – Application for dismissal for want of prosecution

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

Mr T Mpofu, for the applicant (fourth respondent in HC 1737/19)

Mr D Tivadar, for the first respondent (applicant in HC 1737/19 and fourth respondent in HC 1473/19)

Mr F Nyangani, for second and third respondent (first and second respondents in HC 1737/19 and HC 1473/19)

CHAREWA J: For purposes of this judgment, the City of Harare Director of Works and the Zimbabwe Republic Police not having engaged themselves in the litigation, I will refer to the litigating parties as Mavros, Palchin and the Gombes. Further, the matters being interconnected and arising from the same judgment of this court in HC 11067/18, which spawned several other applications as shown on the reference records, I have decided to issue one consolidated judgment.

Background

On 16 January 2019, Mavros obtained default judgment in HC 11067/18 against Palchin and the Gombes in the following terms:

- “1. The construction currently being undertaken on the 1st and 2nd respondents (*the Gombes*) property situated at Lot 1 of Subdivision P of Luna of Section 4 Borrowdale Estate, otherwise commonly referred to as Number 1 Hawksmoor Road, Umwinsidale, Borrowdale, Harare is hereby declared illegal.
2. The 1st, 2nd, 3rd (*City of Harare Director of Works*) and 4th respondents (*Palchin*) be and are hereby ordered to immediately cease construction of the three cluster homes on the applicant’s property situated at Lot 1 of Subdivision P of Luna of Section 4 Borrowdale Estate, otherwise commonly referred to as Number 1 Hawksmoor Road, Umwinsidale, Borrowdale, Harare forthwith.
3. In the event that additional structures whose construction has not been approved by the 3rd respondent are being constructed by the 1st and 2nd respondents, such construction is hereby declared illegal and the 1st and 2nd respondents are ordered to cease construction of these structures immediately.
4. The 1st and 2nd respondents to pay costs on the ordinary scale.”

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

What followed the granting of this order is what the Cambridge English Dictionary terms “a dog’s breakfast” of unparalleled confusion and ineptitude by Mavros Legal Practitioners. It transpires that it is common cause that the Gombes do not even own the property referred to in the order of 16 January 2019. The property is owned by persons called the Galantes who are not party to any of the proceedings before the court. Further Palchin is not even a construction company, did not construct any buildings on the property in question and is not in the process of constructing anything for which it could be ordered to cease construction.

Despite all this, Mavros instituted, in HC 1473/19 an application for a contempt order seeking the relief that the Gombes be declared to be in contempt of the order in HC 11067/18 and the demolition of all structures on the property in dispute. Further, Mavros followed this up with a further application in HC 2397/19, seeking an amendment to the order that he wanted Palchin and the Gombes to be held in contempt of. In the meantime Palchin and the Gombes sought rescission of the order in HC11067/18 in HC1737/19 and HC2523/19, respectively, on the basis that there are challenges with respect to the propriety of service of the application for a *declaratur* and interdict in HC 11067, in error of which default judgment was granted. As if that was not enough, Mavros sought, in HC 4339/19, dismissal of the application for rescission in HC1737/19 for want of prosecution.

At the hearing of these matters on 30 January 2019, Mavros removed from the roll, by consent, the application in HC 2397/19 for amendment of the order in HC 11067/18, consented to the application for rescission of HC11067/18 filed by the Gombes in HC 2523/19, and withdrew with a tender for costs on the ordinary scale, his application for contempt of court in HC 1473/19. He persisted with the application for dismissal for want of prosecution filed under HC4339/19, insisted on opposing the application for rescission filed by Palchin in HC1737/19, and sought the court’s determination on the issue of costs in HC 1473/19, which three matters this judgment therefore deals with in *seriatim*.

Patrick Mavros v Palchin Associates (Pvt) Ltd + 3 HC 4339/19

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

This is an application by Mavros for dismissal, for want of prosecution, of the application, filed by Palchin on 4 March 2019 in HC1737/19, for rescission of the judgment granted in default on 16 January 2019 in HC 11067/18 in terms of r449. Mavros having opposed the application for rescission and by 18 March 2019 the pleadings having been closed, Palchin did not file its heads of argument or set the rescission matter down for hearing. Consequently, applicant filed this application on 23 May 2019.

Mr *Arnott*, for Palchin, deposed an opposing affidavit in which he explained what transpired between March and June 2019, to the effect that he did not file heads of argument on behalf of Palchin in the application for rescission or set the matter down because Mr *Mlotshwa*, for Mavros had requested that the parties should hold litigation in abeyance and discuss a possible resolution of the matter. Attached to Mr *Arnott*'s affidavit is correspondence and exchanges which show that he was in constant and apparently amicable communication with Mr *Mlotshwa* to the extent that they even agreed a date for the meeting as requested. However, Mr *Mlotshwa* did not turn up. Instead, he then requested a rescheduling of the meeting, which he again failed to attend. In the meantime, Mr *Arnott* received news of the grave illness of his father and of the need for him to travel to the United Kingdom as a result, and the eventual decease of Mr *Arnott* senior all of which he informed Mr *Mlotshwa*. The record does not indicate that Mr *Mlotshwa* advised Mr *Arnott* of the termination of any attempt to hold discussions to resolve the issue. The next thing that Palchin received, out of the blue, so to speak, was this application.

Mavros has filed no answering affidavits refuting the allegations in Mr *Arnott*'s affidavit and communications referred to therein, which suggest that Mavros' legal practitioners may have led Mr *Arnott* on, fully intending to seek dismissal unfairly. It seems to me therefore that Mavros' legal practitioners may have behaved with a distinct lack of probity and honesty in their dealings with Mr *Arnott* so that they could allege, as they do, that the party requiring the indulgence of the court must comply with the rules. It is my view that the conduct of Mavros' legal practitioners leaves a lot to be desired, and in fact, raises questions about their integrity and ethics. The court must frown at such conduct by legal practitioners.

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

I also note that in his submissions, Mavros' counsel raises issues of illegality and immorality which relevance, in an application for dismissal for want of prosecution, I cannot fathom. Nor is the question of prospects of success in the application for rescission, which Mavros' counsel also submits, *germane* to an application for dismissal.

It is trite that the *causa* for an application for dismissal is unwarranted delay in the prosecution of a matter. Mavros was required to satisfy me that I should exercise my discretion and dismiss the application for rescission of judgment due to unwarranted or unjustified delay in prosecuting it. But given, the tenor of Mr Arnott's uncontroverted affidavit, which shows that Mavros' legal practitioners requested that the application for rescission be held in abeyance pending discussions; that Mr *Mlotshwa*, for Mavros, absented himself from the meeting on the agreed day and time, to hold those discussions, and instead filed this application, I am hard pressed to find any justification to exercise my discretion in Mavros' favour. This is more so since that same affidavit by Mr Arnott shows unrefuted evidence that the delay was neither unreasonable, unwarranted or of Palchin's making. In addition, it is not disputed that Mr Arnott did indeed suffer a bereavement which was communicated to Mr *Mlotshwa*. All this raises a disagreeable whiff to the conduct of Mavros' legal practitioners.

I must also note that this application is not even properly paginated and indexed. Nor are there any heads of arguments filed in support of the application for dismissal, let alone a draft of the order of dismissal sought. Further, the record does not show, either, when the opposition to HC 1737/19 was served on the Palchin.

In the circumstances, I cannot find that there is any reasonable justification for this application, let alone any reasons to support the exercise of my discretion to grant dismissal of the application for rescission of judgment in HC 1737/19. Suffice it to say that the conduct of applicant's legal practitioners is such that, had I been requested, I would have been hard pressed not to consider a claim for costs on the higher scale.

Palchin Associates (Pvt) Ltd v Fabian M Gombe + 3 HC 1737/19

This is an application for rescission of default judgment for a *declaratur* obtained by Mavros in HC 11067/18 on 16 January 2019 on the grounds that the order sought to be

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

rescinded was granted erroneously in the absence of Palchin which was never served with the application.

It is apparent from the record that there is no certificate of service of the application on Palchin. The certificate of service (item 7 on the index in HC 11067/18) which is duplicated at page 66 of this record is a certificate of service of notice of set down for a pre-trial conference. Further, that certificate of service is distinctly questionable, it certifying that service was effected contemporaneously on three other respondents at disparate addresses of service: an impossible feat as the server could not have been at three different addresses at the same time. Moreover, the certificate of service does not state the responsible person who received service on behalf of Palchin and at what address. Even the amended certificate of service filed on 8 January 20 19, at p 19 of the record in the main matter in HC11067/18 does not indicate where service of the application for a *declaratur* was effected or on whom. It seems to me that this amended certificate of service was a clear intention to sanitize improper service.

Mavros insists that service was effected on Palchin's business address, but this is not borne out by the certificate of service. Besides, this is evidence from the bar by counsel for Mavros which is not admissible. In addition, Mavros submits that one cannot rely on an improper certificate of service to seek rescission in terms of r449 but, despite direction from the court to do so, his counsel did not provide any authority in that respect. The reasonable assumption is that the application in HC 11067/18 was never served on Palchin and it could not, therefore, have filed any opposing papers as it was unaware of the application. Clearly therefore, the judgment was obtained in error as the order was granted in the absence of a party affected thereby in circumstances where the judge a quo was not aware that service had not been properly effected.

Palchin submits that it has a *bona fide* defence to the claim for a *declaratur* with good prospects of success in that firstly, it is not a construction company, has not constructed any buildings as alleged and cannot be ordered to cease such construction. Further, in his founding affidavit, Mavros does not state on what basis Palchin should be ordered to cease construction. Indeed, I note that the pleadings do not show that any allegations are made that Palchin is a

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

construction company which is responsible for whatever construction is being erected on the disputed property.

COSTS

Having conceded to the rescission application by the Gombes in HC 2523/19, on basically the same challenges of improper service, resulting in the grant of judgment in the absence of an affected party, in addition to the concession that first and second respondent have nothing to do with the property in issue, I find the attitude of Mavros in this case inexplicable, unwarranted and abusive of court process. Clearly, his papers are in a mess and the conduct of his claim in HC 11067/19 leaves a lot to be desired. A reasonable litigant would have consented to rescission sooner rather than insist that the matter go through to a hearing, thus unnecessarily clogging the administration of justice system.

As a result I agree with Palchin that the resistance to rescission is perplexing, particularly since the order Mavros insists on holding on to does not assist him as it is against parties who are not in a position to effectively give him the relief he seeks. Indeed the need for rescission is indefensible. Mavros' conduct therefore in spiritedly trying to resist rescission is an unreasonable impediment to swift and effective administration of justice and amounts to harassment of applicant for which the court must censure him with an order for higher costs. This harassment becomes even more apparent when regard is had to HC 2397/19, in which Mavros seeks to amend the order in HC 11067/18, in circumstances where he is, at the same time, seeking an order for contempt of court in HC 1473/19, of that very same order he wants amended.

Patrick Mavros v Fabian M Gombe + 4 HC 1473/19

This is an application for contempt of court wherein, by consent, Mavros withdrew his claim on the date of hearing and tendered costs on the ordinary scale. The Gombes and Palchin contended that they were entitled to costs on the higher scale because Mavros' claim for contempt was not *bona fide*, his conduct in pursuing the application until the hearing date was unreasonable, unwarranted, arrogant and sheer abuse of court process.

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

On his part, Mavros submits that costs on the higher scale are not warranted. In particular, he submits that Palchin is not deserving of higher costs as no relief is sought against it and there was therefore no need for it to incur costs defending the application.

The issue of costs in this matter cannot be decided in isolation. Mavros' claim for contempt arises from a litany of litigation most of which he instigated as is apparent from the reference records cited. Mavros sued the Gombes and Palchin in HC 11067/18 for a declaratory order which I have already found to have been erroneously granted in default on 16 January 2019. In so far as the Gombes are concerned, it is not in dispute that the application was served on their elderly mother, at an address which was not even their address of service, in circumstances where the Gombes, to Mavros' avowed admission, were wrongly cited in a case where they are not even the owners of the property concerned, do not reside there and are not even remotely concerned with the issue before the court. See the Mavros' consent to rescission of that order in HC2523/19 as well as my findings in HC 1737/19 above.

Besides, the relief sought in the contempt application is not even valid as it goes beyond the order in HC11067/18 as Mavros seeks a demolition order in contempt proceedings. In any event, in HC 2397/19, Mavros is, at the same time, seeking amendment of the very order he wants the Gombes and Palchin to be held in contempt of. Despite all this, Mavros persisted with his application for contempt right up to the date of hearing.

With respect to Palchin in particular, while it is true that no relief is sought against it, the fact remains that it was unwarrantedly made party to proceedings which required that it had a duty to protect its interests by opposing the same. The citation of Palchin in the contempt proceedings was unreasonable given that no allegation is made by Mavros that Palchin is a construction company which is responsible for the construction work at the disputed property. To make matters worse, I must agree with Palchin that Mavros' counsel, in response to the application for costs on the higher scale, sought to terrorize Palchin by making submissions which amount to a threat of continuing with the application if Palchin does not accede to ordinary costs. Such conduct in my view borders on arrogant abuse of process.

- (1) HC 4339/19
 - (2) HC 1737/19
 - (3) HC 1473/19
- Ref.: HC 11067/18
Ref.: HC 2523/19
Ref.: HC 2397/19

It is trite that an order for costs on the higher scale should be granted judiciously and very sparingly, and only in cases where there is unreasonable and unwarranted conduct which amounts to gross abuse of court process, which causes, not only unnecessary inconvenience to the court and the due administration of justice, but unnecessary aggravation and legal costs on other litigants. In my view, this is such a case. Certainly, Mavros' conduct can only be termed an unreasonable and unwarranted abuse of court process.

Disposition

Consequently, it be and is hereby ordered that

1. The application in HC 4339/19 for dismissal of HC 1737/19 for want of prosecution is dismissed. The applicant (Mavros) is ordered to pay the first respondent (Palchin)'s costs of suit.
2. The order of this court in HC 11067/18 dated 19 January 2019 be and is hereby rescinded. The applicant (Mavros) is ordered to pay the first respondent (Palchin)'s costs in HC 1737/19 on the scale of legal practitioner and client.
3. The applicant (Mavros) is ordered to pay the first (Palchin), second and fourth (the Gombes) respondents' costs in HC 1473/19 on the scale of legal practitioner and client.

Messrs GN Mlotshwa & Company, applicant's legal practitioners
Kevin J Arnott, first respondent's legal practitioners
Nyangani Law Chambers, second and third respondent's legal practitioners