

BRIGHTON CHORUWA  
versus  
PETER MUPEDZISWA

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 1 June & 15 September 2021

### **Opposed Application**

*T. Mutonhori*, for applicant  
Respondent in person

TAGU J: Rule 236 (4)(b) of the Rules of this Honourable Court provides that “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... 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.” Pursuant to the provisions of the above rule the applicant filed the present application for the dismissal of the respondent’s application in Case No. 6311/16 for rescission of default judgment for want of prosecution.

The facts giving rise to this application are that on 11 September 2014 the applicant issued summons for confirmation of agreement of sale of Stand Number 19982 Trafalgar, Norton between the applicant as the purchaser and the respondent as the seller and ejection of the respondent from number 199982 Trafalgar, Norton. The respondent entered an appearance to defend on 3 October 2014. He was served with a Notice to plead on 5 December 2014 but he never responded. He was successfully barred. Ultimately a default judgment was granted by this Honourable Court. The respondent filed an application for rescission of the default judgment under case number HC 6311/16. The applicant opposed the application. The respondent filed his

answering affidavit on 29 July 2016. Since then the respondent did virtually nothing to pursue the matter resulting in the applicant filing the present application.

In his notice of opposition, the respondent submitted that the applicant's application for dismissal of his application for rescission is premature. He submitted that instead of opting to apply for dismissal the Applicant ought to have set down the matter for hearing after filing his heads of argument.

The provisions of r 263(4)(b) of the High Court is very clear. Where the applicant has filed an answering affidavit, in response to the respondent's Opposing Affidavit, but within a month thereafter the respondent may make a chamber application for dismissal of the applicant's case. In *casu* the respondent filed an answering affidavit on 19 July 2016. To date he did nothing to prosecute his case.

In *Guardforce Investments (Pvt) Ltd v Ndlovu & Ors* SC 24/16 it was held that 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.

In this case the applicant brought himself squarely within the confines of what has to be proved for an application under r 263 of the Rules to succeed. There should be finality to litigation. In *Ndebele v Ncube* 1992 (1) ZLR 288 it was observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time and for other relief arising and of delays either by the individual or his lawyer have rocketed in numbers.

The rule in question gives the aggrieved party an option to either set the matter down or apply for dismissal for want of prosecution. The applicant *in casu* opted for the dismissal.

In *Kimley Row Investments (Pvt) Ltd v City Bright Services (Pvt) Ltd* HC 1088/15, commending on the discretion of the court, MATHONSI J (as he then was) said-

"It is the making of such other order the judge deems fit which requires further consideration. Does that give the judge the leeway to dismiss an Application made in terms of that Rule where the Applicant has

failed to comply with the time frame for setting the matter down? I think not. This is because the rule gives the Respondent a remedy to have the matter dismissed upon failure to comply.

Where the Respondent has sought that remedy, which he is entitled to, it would not be a judicious exercise of the judge's discretion to refuse that remedy in fear of some other obscure order not defined by the rules. Doing so would negate the remedy given to the Respondent."

In casu the respondent is sluggard and not sincere in his opposition. The application will succeed.

IT IS ORDERED THAT

1. Application for rescission of default Judgment in Case No. HC 6311/16 be ad is hereby dismissed for want of prosecution.
2. Respondent to pay costs of suit.

*Pundu & Company*, applicant's legal practitioners