

KEVIN O TOOLE
versus
YZ HOLDINGS (PVT) LTD

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 22 March and 20 July 2022

OPPOSED APPLICATION

B. Mtetwa and *R Sitotombe* for the Applicant
T.K Mudzimbasekwa for the Respondent

NDLOVU J This is an application for dismissal for want of prosecution of case number HC 8645/18. The following is the order sought.

1. The application for dismissal of the action in HC 8645/18 for want of prosecution be and is hereby granted.
2. The action in HC 8645/18 is and hereby dismissed for want of prosecution.
3. The Respondent shall pay the Applicant's wasted costs in HC 8645/18 and costs of this application on attorney-client scale.

The application is opposed.

BACKGROUND

The Respondent in this matter caused a summons to be issued against the applicant on the 21st of September 2018 claiming payment of \$754 962.21 being money from which Defendant was unjustly enriched at the expense of the Plaintiff, interest thereon and costs of suit. The action was defended, and the matter took the usual trajectory up to the Pre-Trial Conference (PTC) stage in 2019.

On 21 May 2019 the first PTC was held before, MUSAKWA J (as he then was) and the matter was postponed to 7 June 2019 to enable the parties to lodge and exchange their respective bundles of documents.

On 7 June 2019 the matter was postponed to 27 June 2019 once again to enable the parties to file their respective bundles of documents and once that was done, to hold another round-table conference.

Come 27 June 2019, no much movement had visited the matter other than the passage of time. The matter was yet again postponed and this time to 11 July 2019. The reasons behind the postponement are recorded as being that the parties had not held a round table conference. The court then directed that *Ms Mtetwa* for the Defendant would itemise the documents required by the Defendant and *Mr Mutema* for the Plaintiff would ensure that those documents are furnished and thereafter as agreed, the parties would hold a roundtable conference on 5 July 2019 at 10am.

Naturally 11 July 2019 arrived. The parties had not made progress in the exchange of documents required by the Defendant. It was then agreed that *Ms Mtetwa* would itemise the required documents and copy same to the Registrar. Thereafter, the parties, as agreed would engage a third party who would mediate between them in the absence of the parties' legal practitioners. The matter was then postponed to 2 August 2019.

On 2 August 2019 the matter had taken one step forward and one step backwards. It is recorded that the parties were in agreement on the appointment of a mediator although they had not by then appointed one. To that end, the parties agreed on the postponement of the matter to enable them to pursue the process of mediation. The matter was then postponed to 27 September 2019.

Whoever coined the phrase, ".....there is no hurry in Africa....." might have experienced what this matter experienced at the P.T.C stage. On 27 September 2019 the following is written as the Judge's comments.

"Parties have to yet agree on the sharing of costs for the appointed mediator, with the Plaintiff's board's approval awaiting to be sought. Again, the Plaintiff's board is expected to clarify whether it will accept the decision of the mediator to be binding."

The matter was then postponed to 22 November 2019.

The original file is silent on what happened on 22 November 2019. The event or non-event of 22 November 2019 is a co-parent, as will morefully appear hereunder, of the current controversy between the parties. The Applicant in his founding affidavit has only stated that at the PTC hearing MUSAKWA J (as he then was) gave a directive that a forensic audit be conducted and consequently removed the matter from the PTC roll and ordered that it be set-down for hearing once the forensic audit had been concluded. On the other hand, the Respondent in its affidavit in opposition has stated that the PTC was held several times (that is borne out by the result slips whose contents I have summarised above). The parties were urged to reach a settlement by way of mediation and they failed to agree on a mediator. The Judge

never gave a directive that a forensic audit be conducted. The applicant requested a forensic audit and that request was declined by the Judge. On 27 September 2019 the Respondent requested that the matter be removed from the roll and the Judge declined. On 22 November 2019 the PTC did not proceed because the Judge was not available and the Judge's clerk had indicated that a new date would be availed. The matter was only removed from the roll on 8 July 2021 and on 23 March 2020 the Respondent had written to the Registrar of the High Court requesting that a PTC date be availed, (a letter to that effect is part of the record). It is pertinent to note that on 3 October 2019 the Applicant's legal practitioners wrote to the Respondent's legal practitioners and stated in the relevant portion of the letter as follows:

“Further to the postponement of this matter, we advise that as suspected, our client is unable to contribute to the costs of the mediator.”

This letter was written between the sitting of 27 September 2019, which recorded that “Parties have to yet agree on the sharing of costs for the appointed mediator.....” and the intended sitting on 22 November 2019.

On 8 July 2021 and before my brother KWENDA J and without appearance for either party the matter was removed from the roll for the reasons that no security of costs for the PTC had been paid and the matter was to be reset after the payment of the same by the Plaintiff. It is common cause, that on 13 July 2021 the Registrar of the High Court wrote to the Respondent's legal practitioners and copied the Applicant's advising them of the removal of the matter from the roll on 8 July 2021. No other removal from the roll is recorded before that one. On 28 July 2021 the Applicant's lawyers wrote to the Respondent's lawyers, in part thus:

“Mr *Mutema* who was previously handling this matter, will be aware of the previous Pre-Trial Conference Judge's directive that a forensic audit be done.... Kindly advise how far that process has gone so that the matter can be set down.”

This letter was fully responded to by Respondent's lawyers on 24 August 2021 and the relevant parts of that response letter read as follows;

- “1. Neither we nor our client are aware of the Judge's alleged directive that a forensic audit be carried out.
2.
3. Our client will make its own decisions as the *dominus litis* in respect of the claim before the court.”

The contents and tone of the Respondent's lawyers' letter seem to have led to the Applicant to take off his gloves and mount this application on 22 September 2021 and serving same on the Respondent on the same morning noon. On 11 October 2021 the Respondent

applied for a PTC date in the main matter HC 8645/18 and the matter was set down for 12 November 2021. At that PTC of 12 November 2021 KWENDA J directed that a forensic audit be carried out into the affairs of the Plaintiff/ Respondent. On the very day of that directive. Respondent's lawyers wrote requesting a written judgment. A clear indication that the Plaintiff is not interested in carrying out a forensic audit of its books in relation to this matter.

THE APPLICATION

The application by the applicant is brought, according to him, in terms of R31(3) of the High Court Rules, 2021. Rule 31(3) provides as follows;

“Where the Defendant has filed a plea and the Plaintiff has not, after one month of the filing of such plea, taken any further step to prosecute the action, the Defendant may, on notice to the applicant¹, make a court application for the dismissal of the action for want of prosecution.....”

The parties have intensely argued over the interpretation and/ or applicability of R 31(3) of the High Court Rules, 2021 to the facts of this matter. The applicant has argued that R31(3) applies to this matter because the Respondent did nothing since November 2019 to prosecute HC 8654/18 and failed to comply with the PTC Judge's directive given in 2019 and has failed to give an explanation for failure to prosecute the action in question for more than 2 years. According to the Applicant “.... any further step” means these kinds of omissions by the Respondent.

The Respondent counter argued and stated that this is an application wanting in merit as it does not satisfy the requirements of the Rule in terms of which it is made. Respondent argued that those requirements are that (1) the Defendant must have filed a plea, (and that was done in this matter) and (2) the Plaintiff must have done nothing to prosecute the action after one month of the filing of the plea (and in this matter the Respondent filed a replication, summary of evidence, PTC papers, effected discovery, set down the matter for PTC and attended several PTCs before a Judge).

JUDGMENT

I am of the firm view that R31(3) is not the remedy applicable to the facts of this matter. In my view R31(3) is a remedy available to a Defendant to deal with a Plaintiff who after one month after filing a plea and before the PTC stage has set back and done nothing to prosecute

¹ “applicant in my view should read “plaintiff”

the matter. I say so because after the closure of pleadings the responsibilities to move the action to trial gets spread to any party to the action, needless to reiterate that that includes a Defendant, R49(1) refers. On the other hand, a party who is as being alleged by the Applicant opts not to follow a Judge's directive given at a PTC is liable to be sanctioned under R49(12) and not under R31(3), in my view.

For the above reasons I am persuaded by the Respondent's argument that R31(3) is not applicable to this matter.

In case, I am wrong in interpreting the Rules in the manner I have done, and I doubt that I am, I now turn to deal with the issues from the perspective that R31(3) is applicable to the facts of this matter.

At the invitation by the Applicant and on the authority of *Mungu v Mutindi* 1986(2) ZLR171 (SC) @ 173 I have perused the file in HC 8645/18. I have narrated my findings therefrom above as part of the background facts of the matter. That perusal has not found that at any time in 2019 MUSAKWA J (as he then was) gave a directive that a forensic audit be done. If anything, after 27 September 2019 being the date the parties appeared before the Judge, per the file, Applicant's lawyers wrote to Respondent's lawyers indicating Applicant's unwillingness to contribute towards the costs of the services of a mediator. What the court found to have been the trajectory of the PTC meeting before the Judge tallies with what the Respondent outlined in its affidavit in opposition. The Applicant in his answering affidavit did not challenge the critical averments set out in the Respondent's opposing affidavit namely that on 23 March 2020 the Respondent wrote to the Registrar requesting a PTC date and that the matter was removed from the roll on 8 July 2021. The Applicant has therefore not furnished this Court with proof that MUSAKWA J (as he was then) gave a directive that a forensic audit be carried out in this matter on 22 November 2019 or soon thereafter. Such directive was in fact given by KWENDA J on 12 November 2021, almost two years later.

There having been no directive given to the Respondent by the Judge in November 2019 to carry out a forensic audit, the Respondent cannot be said to have disregarded a Judge's directive. Having written to the Registrar on 23 March 2020 requesting for a PTC date to be availed, and none availed, sooner than 8 July 2021, the Respondent cannot be said to have taken no further steps to prosecute the action under HC 8645/18 from November 2019. It will be remiss of this Court to turn a blind eye to the historical fact that from late March 2020 (although this issue was not argued by either party) the courts registries were interrupted in

their operations in one form or another by the Covid-19 pandemic induced intermittent lockdowns.

I have not been directed to any proof and neither was proof furnished by the Applicant that it is KWENDA J who initiated the re-enrolment of the matter on the PTC roll after this application had been lodged. What I found is that the matter remained on the PTC roll until 8 July 2021 when it was removed from the roll. On 11 October the Respondent applied to the Registrar for a date for the PTC and it was given as 12 November 2021. It should be noted that judging from the tone of the Applicant's letter dated 28 July 2021, the Applicant had no qualms with the matter being re-enrolled on the PTC roll. With the Respondent having responded in a manner or tone unamusing to the Applicant, the Applicant's recourse lay elsewhere in the Rules, but for its mistaken belief that the Respondent had not complied with a Judge's directive.

I find that the Respondent took further steps to prosecute the action under case number HC 8645/18 post 22 November 2019. In the circumstances and times of this case I find that the length of the delay period between 8 July 2021 and 11 October 2021 was not long to warrant the dismissal of the action matter. I find the explanation reasonable and, in any case, allowed by the Registrar. The Respondent's case does not seem doomed to fail. Either party deserves his day in court and either party seems to have a fair share of prospects of success. The balance of convenience favours that the PTC proceedings currently before KWENDA J proceed and finality in this litigation be realised rather sooner than later. I see no prejudice visiting the Applicant in this matter as the matter is back on the PTC roll.

Guardforce Investment (Private) Limited v Sibongile Ndlovu & Others SC 24/16

On the above findings and reasons therefore I order as follows.

IT IS HEREBY ORDERED THAT:

The Application for dismissal of the action in HC 8645/18 for want of prosecution be and is hereby dismissed with costs.

Mtewa & Nyambirai, Applicant's legal practitioners
Sawyer & Mkushi, Respondent's legal practitioners