

REPORTABLE (28)

CUTHBERT ELKANA DUBE

v

**(1) PREMIER MEDICAL INVESTMENTS (PRIVATE) LIMITED (2)
PREMIER SERVICE MEDICAL AID SOCIETY**

**SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & KUDYA JA
HARARE, 24 JANUARY 2022 & 24 FEBRUARY 2022**

L Madhuku, for the appellant

Ms *F. Mahere*, for the respondents

MATHONSI JA: On 7 July 2021 the High Court (“the court *a quo*”) dismissed an application brought against the respondents by the appellant for want of prosecution with costs. It also ordered the appellant to pay the costs of the application, brought by the first and second respondents for the dismissal of the main application. This appeal is against that judgment.

THE FACTS

Both respondents are incorporated in terms of the laws of this country and are sister companies. The second respondent is a medical aid society while the first respondent is its investment vehicle. For quite some time the appellant was the second respondent’s Chief

Executive Officer, a position he vacated prior to the commencement of the proceedings forming the basis of this appeal.

On 27 March 2018, the appellant brought a court application in the court *a quo* for a declaratory order to the effect that he was the holder of ten million shares, representing a 20% shareholding in the first respondent. He also sought a declaration that the conduct of the first and second respondents of regarding him as not being a shareholder was unlawful, null and void and of no force or effect. He also sought costs on the scale of legal practitioner and client.

The basis of the application, as stated in the founding affidavit, was that the appellant had purchased the ten million shares of the first respondent on 29 July 2010. He attached a copy of a share certificate issued to him and signed by two directors of the first respondent whose names are not disclosed in the certificate. While alleging that he paid for the shares, he did not produce proof of such payment.

According to the appellant, what prompted him to make the application for a declaratory order was the first and second respondents' refusal to acknowledge him as the holder of the shares in question. This followed a meeting of the second respondent held on 21 May 2015 which resolved not to ratify the award of the 20% shareholding in the first respondent to the appellant.

On 11 April 2018, the respondents filed opposition to the application for the declaratory orders. The opposing affidavit was deposed to by Jeremiah Bvirindi, the chairman of the Board of Directors of the second respondent, who denied that the appellant was ever a

shareholder of the first respondent. The respondents also took the view that there were disputes of fact and put in issue the circumstances under which the appellant had purported to acquire the shares at a time he was the Chief Executive Officer of the second respondent.

According to the respondents, the appellant obtained the share certificate he relied on “either illegally, fraudulently or without following due process” as set out in the first respondent’s regulations. Significantly, the respondents confirmed that the appellant had deposited a cheque of Z\$6 585 672 555.75 into the second respondent’s bank account.

The respondents’ view was that a mere deposition of the above amount in the bank account was improper and motivated by fraudulent intent on the part of the appellant. In any event, so the respondents argued, while the payment for the 15% shares (not 20%), should have been made on 25 April 2007 it was only made on 19 March 2008 when the amount had been ravaged by inflation rendering it inequitable to the value of the shares.

It was also the respondents’ case that the purported sale of the 15% shares and a donation of 5% shares to the appellant was done without the authority of the board and/or the shareholders. The appellant took advantage of his position as the Chief Executive Officer to influence the sale to their prejudice.

It is common cause that the appellant did not act upon the notice of opposition filed by the respondents within the time allowed by the rules of court or at all. This prompted the respondents to file the initial application for dismissal of the application for want of prosecution

under case number HC 11129/18. The application was opposed by the appellant and subsequently set down for hearing in March 2019.

Again, it is common cause that on the date of the hearing, following negotiations between the parties, the respondents withdrew the initial application for dismissal for want of prosecution. This was on the understanding that the appellant would purge his default by filing the outstanding pleadings in the main application and prosecute it. He did not.

PROCEEDINGS IN THE COURT A QUO

When the appellant did not honour his undertaking to prosecute the main matter for about 5 months, the respondents filed the second application for dismissal for want of prosecution in terms of r 236 (3) (b) of the High Court Rules, 1971 on 2 August 2019. It is that application which forms the basis of the present appeal. In the founding affidavit, again deposed to by the chairman of the Board of Directors of the second respondent on behalf of both of them, the respondents stated that following their filing of their opposition on 11 April 2018, the appellant had neither filed an answering affidavit nor set the matter down for hearing.

The respondents chronicled the appellant's tardiness in the handling of his application which saw him failing to file heads of argument even in the initial application for dismissal. They stated that even after being accorded the second chance to redeem himself the appellant had snubbed the opportunity and done absolutely nothing until a second application for dismissal was lodged.

After stating that they had elected to file the application for dismissal for want of prosecution instead of setting the main matter down for hearing as they are entitled to do in terms of the rule, the respondents ended there. They urged the court to grant the order for dismissal on that basis alone.

In opposing the application, the appellant took issue with the authority of the deponent of the founding affidavit to represent the respondents. He contended that one person could not lawfully represent two separate artificial persons and that the resolutions relied upon by the respondents were invalid by reason that the signatories' names were not declared.

His only explanation for the delay in prosecuting the application was that, to the knowledge of the respondents, he had "not been feeling well for a long time" which affected his ability to give instructions to his legal practitioners to file an answering affidavit.

The appellant insisted that he owns 20% shares in the first respondent and should be allowed to pursue his claim, otherwise his property rights would be infringed. It is also important to note that the appellant made two assertions which have a bearing on the resolution of this appeal.

In para 6 of his opposing affidavit, in response to the accusation that he had not filed an answering affidavit or taken steps to set down the matter down, the appellant stated that:

"6. Ad para 8-9

These averments have been overtaken by events. On 19 August 2019, I filed my answering affidavit and heads of argument in HC 2821/18. What remains is for the applicants herein, as respondents therein, to file their heads of argument."

Regarding the question whether the respondents had made a good case for the relief sought, the appellant stated at para 8:

“8. Ad para 11-14

- 8.1. I do not accept that the applicants have met (sic) the case for the order they are seeking.
- 8.2. The founding affidavit does not advance any grounds for the court to exercise its discretion in favour of dismissal instead of determining the main matter on the merits. The applicants just want a dismissal because they are asking for it.”

The court *a quo* found that it was both convenient and logical for the deponent of the founding affidavit to represent the respondents as he had knowledge of the shareholding structure of the first respondent. In the court *a quo*'s view a company has the liberty to authorize anyone it deems fit and proper to represent it in litigation.

It found that the delay in responding to the pleadings was evidence of the appellant's non-committal to finalize the matter because if it had been of importance to him, the appellant would have pursued the matter with diligence. In the court *a quo*'s view the unsubstantiated claims of illness by the appellants were not an acceptable reason for the delay. It granted the application for dismissal for want of prosecution.

PROCEEDINGS BEFORE THIS COURT

The appellant was aggrieved. He launched this appeal on the following grounds:

1. The court *a quo* misdirected itself and erred in law in not finding, *in limine*, that the respondents were not properly before it for the reason that the deponent to the respondent's founding affidavit had no lawful authority to institute the proceedings on their behalf.

2. In dismissing the appellant's application under HC 2821/18 for want of prosecution, the court *a quo* improperly exercised its discretion in that it only took into account one factor, namely the reasonableness of the explanation for inaction, instead of also taking into account other mandatory factors such as possible prejudice to the respondents' appellant's (sic) prospects of success on the merits and the balance of convenience.
3. As an alternative to 2, the court *a quo* improperly exercised its discretion and erred in law in dismissing the appellant's application under HC 2821/18 for want of prosecution without an analysis of, and application of its mind to all the mandatory factors to be taken into account before such dismissal.
4. With the court *a quo* having refused to take into account the established fact that the appellant's application under HC 2821/18 had been ready for set down for a considerable period, its decision to dismiss the application for want of prosecution was so unreasonable that no reasonable court, applying its mind to the circumstances of the case, could ever have made such a decision.
5. The court *a quo*'s finding that the appellant's explanation for the delay in prosecuting his application was inexcusable was so unreasonable that no reasonable court, applying its mind to the circumstances of the case, could ever have made such a decision.

I mention in passing that some of the 5 grounds of appeal are repetitive and inconcise. They do not meet the threshold set by r 44. As the issue was not raised with the parties at the hearing of the appeal, it shall not be considered in the determination of the appeal.

ISSUE FOR DETERMINATION

From the grounds of appeal and submissions made by counsel only one issue commends itself for determination in this appeal. It is whether the court *a quo* properly exercised its discretion in dismissing the application for want of prosecution.

SUBMISSIONS ON APPEAL

At the commencement of the hearing, Mr *Madhuku* who appeared for the appellant submitted that, while not abandoning grounds of appeal 1, 4 and 5 for which he stood by heads of argument filed for the appellant, he would motivate the appeal on grounds of appeal 2 and 3. In his view, those 2 grounds are dispositive of the appeal. In fact, ground 3 is in the alternative to ground 2.

Mr *Madhuku* submitted that there are 3 factors which are relevant in considering an application for dismissal of an application for want of prosecution in terms of the old rule 236 (3) or (4) of the High Court Rules. These are:

- (a) the length of the delay and the explanation for it.
- (b) the prospects of success on the merits; and

- (c) the balance of convenience and the possible prejudice to the applicant caused by the delay. He relied on the authority of *Guardforce Investments (Pvt) Ltd v Ndlovu & Ors* SC 24/16.

It was submitted that when deciding the matter, the court *a quo* only considered the reasonableness of the explanation for the delay. Upon concluding that it was insufficient, the court *a quo* promptly granted the application without more. It did not consider the remaining 2 relevant factors to be taken into account in exercising its discretion. For that reason, the judgment of the court *a quo* should be interfered with.

Per contra, Ms Mahere for the respondents submitted that grounds of appeal 2 and 3 raise brand new points of law not placed before the court *a quo*, without justification. She submitted that even the case law authority relied upon by the appellant was not placed before the court *a quo*. Counsel suggested that the appellant cannot be allowed to do so as those points were not pleaded.

Ms Mahere submitted further that even were one to consider the 2 factors to be taken into account by the court before exercising its discretion to grant or dismiss an application for dismissal for want of prosecution, the onus to set those out is on the appellant, who was the respondent *a quo*. It is him, according to counsel, who should show the prospects of success of his application and the absence of prejudice over and above providing a reasonable explanation for the delay.

Ms *Mahere* also made the point that the filing of an answering affidavit and heads of argument in the main case by the appellant was of no moment. He was precluded from doing so upon receiving the application for dismissal for want of prosecution. In making that submission, counsel relied on the authority of the High Court judgment in *Melgund Trading (Pvt) Ltd vs Chinyama & Partners* 2016 (2) ZLR 547 (H).

In that case the High Court remarked at p 552B-E;

“The respondent suggests that because it filed an answering affidavit and caused the application for upliftment of bar before this application was dealt with, this application has been overtaken by events. Rule 236 (3) does not state so. It is not a defence for a respondent who has been served with an application for dismissal for want of prosecution to plead that he subsequently made arrangements for the application to be set down. Once a litigant has been served with an application for dismissal in terms of r 236 (3), he cannot file any other process in pursuance of the proceedings under scrutiny. The application for dismissal has to be dealt with first. Once an application for dismissal for want of prosecution has been filed, it must be determined on the merits unless it is withdrawn or the bar is uplifted by consent. If the courts were to allow a respondent who has failed to comply with the requirements of r 236 (3) (b), to jump and set down the application complained against to defeat the application for dismissal, this would be tantamount to the courts allowing respondents to pull the carpet from under the feet of applicants. The action that a respondent takes after an application for dismissal has been made is of no consequence. The only option open to him, is to oppose the application for dismissal and let it be dealt with on the merits.”

Unfortunately, the High Court did not cite any authority for the above proposition.

In fact, one of the authorities cited in that judgment is *Ndlovu v Guardforce Investments (Pvt) Ltd & Ors* 2014 (1) ZLR 25 (H), a judgment which is of no consequence. More importantly, as shall be seen shortly, the pronouncement by the High Court cited above, sought to overturn the judgment of the Supreme Court in *Guardforce Investments (Pvt) Ltd v Ndlovu & Ors*, *supra* SC 24/16.

ANALYSIS

Rule 236 (3) of the High Court Rules (now r 59 (15) of the High Court Rules, 2021) does not set out the factors to be considered by a judge or the court on an application for dismissal for want of prosecution. CHIDYAUSIKU CJ however set out those factors in the case of *Guardforce Investments (Pvt) Ltd, supra*, at pp 5 -6 as:

- “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.

Dealing with the delay and the explanation for the delay, there is no doubt that there was a delay in this matter. However, the delay and the explanation thereof in this matter alone cannot form the basis for the dismissal. The other factors should also have been considered in determining whether or not to dismiss the application for rescission for want of prosecution. This is a serious misdirection.” (The underlining is for emphasis)

Later in that page going on to p 7, the learned Chief Justice went on to state:

“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 against the appellant. If anything, the chamber application ought to have triggered the appellant to attend to the finalization 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.” (The underlining is for emphasis)

See also *Mashangwa & Anor v Makandiwa & Ors* SC 95/21.

In my view, this completely resolves the present appeal. The jurisprudence coming out of this Court is completely at variance with that of the High Court. The judgment in *Guardforce Investments (Pvt) Ltd supra* was delivered on 31 May 2016. The one in *Melgund Trading (Pvt) Ltd, supra* was only delivered on 16 November 2016 at a time when this Court had already set out the law. The High Court was bound, by virtue of the *stare decisis* principle to follow the judgment of this Court in *Guardforce Investments (Pvt) Ltd, supra*. See *Commercial Farmers Union v Mhuriro & Ors* 2000 (2) ZLR 405 (S) at 407G – 408A.

By the same token, the court *a quo* in the present case was bound to follow the requirements set out in *Guardforce, supra* when it exercised its discretion to dismiss the appellant's application for want of prosecution. It did not. Instead the court *a quo* only considered the extent of the delay and the reasonableness of the explanation for it. It ignored the prospects of success on the merits and the balance of convenience or prejudice. By the authority of *Guardforce, supra*, this was a misdirection. This Court is, therefore, at large on appeal.

Earlier on in this judgment I made reference to portions of the appellant's opposing affidavit which unequivocally drew the court *a quo*'s attention to the factors that it was required to take into account in exercising its discretion. He made it clear that the inquiry on the delay was not the only factor. He also drew attention to the filing of the answering affidavit and heads of argument as measures taken to prosecute the application. All that was overlooked by the court *a quo*. This was a misdirection.

Apart from that, the appellant maintained his claim for ownership of the 20% shareholding in the first respondent. There was evidence that a payment had been made for the shares. Indeed, both the payment and the existence of the agreement were acknowledged by the respondents. The interests of justice require that the propriety of the appellant's claim be interrogated fully and that a decision on the merits be made. This is not a case for closing the door on the appellant merely on the basis of the inordinate delay in prosecuting the application.

In my view, the court *a quo* did not take into account relevant considerations in exercising its discretion to allow the application. This gives this Court a foothold to interfere with that discretion. See *Barros & Anor vs Chimphonda* 1999 (1) ZLR 58 (S). The appeal has merit and ought to succeed.

Regarding the issue of costs both *a quo* and before this Court, there is no explanation why the authorities upon which the matter has now been resolved were not brought to the attention of the court *a quo*. This is moreso regard being had that the principles set out in *Guardforce* were captured in the opposing affidavit. To that extent, Mr *Madhuku* for the appellant conceded that their case could have been presented more elegantly. In the exercise of the court's discretion on costs, the appellant will not be awarded the costs *a quo*.

The costs on appeal are well deserved and there is no reason why they should not follow the result. I say so because the respondents persisted with their contestation of the appeal without regard to the authorities set out in the appellant's heads of argument filed as far back as 26 November 2021.

In the result, it be and is hereby ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
“The application is hereby dismissed with each party to bear its own costs.”

MAKONI JA : I agree

KUDYA JA : I agree

Lovemore Madhuku Attorneys, appellant’s legal practitioners

Muzangaza Mandaza & Tomana, respondents’ legal practitioners