

AARON SHANJE
versus
TICHARWA MUREHWA
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O.
and
PROVINCIAL MINING DIRECTOR MANICALAND N.O.
and
KINGSTON MUDONHI

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
HARARE, 27 March 2018 and 25 April 2018

Opposed application for dismissal for want of prosecution

L. Uriri, for applicant
G.R.J. Sithole, for the 1st respondent
K. Warima, for the 2nd and 3rd respondents

MWAYERA J: This is an application for dismissal of a matter for want of prosecution in terms of r 236(3) of the High Court Rules, 1971. The applicant sought to have first respondent's application for review under case number HC 5172/14 dismissed. The second, third and fourth respondents are not opposed to the application. The first respondent is however opposing the application.

The background of the matter as discerned is as follows. The applicant Aaron Shanje and first respondent Ticharwa Murehwa had a mining dispute which was resolved by the second respondent in applicant's favour. The applicant had argued before second respondent that the first respondent had encroached into the applicant's mine. After the decision by second and third respondents, first respondent filed for review before this court which review, the applicant *in casu* is vehemently opposing.

In this application the applicant argues that he filed the current application on 6 October 2017 about four months after the first respondent had filed a chamber application for review under case no. HC 5172/14. The applicant contends that there must be finality in litigation and additionally to prevent the abuse of the court process. The applicant further argued that the application for review filed by the first respondent was abuse and was made by the first respondent purely to extend the stay and continue mining the applicant's mineral resources,

with no intention of prosecuting the application for review. According to the applicant, the application for review was issued on 12 June 2017, but it was not immediately served on the respondents. The applicant contends further that the first respondent has not yet served the respondents in the matter for review. Even though the applicant concedes that the first respondent has filed an answering affidavit as well as Heads of Argument, the application for review can still not be set down because the first respondent has not as yet served the second and third respondents with the original court application, *Mr Uriri* for the applicant correctly pointed out that that r 236 bestows on this court wide discretion in an application of this nature.

The first respondent in his opposition states that after filing the review application on the 12 June 2017, all the parties were served on 21 June 2017. On 26 June 2017, he filed an urgent chamber application under case no. HC 5627/17 and that application was disposed of by FOROMA J on 4 August 2017 and the judgement was in first respondent's favour. The present applicant also filed a chamber application under case No. HC 7757/17 which application was disposed off on 11 October 2017 where the court issued an order binding both parties, hence since June 2017 both Applicant and first Respondent have been battling in the courts over the dispute and by the nature of the urgency of these matters first respondent had to put in abeyance the review application. Mr *G.R.J Sithole* argued that the first respondent has already filed the answering affidavit as well as the heads of argument and the matter of an application for review is now ready for hearing and finalisation.

The issue for determination by this court is whether the first respondent failed to act in expediting the prosecution of the review application to warrant the dismissal of such an application for want of prosecution in terms of r 236(3). This requires the court to look at the conduct of the first respondent and the explanation proffered by him.

The rules of this court provide in r 236 (3) and (4) that;

(3) "Within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent on notice to the applicant may either

(a) set the matter down for hearing in terms of r 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 order on such terms as he thinks fit.

(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 Respondent on notice to the applicant may either;

(a) set the matter down for hearing in terms of R223, 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.”

Rule 236 as amended by s 7 of the High Court (Amendment) Rules 2000 (number 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 its case with due expedition. I think, however, as admitted by Mr *Uriri* in his submissions, the overriding consideration for the Judge is to exercise his or her discretion in such a manner as would give effect to the intention of the law maker. The primary intention of the lawmaker is to ensure that matters brought to the court are dealt with due expedition.

(See *Scotfin Limited v Mtetwa* 2001 (1) ZLR 249 per CHINHENGO J, *Gwasira v Sibanda* and others HH-298-17 PER MATANDA-MOYO J)

The court has to look at the following in an application for this nature brought under r 236(3).

- (i) The public interest in the expeditious resolution of disputes.
- (ii) The excuse given for the delay in prosecuting the matter.
- (iii) The availability of less drastic solution.
- (iv) The prejudice likely to be suffered by the other party.

(*Ordeco (Private) Limited and others v Govere and others* HH-21-2117.)

In *Moan v Moon* HB 94/05 two more principles were added by the court

- (a) That the party seeking relief must present a reasonable explanation of default and
- (b) That on the merits the party has a *bonafide* case which prima facie carried some prospects of success.

The above analysis reflects that the paramount objective of Rule 236 is to ensure that there is finality to the legal proceedings.

The following is common cause. The application for review by the first respondent was issued in June 2017 and as at the date of hearing, the first respondent has since filed the answering affidavit as well as the heads of argument. There are two judgements in favour of the first respondent. One by FOROMA J under case No. HC 5627/17 and the other one by PHIRI J under Case No. HC 7757/17 binding both applicant and first respondent. It has also been agreed by both counsel that R236 of the High Court Rules is to ensure that the court may

dismiss an application if the principal litigant does not prosecute its case with due expedition. The court may instead of dismissing the application make such other order as it thinks appropriate. In terms of r 236 (3) or (4) the respondent has an option either to set the matter down for hearing in terms of r 223 or a chamber application of the nature as the one before me. The court entertaining an application for dismissal for want of prosecution has a discretion either to dismiss the matter or to make such other order as he or she may consider to be appropriate in the circumstances.

What is in issue therefore is whether the applicant has proved his application on a balance of probabilities .

After issuing of the application for review by the first respondent, it is common cause that there were three applications made by the parties against each. One was at Mutare Magistrates Court and two at the High Court. The matter before FOROMA J was appealed against by the applicant but in principle there are two orders to first respondent's benefit or advantage and which orders remain extant. Those orders come as a result of an assessment of prospects of success on a review application made by the first respondent which is pending before the High Court. The balance of convenience favours that since the first respondent has already filed the answering affidavit as well as heads the review application be prosecuted. The first respondent should serve the pleadings or process on the second to fourth respondents as *per* the rules but the second to the fourth respondents seem to be willing to abide by the outcome of the application. They had been included in the other applications heard by FOROMA J and PHIRI J where they are aware of the review application by the first respondent but have not expressed interest in the review application, it is the conduct of the third and fourth respondents which is subject to review yet none of them have shown interest in the review application. Whilst this observation may not be directly pertinent to the question at hand, they certainly fortify the aspect of prospects of success on the application for review for the first respondent.

In any event, I see no logic or reason in dealing with dismissal of the application for review of a matter whose pleadings are at most closed and awaiting a hearing date. Whereas it is important that there be finality to litigation the court in exercise of its discretion should not lose sight of the central aspect of ensuring that the interest of administration of justice is met.

The applicant contended that he is suffering prejudice because the first respondent is mining in his claim. This was but an averment which was never substantiated. The first respondent did not establish the basis for such, he has not shown that he had at one occasion extracted any mineral from the ground. However, the person who stands to suffer is the first

respondent if the application for dismissal for want of prosecution is granted. He will forfeit the benefit of FOROMA J's order as well as part of PHIRI J's judgment. He will be removed from the mine and application for review will have adverse effects on his financial investments. The matter will not have been ventilated on merits.

In the result, the applicant's position cannot be sustained. Its prayer for an order dismissing first Respondent's application for review for want of prosecution is hereby dismissed and costs be in the cause of the application for review.

MUZENDA J agrees-----

Machaya and Associates, applicant's legal practitioners
Mvere Chikamhi Mareanadzo 1st respondent's legal practitioners
Civil Division of the Attorney, 2nd and 3rd respondent's legal practitioners