GIBSON KATSANDE
versus
EUNICE SAVANHU
and
CHINDEGA KATSANDE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
Harare, 15 July 2013, 11 September 2013

OPPOSED APPLICATION

F.M. Katsande, for applicant
G. Machingambi, for 1st respondent
No appearance, for 2nd respondent

CHIGUMBA J: This is an application made in terms of Order 32 r 236(4) of the Rules of the High Court 1971, for dismissal of the application for rescission of judgment in case number HC 3489/12 with costs. The background to this matter is as follows:

On 28 March 2012, the first respondent filed an application for the rescission of the default judgment granted in case number HC 3003/09. Applicant filed notice of opposition to that application on 3 April 2012. First respondent filed answering papers on 25 April 2012. Thereafter, first respondent neither filed heads of argument, nor set the matter down for hearing. Applicant brought the present application in terms of r 236(4) as a chamber application, on 16 August 2012.

Applicant contends further, that the first respondent's application for rescission of judgment has no merit because, she does not have a good defense in the main matter, even though her explanation for the default may be attributable to her legal practitioners at the time.

First respondent contends that the application ought to be dismissed because applicant did not make the material averment that there was a deliberate desire on her part to delay the proceedings in the application for rescission of judgment. She contends further, that her explanation for the delay in setting that application down is reasonable. Lastly, it is contended by the first respondent that, the issues in the main matter are incapable of resolution on paper, and that the parties ought to be allowed to have those issues disposed of, once and for all in a trial where *viva voce* evidence can be led and ventilated.

It was suggested that in a chamber application for dismissal of a matter for want of prosecution, the sole issue for consideration ought to be, whether or not the first respondent has deliberately failed, for an inordinate time, to pursue her right. The period in question, is a period between 25 April 2012 when the answering affidavit was filed to 16 August 2012 when this application was filed. Was this period of four months inordinate in the circumstances of this case?

First respondent does not dispute that she failed to set the matter down for hearing as alleged. She tendered her apologies but insisted that the failure to set the matter down was not deliberate or willful, but due to pressure of work. She avers that in fact, she filed her heads of argument in the application for rescission of judgment on 16 August 2012, the same day as this application was filed, and maintains that this is an indication of her desire to prosecute that matter to finality. Finally, first respondent avers that the main matter is now ripe for set down since applicant has also filed his heads of argument.

Order 32 r 236 (4) provides that:

> **"236. Set down of applications**
> (1)…
> (2)…
> (3…
> (4) 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—

(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 other order on such terms as he thinks fit".

The wording of r 236(4) is not peremptory. In my view this allows the court wider discretion to decide what is just and equitable in the circumstances. Applicant did not, in his founding papers, aver that the failure by first respondent to set the matter down for hearing, was deliberate, or willful, or occasioned by a desire to cause prejudice to him. In my view, in the absence of deliberate intention to delay the prosecution of the matter, it is inappropriate to dismiss a matter such as this one on this technical ground, It is tantamount to non-suiting the parties, denying them their day in court where they can iron out their differences in a substantive manner that will put the matter to rest once and for all. The main action is one for divorce. It is just and equitable that the ownership of the immovable property in question be determined once and for all. Applicant could have opted to simply set the matter down for hearing in terms of r 223. There was explanation given to the count as to why this was not a viable option.

The court's discretion is limited to dismissal for want of prosecution, or alternatively to making such other order on such terms as it thinks fit. I have rejected dismissal for want of prosecution for reasons already stated. I am satisfied that the respondents are interested in prosecuting the matter to finality, and that having filed heads of argument, are ready to set the matter down for hearing. There is therefore no "want of prosecution" to speak of at this stage. I find that applicant failed to aver or provide *prima facio* evidence of deliberate or wanton disregard or intention to prejudice him by the unnecessary delay of the proceedings. As such there is no justification for dismissing the respondents' claim for want of prosecution. It is in the interests of justice that the party's rights and obligations be determined, at trial.

The application in terms of Order 32 r 236 sub-rule (4) is hereby dismissed. Costs are to be in the cause.

FM Katsande & Partners, applicant's legal practitioners
G Machingambi, respondent's legal practitioners