TINASHE VURAYAYI
and
TONGAI VURAYAYI
and
CHIEDZA VURAYAYI
versus
LAINESS MHANGO

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 31 October 2016 & 19 January 2017

Opposed Matter

A. Chambati, for the plaintiffs
Mrs *K .F Zinyemba,* for the defendant

MUNANGATI-MANONGWA J: The applicant in this matter applied for dismissal of respondent's application filed in case No HC2146/12 for want of prosecution in terms of order 32 r 236 (3) (b) of the High Court Rules 1971. The application was opposed and was heard on 31 October 2016 wherein I dismissed the application with no order as to costs. The applicant has requested for reasons and I so furnish same.

The historical background to this case does not clearly come out. Applicants seem to have applied for condonation for late filing of review proceedings in a matter involving a deceased estate and an immovable property. The same was opposed but respondents failed to file their opposition in time. The respondent applied for upliftment of bar in case number HC 2146/12 on the 20 March 2012. The applicant filed a Notice of Opposition on 29 March 2012. Apparently nothing further happened with the proceedings up until 17 June 2016, four years three months later, when applicants filed this application. What complicated this matter resulting in background facts not clearly coming out, is that, the applicant did not attach certain documents which were material for example the very application upon which this application is grounded, in

order to give the court a full picture. The court was left to glean information from other documents, the notice of opposition in case number HC2146/12 in the absence of the founding application.

The respondent seems to be resident in Malawi and her representative Judith Mhango filed a Notice of Opposition stating that the delay in prosecuting the matter is due to the fact that respondent is indisposed having been unwell for a long time. The respondent is defending the matter as a pauper having applied to be assisted *in forma pauparis.*

At the hearing Mr *Chambati* raised issue that the heads of argument were filed out of time. The document was due on 26 September 2016 but were only filed on 17 October 2016 about 14 working days later. In seeking condonation the respondent's legal practitioner Mrs *Zinyemba* for the respondent explained that the registrar had furnished them with documents late, the matter being handled in *forma pauperis*. The court condoned failure to comply with the rules in so far as failure to file heads of argument was concerned and proceeded to hear the matter on merits. The respondent faced another hurdle. Mr *Chambati* for the applicant raised issue with the power of attorney that empowered the respondent's representative to act for her. Same had been signed in Malawi and had not been authenticated by a Notary Republic.

Ms *Zinyemba* indicated that that anomaly was then rectified by a local embassy official by way of authenticating the document. The papers proving such rectification are not before the court, neither could they be admitted from the bar and in any case, leave would have to be sought to file a supplementary affidavit explaining the anomaly which leave was not sought. In that regard, the respondent is not properly before the court and as such there is no opposition before the court

The following points are peculiar to this case: the delay in prosecuting the application by the respondent has been in applicant's knowledge for more than four years, and, there was no prejudice to the applicants as they are the ones who are in occupation of the disputed property in the main matter. The applicant sought to rely on Order 32 r 236 (3)(b) in seeking dismissal but it is pertinent to consider r 236 (3) as a whole as subparagraph (b) comes as an alternative. Rule 236 (3) reads as follows:

> "(3) Where the respondent has filed a notice of opposition and an opposing affidavit and, 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 rule 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."

Clearly the rule provides an applicant with a month to either file their answering affidavit or set the matter down failure of which the respondent is at liberty to take charge of the proceedings and ensure speedy resolution of the matter. In that regard, applicants had two options in terms of rule to either apply for dismissal of the matter for want of prosecution or they could set the matter down. It does not escape my mind that for four years the applicant knew that the application for upliftment of bar was inactive or dormant , and they did nothing about it despite the two options being open to them within just a month of their filing their notice of opposition. They are coming to court at a time when, as has been confirmed by Mr *Chambati* their legal practitioner, an answering affidavit and heads of arguments have now been filed in that matter which they seek to be dismissed, meaning it is ready for hearing.

The purpose of r 263 (3) (a) and (b) of the High Court rules, is to ensure expeditious conclusion in litigation, it is meant to ensure that the person dragged to court gets over litigation and is not being kept in suspense with unfinished court business trailing behind them, hence the option to either apply for dismissal of the case or set the matter down. This is confirmed by the time period which is provided for the respondent to act, within one month of failure by the applicant to either file an answering affidavit or set the matter down. The time frame speaks to expedience and such cannot be served if one were to wait a number of years to invoke the provisions of the rule. That the applicant is coming to court four years later for this relief, does not show that the applicant wanted a quick conclusion to this dispute. Clearly applicants being in occupation of the property were in comfort so as not to be in a hurry to seek conclusion of the matter. The blame cannot lie on the respondents alone, it is shared blame as respondents did not push the case and the applicants did not act timeously.

In casu, resort to the rule is clearly not driven by the intention to have a quick conclusion of the matter, more so, when applicants have not suffered any prejudice and have laid back for more than four years. This case typifies laid back litigants who totally forgot that they had litigation going on and form part of the group that unnecessarily contribute to the backlog statistics.

Even though the respondent is barred and could not be heard by this court for lack of any competent notice of opposition, I do not believe that this is a case that warrants dismissal of case for want of prosecution for the reasons expounded above. Further, given that the answering affidavit and the heads of argument in the main matter, (that which applicant sought to be dismissed) have been filed as confirmed by the applicant I believe that the granting of this application will not be proper. The main matter should proceed and be heard on merits rather than allow the applicant to belatedly resort to a technicality in the light of the facts of the matter. The rule allows the court to exercise its discretion in such applications and given the background facts of this matter, it is in my view just and fair that the respondent be given an opportunity to prosecute her case especially when the case is ready for set down. As the respondent is indigent and is being assisted *in forma pauperis* I could not grant an order for costs as against her. It is due to the aforegoing that I dismissed the application with no order as to costs.

Chambati Mataka & Makonese Attorneys at Law, applicant's legal practitioners