SEED POTATO CO-OP (PVT) LTD
versus
GUSHUNGO HOLDINGS P/L

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 7 February & 15 May 2019

Opposed Application – Dismissal for want of prosecution

C.C. Mumba, for the applicant
Ms M Muvhundusi, for the respondent

CHAREWA J: This is an application for dismissal of an application for rescission of judgment in HC 6524/18 for want of prosecution in terms of r 236 (3) (B).

Background

On 17 December 2018, the judge president allocated to me the application for rescission of judgment in HC 6524/18 which I duly set down for hearing at 0900 on 7 February 2019. On 10 January 2019, the applicant's legal practitioners drew my attention to the fact that they had filed an application, HC 8661/18, for dismissal of HC 6524/18 for want of prosecution and requested that, in view of the fact that disposal of the dismissal application may avert prejudice to applicant and render the application for rescission academic, it be removed from the roll or be postponed until the application for dismissal was determined.

In the interests of speedy and effective administration of justice and with the consent of the parties, I requested that the application for dismissal be allocated to me and that both matters be heard on the same day, starting with the application for dismissal, with the understanding that if I granted the order of dismissal, then the issue of rescission would fall away, but if I dismissed the application for dismissal, I would then proceed to determine the merits of the application for rescission.

After hearing both matters on 7 February 2019, I reserved judgment.

The facts

On 30 May 2018, the applicant issued summons against the respondents in HC4994/18 claiming payment of US$174 193.40 being the outstanding balance for seed potato delivered to respondent but not paid for together with interest thereon at the prescribed rate reckoned from 31st (sic) September 2015 to date of payment in full and costs on a legal practitioner and client scale. The summons were served on one Mr Mvenge, operations trainee, at Gushungo Holdings, 3km from Mazowe Hotel, Jumbo Mine Rd, Mazowe on 5 June 2018. The respondent not having entered appearance to defend, applicant sought and obtained default judgment on 2 July 2018.

However, prior to the issuance of default judgment, respondents wrote to applicant, on 29 June 2018 advising of their intention to defend the matter and requesting consent to rescission should judgment have been entered in the meantime. On 6 July 2018, applicant advised respondent that default judgment had indeed been obtained and that any application for rescission would be opposed on the grounds that respondent was not *bona fide* and that its defence to applicant's claim was *mala fide*, being raised three years after the event in circumstances were the quality of the seed had never been previously put in issue.

On 13 July 2018, respondent filed its application for rescission of judgment in HC 6524/18. On the same day it filed an urgent chamber application in HC 6540/18, for stay of execution pending the finalisation of HC 6524/18. The urgent chamber application was opposed, but the judge granted the provisional order of stay of execution on 17 July 2018 even though, according to undisputed averments of the applicant, he was of the view that that respondent had "negligible prospects of success on the merits in the main matter". The provisional order was subsequently confirmed, unopposed, on 26 September 2018.

Upon receipt of the application for rescission, applicant indicated, by letter dated 18 July 2018, its inclination to consent thereto or even to settle the matter provided that the respondent provided proof of the alleged bad quality of the seed potato. Defendant ignored the letter. Consequently, application filed its opposing papers on 1 August 2018 and served them the following day.

The respondent did not file any answering affidavit, neither did it file its heads of argument within the *dies induciae* or set the matter down for hearing. As a result, more than one and a half months after service of its opposing papers, applicant filed and served this

application on 21 September 2018. On the same day, respondent filed its answering affidavit in HC6524/18 on 21 September 2018, but only served it on 25 September 2018.

Despite filing its notice of opposition to this application on 5 October 2018, respondent did not bother to serve the same until 23 November 2018, 49 days later, even though applicant had alerted it of its failure to comply with the rules by letter dated 12 October 2018. Further, respondent still made no effort to prosecute its application for rescission, until 19 November 2018, when it filed its heads of argument which it only served on 23 November 2018.

In addition, despite being served with applicant's heads of argument in this matter on 14 December 2018, respondent did not file its heads of argument until 29 January 2019, and provided no proof of service thereof.

Parties Submissions

At the hearing, the respondent raised the preliminary point that applicant was not properly before the court and therefore that the application was fatally defective by reason of lack of authority of the deponent to applicant's founding affidavit[1]. Respondent further objected to the attachment of a resolution to the applicant's answering affidavit, submitting that since, as at the time the application was filed there was no such resolution, the application was fatally defective[2]. In any event the resolution refers to Seed Potato (Pvt) Ltd when applicant is Seed Potato Co-op (Pvt) Ltd and is thus defective and should be disregarded.

On the merits, respondent admits that it failed to comply with the rules in that its answering affidavit and heads of argument in the application for rescission were filed out of time. It submits that the delay in filing an answering affidavit was short and the explanation therefor was reasonable in that the legal practitioners were still seeking instructions. Besides, it further argued, delay is not, of itself conclusive for dismissal but that other factors including keenness to prosecute the matter must be considered. In any case, respondent averred, upon receipt of the application for dismissal, the law permits a respondent to attend to the finalisation of the application for rescission which it did.[3] Further, respondent was of the view that applicant was discourteous in not advising it that it was running afoul of the rules before filing this

[1] See *Madzivire & Ors v Zvarivadi & Ors* SC 10/06. See also *Mall (Cape) (Pty) Ltd v Merino-KO-Operasie Bpk* 1957 (2) SA 347
[2] See *Tuner & Sons (Pvt) Ltd) v Master of the High Court and Ors* HH498/15
[3] See *Guardforce Investments (Pvt) Ltd v Sibongile Ndlovu & Ors* SC 24/16

application[4]. Therefore the balance of convenience favours that the application for rescission be heard rather than be dismissed for want of prosecution. Consequently, respondent made an oral application for condonation of late filing of answering affidavit in HC 6524/18 and requested the court to resort to r 4C to excuse its lack of diligence in that regard.

In response, the applicant submitted that r 227 (4) permits any person who can swear to the facts and averments made to depose a founding affidavit and applicant's deponent was such person[5]. It further argued that *Madzvire & Ors* (supra) is not authority that a judge must dismiss an application on the grounds of lack of authority in circumstances where a deponent has always represented the applicant in its dealings with the respondent and is able to swear to the facts. Besides a distinction must be made with regard to authority to institute proceedings and authority to depose to a founding affidavit.[6] And in this regard, the deponent to applicant's founding affidavit did not allege that he was authorised to institute proceedings. Further, it submitted that the attachment of evidence to answering affidavits is only unacceptable where fresh allegations are being made in the answering affidavit, rather than responding to a challenge made in the opposing affidavit. In that regard it submitted that failure to attach a resolution to a founding affidavit is not fatal.[7] It also argued that an error in name is immaterial.

On the merits, applicant submitted that respondent has no substantive challenge to the application for dismissal save on the grounds of courtesy. In that regard, it argued that the case of *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* (supra) has created a challenge in seeming to suggest that a litigant can ignore the rules and demand courtesy. It submitted that the proper approach is that at the end of the day the respondent must make out a proper case for the grant of the court's indulgence, which cannot be had for the mere asking as an applicant is, of right, entitled to take judgment in terms of the rules where the respondent has failed to comply with the rules[8].

Since the rules require a litigant to file an answering affidavit and/or heads of argument and set the matter down within one month of service of opposing papers, applicant had no

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[4] See *Founders Building Society v Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H) @ 528. See also *Zimbabwe Banking Corporation Ltd v Masendeke* 1995 (2) ZLR 400 (S) @403
[5] See *BancABC v PWC Motors & Ors* HH123/13
[6] *Ganes & Anor v Telecom Namibia Ltd* 2004 (3) SA 615 @ paragraph 19. See also *CABS v Magodo* HH331/15.
[7] See Herbstein and van Winstein
[8] *Stuttafords Holdings Limited v Alice Mudzudzu* HH 33-2003

obligation to remind respondent of its duty as required by the rules. That respondent did not do anything one and a half month after opposing papers were filed indicated that respondent had no intention to prosecute the application for rescission but only intended to obtain stay of execution and sit back. The answering affidavit was filed out of time and to date no condonation thereof has been sought. The court can and should not be used to encourage courtesy that promotes infringement of the rules. Applicant was doubtful that had the application for dismissal not been made respondent would have filed its answering affidavit or set the application for rescission own given that the answering affidavit was filed most likely upon receipt of the application for dismissal.

It submitted that the explanation proffered was unreasonable and an insult to the court as it is improbable to require one month to receive instructions to file an answering affidavit, let alone one and a half months. And while demanding courtesy from applicant, respondent did not see it fit to extend the same courtesy by responding to correspondence or advising applicant of any difficulty in obtaining instructions.

Finally, applicant submitted that the application for condonation of late filing of answering affidavit in HC 6524/18 made during the hearing is unprocedural and out of time and thus incompetent.

Analysis

Firstly, regarding the point *in limine*, it is trite that, *Madzivire & Ors* v *Zvarivadi* (supra) is indeed authority that a company, being an inanimate and separate legal entity must be represented by a duly authorised person for purposes of **instituting legal proceedings** *(my emphasis)*. However, it is a misinterpretation to suggest that, that case establishes that authority to sue is equal to or is the same as authority to depose to a founding affidavit. I agree with the reasoning in *Ganes & Anor* (supra) to the effect that deposition to a founding affidavit is not institution of proceedings: it is exactly what it is, attestation of a document of evidential value by a person swearing to personal knowledge of the veracity of facts and averments made therein, unless in that affidavit the deponent attests that he has been authorised to institute proceedings. In that regard he must attach the relevant resolution so authorising him. It is thus not necessary for anyone who can attest to facts and averments within his personal knowledge to require authority to do so. In this respect, I am of the view that the Court in *First Mutual*

Investment (Pvt) Ltd v *Roussaland Enterprises*[9] fell into the same error as the respondent, if it equated authority to sue to authority to depose an affidavit[10].

Nor is it incompetent to attach to an answering affidavit proof of a challenge raised in the opposing affidavit. In this regard, I agree with the judge in *First Mutual Investment (Pvt) Ltd* v *Roussaland Enterprises* (supra), that the answering affidavit was the perfect opportunity for applicant to attach the resolution in answer to the challenge raised in the opposing affidavit.

In casu, the relevant resolution attached to applicant's answering affidavit is instructive: in clause 1, it authorises the legal practitioners to institute legal proceedings; and in clause 2, authorises the deponent to the founding affidavit to speak for it with regard to giving instructions to the legal practitioners, attending to any proceedings that may arise including deposition of affidavits and doing any other acts as may be necessary until the conclusion of the litigation. In my view this resolution is in line with both the *Madzivire* and *Ganes* cases in differentiating between authority to sue and representation in that suit. In this case, the authority to sue reposed with the legal practitioners and the mouth piece in the suit was the deponent.

Now, much has been made by the respondent about the validity of that resolution in view of the fact that it purports to be a resolution of the directors of Seed Potato (Private) Limited rather than Seed Potato Co-op (Private) Limited, the litigant in this matter. I do believe that this is much ado about nothing. It is a patent typing error which went unnoticed, in my view, and does not change the fact that the resolution is one by Seed Potato Co-op (Private) Limited. This is because the heading states so and the stamp confirms the same.

It may indeed be a fatal defect to a party's case where such party has failed to abide by the rules of court. This is because it is

> "….detrimental to the administration of justice and the court will not be lax in dealing with non-observance of the Rules. Condonation may be refused even where this entails visiting the negligence of the legal practitioner concerned upon his client."[11]

A party is not obliged to file an answering affidavit. However, it is obliged to file heads of argument within the time limits prescribed by the rules, otherwise it is subject to an automatic bar. *In casu,* the respondent filed heads of argument in HC6524/18 out of time and

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[9] HH301-17
[10] *Ganes & Anor v Telecom Namibia* (supra)
[11] See headnote in *S v McnNab* 1986 (2) ZLR 280 (SC). See also *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (AD) @ 141C-E.

was automatically barred. It has proffered no explanation for the non-compliance with the rules or for the delay. It has not sought condonation or upliftment of the automatic bar. Where a party is barred for failure to comply with the rules, I share the same sentiments as MAKARAU J when she said that:

> ".…….the rule is peremptory and the court has no discretion to exercise whether to bar the respondent or not. The bar falls into place automatically and by operation of the rules of procedure. It is not an order of the court that bars the respondent."[12]

Therefore unless the respondent applies for and is granted an order of upliftment of the bar, he remains improperly before the court and judgment may be granted against him on an unopposed basis.

While I agree that the rules do not bar a party from attending to finalisation of a matter sought to be dismissed for want of prosecution, this must be done in a procedurally correct manner. It behove on it to seek condonation of its dereliction. It did not do so. Without seeking condonation or upliftment of the automatic bar, respondent could not properly attend to finalisation of the application for rescission. What it did was to proceed to file further documents as if it was still properly before the court right up to the date of the hearing without making any application for upliftment of the bar and for condonation.

It only dawned on it during its response to the applicant's oral submissions at the hearing that something was terribly amiss. Even then, instead of seeking a postponement to obtain the applicant's consent or to file a proper application for upliftment of the bar and condonation, it made an application in terms of r 4C for condonation of late filing of answering affidavits. This oral application seeking the court's indulgence to advert to r4C is, in my view, a non-event as it is clearly unprocedural. Rule 4C does not entitle a party to make any application for condonation: it is a rule designed for the court to resort to, to permit it to overlook irregularities in the interest of justice. The long and the short of it is that the respondent failed to make the necessary application for condonation of late filing of heads of argument and for upliftment of the bar.

In any event, it is trite that it is in the discretion of the court to refuse condonation even in cases in which the other party does not object to relief being granted to the party seeking such condonation. Thus, condonation is an indulgence granted by the court, which is not

[12] *Shadreck Vera* v *Imperial Asset Management Company* HH 50/2006

intended to be a salve against the incompetence or negligence of a party's legal practitioner. Such legal practitioner, being the chosen representative of a litigant, there is little reason why, in regard to condonation of a failure to comply with the rules of court, the litigant should be absolved from the normal consequences of a failure by the legal practitioner to abide by the rules no matter what the circumstances of that failure may be. The indulgence of condonation may therefore be granted only on good cause shown, otherwise the administration of justice falls into disrepute.

I therefore have to agree with applicant and find that the application for condonation is unprocedural, incompetent and out of time.

But this was not the only problem with respondent's papers. No explanation is proffered as to why, upon receipt of the applicant's heads of argument in this matter on 14 December 2018, respondent's legal practitioner failed to file heads of argument until 29 January 2019. Rule 238 (2) & (2a) requires any respondent to file and serve heads of argument within 10 days of service of the applicant's heads of argument. Sub-rule (2b) provides that failure to comply with sub-rules (2) and (2a) shall result in an automatic bar against the respondent. Even after discounting vacation days, respondent's heads of argument were filed out of time. In terms of the rules therefore, it was necessary for the respondent to seek necessary condonation and upliftment of the bar, but it chose not to do so.

In my view, this matter suffers both from the utter negligence of respondents chosen representative which must be visited upon the litigants as well as clear and wanton disregard of the rules which the court should never condone.

While I fully subscribe to the notion that the rules are made for the court and not the court for the rules, and that at the end of the day the court must administer justice as between the parties, I am of the firm view that justice includes ensuring fair play between the parties and that such fair play is safeguarded by adherence to the rules. The increasing tendency of litigants or their legal practitioners to rely on the court's discretion and indulgence to forgive flagrant violation of the rules cannot surely be in aid of the proper administration of justice. Neither is the tendency of legal practitioners to demand that judges should resort to r 4C to overlook their dereliction.

I have taken the trouble to narrate in detail the respondent's conduct from the time judgment was obtained against it. What that narration reveals is a persistent and consistent

disregard of the rules which is inexcusable and does not deserve the exercise of my discretion to condone, even had a proper application been made, which it was not. Nor do I think that that the consequent prejudice to the applicant can be adequately compensated for by an order for costs.

On the merits, while this judgment is limited to whether or not the application for rescission of judgment should be dismissed for want of prosecution, the requirements for dismissal are that:

1. There must be a delay in the prosecution of a matter which explanation is unsatisfactory.
2. The prospects of success on the merits must be minimal
3. The balance of convenience and the possible prejudice caused by the other party's failure to prosecute its case on time must weigh in the applicant's favour.

On the delay in prosecution and the explanation thereof, it beggars belief that after giving instructions to apply for rescission of judgment, a litigant suddenly and for one and a half months, had problems giving instructions to file an answering affidavit or to file heads of argument or set its matter down. I am inclined to agree with applicant that once it had obtained stay of execution, respondent felt safe and secure and saw no need to diligently pursue the application for rescission. Certainly, the delay was not minimal. Opposing papers to the application for rescission were served on 2 August 2018. In terms of the rules respondent had one month from 2 August 2018, within which to file its answering affidavit and/or heads of argument. However, it only filed an answering affidavit on 21 September 2018. It is not farfetched to surmise that this was only done, most likely only because respondent was jolted into action by receipt of this application for dismissal. Further respondent only heads of argument almost two months later (more than three months out of time), on 19 November 2018.

If there was a problem with giving instructions, respondent had the opportunity to ask applicant to agree to an extension of time, but chose not to do so. Nor did it avail itself of the opportunity to seek an extension of time in terms of r 229. It simply sat back and waited to see what applicant would do. And applicant, as it was wont to, applied for dismissal. To demand that applicant ought to have extended it the courtesy of reminding it of its obligations in terms of the rules in circumstances where the respondent itself did not think it necessary to extend

the same courtesy to applicant by advising it of any difficulties it had in prosecuting its case is in my view unreasonable and unacceptable.

It is instructive to note that respondent continued its flagrant breach of the rules in that, after belatedly filing its answering affidavit on 21 September 2018, it did not immediately serve the same, nor did it validly set the matter down within one month, for, despite requesting set down on 5 October 2018, it had not filed its heads of argument which it only did on 19 November 2018.

I cannot therefore find that the explanation for the delay was reasonable or satisfactory.

Further, I am obliged to consider whether or not respondent has good prospects of success both in the application for dismissal and in the main matter. Sadly I must answer in the negative. With regard to the application for rescission itself, the respondent filed illegible heads of argument. When the court pointed this out, the applicant submitted to the court a bundle with unissued heads of argument. There are therefore no valid heads of argument before the court in support of the application for rescission.

On the merits, the respondent argued that it was never served with the summons in the main matter as service was effected on a person unknown to it and was therefore not in wilful default. In support of that it produced a print out of an employee schedule showing that Mr Mvenge, the recipient of the summons was not its employee. The document is unauthenticated, carries no letterhead of the respondent and does not even specify that the deponent to its founding affidavit is its employee or management official. Its veracity is therefore questionable. Returns to National Social Security Authority or to the National Employment Council for respondent's industry would have been conclusive proof, of its claim, but respondent did not see it necessary to attach the best evidence of its averments.

Further respondent does not deny that the address of service is its place of business. The sheriff's returns being the official record of a court officer remain, in my view, unchallenged as service was effected on an identified responsible person at the business address of the respondent.

Nor is it clear in what capacity the deponent to respondent's affidavits claims to have personal knowledge of the facts of this matter. A managing or executive director might have personal knowledge, but any other director would not. The resolution empowering him to swear the affidavit merely states that he is a director.

In addition, the record shows that respondent was aware of impending litigation as it had received a letter of demand and had instructed its lawyers. However, it appears to have failed to give any instructions to those lawyers from the time it received demand on 24 April 2018, until summons was eventually issued on 30 May 2018.

Further, the defence raised to the applicant's claim is that the seed potato, which payment applicant it seeks to enforce was of bad quality and therefore respondent is entitled to refuse to pay for it. Yet despite having received this seed between July and September 2015, and despite the record showing that applicant consistently followed up on payment over the intervening years, respondent never queried its quality until a verbal response to applicant's letter of demand by respondent's legal practitioners in May 2018, long after the seed had been used and was no longer available. Nor is the respondent's founding affidavit in the application for rescission supported with any evidence of the alleged defence. Neither did respondent ever put applicant *in mora* regarding the quality of this seed.

In the premises, I subscribe to the view ascribed to CHITAKUNYE J that respondent has little prospects of success in the main matter. I therefore find that the application for rescission of judgment has little or no prospects of success.

Finally on consideration of the balance of convenience, while I agree that the delay and the unreasonableness of the explanation thereof is not enough to lead to dismissal of a litigant's case, the court must take account of the particular circumstances of each case, paying regard to, in addition, issues such as public interest in the expeditious resolution of litigation and management of the court docket; the availability of less drastic sanction, prejudice to applicant arising from respondent's failure to prosecute its application and any abuse of court process.

I agree that it is the right of every person to litigate as necessary. However, in this case, respondent's conduct has unnecessarily caused the institution of multiple proceedings, some of which it has failed to prosecute expeditiously, thus inconveniencing the court and the applicant. The respondent's dereliction deserves reiteration. Despite being properly served with summons respondent did not enter appearance to defend resulting in default judgment being entered. It proceeded to frustrate that judgment by applying for stay and rescission. Subsequently it failed to properly and expeditiously prosecute its application for rescission leading to this application. After opposing the current application respondent failed to serve its opposing papers only for applicant to discover this on attempting to set the matter down on the unopposed roll.

Respondent subsequently filed its heads of argument in both HC 6524/18 and in this matter also out of time. What emerges, in my view, is consistent conduct by the respondent which amounts to abuse of court process, particularly when regard is had to the litany of violations of the rules which I have traversed above, the explanations for which I find unacceptable, more so when regard is had to the fact that the law helps the vigilant rather than the sluggard.[13]

I therefore have no doubt that applicant has suffered prejudice in being denied expeditious justice by respondent's lackadaisical approach. I subscribe to the applicant's view that respondent does not appear to be taking these court proceedings seriously and is in fact seeking to buy time and is, in the process, abusing the court. I find the totality of the above circumstances to be entirely on all fours with the requirements for dismissal for want of prosecution.

While it is the general principle that the courts should apply the rules in a manner that allows the real dispute between the parties to be resolved, I am of the firm view that judicial sensitivity should not be a breeding ground for wanton disregard of the rules and professional laxity by legal practitioners. It is high time that it is brought home to litigants and their legal practitioners that there is a limit to judicial sensitivity. And in view of the fact that each case must be decided on its own merits and judicial discretion must be exercised in accordance with the particular circumstances of the case, I do not see how an order of costs can adequately compensate the applicant for the denial of expeditious justice. In the premises I am of the view that the applicant has made cogent representations why the application for dismissal for want of prosecution should be granted.

Disposition

Consequently, it be and is hereby ordered that

1. The application for rescission in case number HC 10554/17 is dismissed for want of prosecution.
2. The respondent shall pay costs of suit.

[13] *Ndebele v Ncube* 1992 (1) ZLR (S)

Messrs Chitewe Law Practice, applicant's legal practitioners
Messrs Chivore Dzingirayi Group of Lawyers, respondent's legal practitioners