

SIMBARASHE HAMA  
versus  
SIBANGENI NGONO  
and  
PAUL VURAYAI  
and  
MASTER OF THE HIGH COURT (N.O)  
and  
THE REGISTRAR OF DEED (N.O)

HIGH COURT OF ZIMBABWE  
MWAYERA J  
HARARE, 11 October 2016 and 16 February 2017

### **Opposed Application**

*M M Ndebele*, for the applicant  
*T Masendeke*, for the respondents

MWAYERA J: On 11 October 2016, after considering papers filed of record and hearing counsel I granted the application as prayed for by the applicant.

The respondent has by letter dated 3 January 2017 requested for the written reasons for judgment. These are they.

The brief background of the matter is as follows. The first respondent instituted application proceedings against the applicant and three others under case HC 2521/07. After receiving opposition papers from the applicant, the matter HC 2521/07 was not set down. The matter remained in abeyance for about eight years after filing of heads of argument. It is with this background that the applicant approached the court seeking dismissal of the matter for want of prosecution in terms of order 32 r 236 of the High Court Rules 1971.

The issues for determination are:

1. whether or not the applicant has laid grounds warranting dismissal of the application.

2. whether or not the respondent has shown good cause why the application should not be dismissed for want of prosecution.

In the case of *Scotfin Ltd v Mtetwa* 2001 (1) ZLR 249 CHINNENGO J under scored the purpose of order 32 r 236 (4) when he outlined the legislative intention was to ensure that matters that are brought to the courts are dealt with expeditiously. In the *Scotfin case, supra* it was stated that a presiding judge, can only make an order other than dismissal if the respondent has opposed the application and has shown good cause why the application should not be dismissed for want of prosecution. In the circumstances of this case the respondent, as the applicant in HC 2521/07 sought a declaratur, for declaration that the agreement of sale between the second respondent and the applicant for a house belonging to the late Kuluma Dimmy Ngonu was a nullity on the basis that Paul Vurayayi the executor did not have a mandate to enter such an agreement of sale. This application remained unprosecuted for over eight years since the filing of heads of argument. The suspense and none prosecution of the matter is what irked the applicant and thereby occasioning the present application for dismissal.

The applicant presented argument that the none finalization of the application under HC 2521/07 was not only causing anxiety but prejudice. This would be an affront to the legislative intention of r 236 which seeks to ensure expeditious disposal of matters in the interest of justice. The delay to prosecute an application in excess of eight years is certainly unreasonable. I am alive to the fact that matters are set down on a first come first serve basis but certainly a party willing to prosecute an application would initiate set down not to wait for a delay of eight or more years.

Rule 236 (3) and (4) it is instructive on how to proceed. Rule 263 (3) states:

“Where the respondent has filed a Notice of Opposition and on opposing Affidavit and, within one month there after 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 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 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 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.”

In this case the respondent has not shown good cause why the matter for which no set down has been initiated for a period in excess of 8 years should not be dismissed. It is not enough for the respondent to shift blame to the applicant for not having set the matter down. The rule in question clearly gives the aggrieved party an option to either set the matter down or apply for dismissal for want of prosecution. The applicant opted for dismissal. The respondent in their heads of argument para 3.3 p 132 admitted being inactive in so far a prosecution of the matter was concerned but imputed equal inactiveness on the part of the applicant para 3.3.

“The respondent/applicant in this application did not attempt to set the application for a set down date as provided for in terms of the rules, he acquiesced by equally being inactive and then sought a chamber application for dismissal of the first respondent’s application. ....”

Clearly the applicant selected an option availed by the rules, that is seeking dismissal and not setting the matter down. That however, is not a good cause why the respondent who is the convener did not set the matter down and certainly not good cause barring the requested dismissal of the application which has not been set down for about 8 or more years. The application in HC 2521/07 appears clouded in material disputes of facts whose resolve on application would occasion injustice. That coupled with the undue delay in the prosecution of the matter occasion prejudice to the applicant. The main application, in the absence of good cause shown for the unduly long delay in its prosecution cannot stand.

I must comment on the issue of costs. Which squarely fall in the discretion of the court. Both parties sought costs on a higher scale. It is trite costs on a higher scale are drastic and as such a preserve for circumstances where litigation is frivolous and vexatious. Also where there is clear abuse of court process then costs on a higher scale are justified. See *Apotex Inl v Surgrrred (Pvt) Ltd* 2002 (2) ZLR 612 and *Mahembe v Matambo* 2003 (1) ZLR 149 at 150 C CHEDA J (as he then was) held:

“Our courts will not resort to this drastic award lightly, due to fact that a person has a right to obtain a judicial decision against a genuine complainant. It is therefore essential that the court only awards such costs in situation where it is clear that the loosing litigant was not genuine in pursuance of a stand in litigation ...”

See also *Rodgers v Rogers and Anor* 2008 (1) ZLR 330 wherein MALABA JA (as he

then was) accepted the definition of frivolous and vexatious as in *S v Cooper and Anor* 1977 (3) SA 475 at 476 D where BISHOOF J said:

“the word ‘frivolous’ in its ordinary and natural meaning connotes an action characterised by lack of seriousness as in the case one which is manifestly insufficient ....” (my emphasis)

In this case the respondent delayed the prosecution of the main matter for a period of in excess of 8 years and when an application for dismissal of the main matter arose opposed the application. The basis of opposition was couched in such a manner that the respondent argued that the applicant ought to have prosecuted and set down the main matter as opposed to applying for dismissal. Given the inordinate delay and no good cause shown it is apparent the respondent did not seriously take the matter and in face of an application for dismissal of the main matter for want of prosecution, the respondent raised a hopeless and groundless defence. Costs on a higher scale in this case are justified as clearly the opposition mounted is frivolous and vexatious.

In the result it is ordered that:

1. The application for dismissal for want of prosecution of case number HC 2521/07 be and is hereby granted.
2. The first respondent shall pay the costs of suit on a higher scale.

*Zvinavakobvu Law Chambers*, applicants’ legal practitioners  
*Muzenda & Partners*, respondent’s legal practitioners