JOCKSTAR INVESTMENTS (PVT) LTD
versus
ARTHUR EZEKIEL MATONGO
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 17 January 2022 and 31 May 2022

Opposed Matter

Mr F Chingoma, for the applicant
Mr D Matimba, for the 1st respondent
No appearance, for the 2nd respondent

MANYANGADZE J: This is an application for dismissal for want of prosecution made in terms of the then applicable Order 32 r 236 (4)(b) of the High Court Rules, 1971.

The applicant seeks the dismissal of an application filed by the first respondent under Case No. HC 3053/15. In that application, HC 3053/15, the first respondent (as applicant) seeks an order of specific performance against the applicant, (as respondent) requiring the latter to transfer an immovable property it sold to the first respondent.

The facts

The facts constituting the background to the matter are set out in the parties' pleadings filed of record. In order to put the matter into its proper context, they can be briefly summarised as follows:

The first respondent bought an immovable property from the applicant, Stand No. 2346 Bannockburn Township measuring 2268m^2 (the property), in terms of an agreement of sale concluded on 28 September 2013. Following a dispute over cancellation of the said agreement by the applicant, the first respondent filed an application under Case No. 3053/15, seeking to enforce specific performance of the same. This application was filed on 2 April 2015.

On 26 April 2015, the applicant filed a notice of opposition and opposing affidavit in Case No. 3053/15. On 26 May 2015, the first respondent filed his answering affidavit. On 6 May 2019, the first respondent filed, after duly obtaining leave of the court to do so, a supplementary affidavit under Case No. HC 11136/18.

No further court papers were filed until 28 May 2021, when the applicant filed the instant application. The applicant seeks an order in the following terms:

> "1. The 1st Respondent's Court Application under Case No. HC 3053/15 be and is hereby dismissed for want of prosecution.
> 2.That the 1st Respondent should pay the Applicant wasted costs in Case No. HC 3053/15, HC 11136/18 and the costs of this application on an attorney-client scale."

Points *in limine*

In his opposing affidavit, the first respondent raised two points *in limine*. These are that:

(i) The applicant has not disclosed material facts.

(ii) The applicant's legal practitioner has improperly deposed to the founding affidavit.

In his heads of argument, the first respondent added two more points *in limine*, which he maintained in his oral submissions. The additional preliminary points, which brought the points *in limine* to a total of four, were to the effect that:

(iii) The applicant's legal practitioners did not file a notice of assumption of agency in respect of Case No. 3053/15.

(iv) The applicant has approached the court with dirty hands.

Material non-disclosure

As already indicated, this is the first preliminary point raised in the notice of opposition. Other preliminary points were subsequently raised, such that when the matter was argued, the initial sequence of the preliminary points was changed. This is immaterial. What needs to be resolved is whether the points raised have merit and are capable of disposing of the matter. Preliminary points should not be raised for the sake of it. They must, if upheld, be capable of disposing of the matter. See *Telecel Zimbabwe (Pvt)* v *Postal and Telecommunications Regulatory Authority of Zimbabwe & Others* HH 446/15. Under this point, that is, material non-disclosure, the first respondent avers that the applicant should be non-suited for concealing vital information from the court. The first respondent alleges that the applicant has not been a candid litigant. It has not taken the court into its confidence, rendering it unworthy of the relief it seeks.

The first respondent indicated that there were negotiations for a settlement of the dispute. This led to payment of the outstanding purchase price by the first respondent, and an agreement that he retains the property in question.

What is particularly significant about these negotiations, for purposes of the instant application, is that the applicant, through its erstwhile legal practitioners, pleaded with the first respondent to hold Case No. 3053/15 in abeyance in order to finalize the said negotiations. This is why the matter could not be set down for hearing.

All these facts, that is, the negotiations, the moratorium on litigation pending finalization of a settlement, were never adverted to by the applicant in its founding affidavit. In this regard, the first respondent avers, in paragraph 3.17 of his heads of argument.

> "Nowhere in the Applicant's Founding Affidavit does it state that a Settlement was reached to the effect that First Respondent pays off the outstanding balance with the latter retaining the property. And nowhere does it state that it's Legal Practitioners of record in Case No. HC 3053/15 pleaded many a time that First Respondent holds further litigation in abeyance."

Strangely, in its heads of argument, the applicant does not address this point *in limine*. This is despite the fact that it had been raised in the notice of opposition, with specific averments in the opposing affidavit. The applicant makes no submissions at all as to why its founding affidavit omitted the information averred by the first respondent. The applicant simply persists with its averment that the first respondent neglected to pursue his matter for a period in excess of 2 years. In fact, it asserts in paragraph 9 of its heads of argument, that the neglect was firstly, for 2 years from 2015 to 2018, and another 2 years thereafter. The latter period is with apparent reference to the period from 2019 to 2021, when the application for dismissal was filed.

An attempt was made to address the point during oral submissions. *Mr Chingoma*, counsel for the applicant, submitted that the said negotiations occurred before he had assumed agency. He further averred that the dates for the negotiations were not recent and that the parties had ceased to negotiate.

I find the submissions made by Mr *Chingoma* astounding. He seems to be suggesting that what transpired before he assumed agency is none of his business. The critical point to note is that these negotiations were the main reason why the matter, that is, Case No. HC 3053/15, was not set down. It is assumed that the new legal practitioners would have studied the file from the former legal practitioners and would have taken full instructions from their client. They would then be in

a better and well informal position to formulate an opinion whether an application for dismissal for want of prosecution is justified.

Given the history of the matter, as clearly borne out by the record, one wonders why such an application was filed. One indeed wonders why the information, which certainly would assist the court in arriving at a proper determination, was not laid out in the founding affidavit.

The record is replete with correspondence, in the form of letters and emails, reflecting protracted endeavors at settling the matter. The correspondence covers the period from July 2015 to April 2021. Highlights of this correspondence include:

- Acceptance of the full purchase price for the property
- Agreement that first respondent retains the property
- Agreement that compensation be paid by the applicant to a subsequent buyer
- Requests by applicant's erstwhile legal practitioner that Case No. HC 3053/15 be held in abeyance whilst the agreed settlement was being finalized.

All this constitutes material and vital information which was concealed from the founding affidavit.

A reading of the founding affidavit *creates the impression that the first respondent was grossly negligent in the prosecution of his case.* It first refers to a period of 2 years after 26 April 2015, when the answering affidavit was filed. The applicant avers that this period passed with no effort being made to set the matter down. It then refers to the period after 6 March 2019, when the supplementary affidavit was filed. Two more years passed with the first respondent not showing any interest in setting the matter down. This is followed by emphatic averments in paragraphs 10 and 11 of the founding affidavit, wherein is stated:

> "There is need to bring finality to any matter which is brought before the courts. A litigant has to show his zeal or enthusiasm in the prosecution of his matter. If he does not, then it has to be dismissed for want of prosecution for it cannot continue to remain pending forever in vain without a determination being made.
>
> The first respondent has clearly failed and neglected to pursue his claim to date, as he is obliged to, such failure gives privilege on the applicant in terms of Order 32 r 236 sub-rule 4(a) and (b) of the High Court rules to either set the matter down for hearing in terms of r 223 or to 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"

Thus, any person who goes through this founding affidavit will strongly feel that the application for dismissal is well deserved. That will be the feeling until confronted with the startling revelations in the opposing papers, which show that there is something seriously amiss in the founding affidavit. Up to as recent as April 2021, for proceedings instituted in 2015, there were spirited attempts to settle the matter. To that end litigation was stopped.

There is no mention whatsoever of those attempts in the founding affidavit. This cannot be due to inadvertence. The applicant was aware such attempts had been made. It was aware that is the reason why the matter was not set down. It deliberately concealed this information. The information would give a different complexion to the matter. It would render the application for dismissal untenable. That is why it was omitted. There is no other reasonable explanation for such a glaring omission. It attests to deliberate concealment of material facts, which concealment would mislead the court.

The pertinent question is, what is the effect of the non-disclosure? The first respondent avers that the applicant should be non-suited. It has not been candid with the court in material respects. It is therefore not worthy of the court's protection and its application should be dismissed on account of the non-disclosure. In this regard, reference was made to the case of *Nehanda Housing Co-operative Society and Others* v *Simba Moyo and Others* HH 987/15.

In that case, the court was seized with an application for an interdict, in which it found that the applicants had concealed material facts. MAFUSIRE J extensively dealt with the question of non-disclosure of material facts by a litigant and the effect thereof on its case. The learned judge remarked as follows, at page 4 of the cyclostyled judgment:

> "In my view a Party that conceals material information must be unworthy of protection or assistance of the Court. If you seek relief, you must take the Court into your confidence laying bare all the relevant facts on the matter, even those that you may perceive to be adverse to the relief you seek."

The judge went on to refer to English and South African authorities, where the need to be candid with the court was emphasized. These include *Rex* v *Kensington Income Tax Commissioners*: *Ex Parte Parte Edmond de Polignac* (1917) I KB 486, at p. 514, *Schlesinger* v *Schlesinger*, 1979 (4) SA 342, at p.349. Reference was also made to the work of the learned authors Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, fifth ed.vol 1, at pages 441-442.

The above authorities underscored the principle of the utmost good faith, which litigants must uphold when approaching the courts for relief. The judge noted that the English and South African authorities he referred to highlighted this principle in the context of *ex parte* applications. He however, ventured to state that there is no reason why the same principle should not be observed in ordinary motion proceedings. The judge observed that there are several other instances where a litigant is non-suited for abuse of the court process. This is done in order to protect the integrity of the court and its processes. In this regard the judge remarked, at p 8 of the cyclostyled judgment:

> "With due respect, I have found the approach of the South African appellate Division in Trakman's case non-persuasive. I am mindful of the fact that it was a decision of five judges of appeal. But with all due respect, I have found no cogent justification for restricting the *uberrima fides* rule strictly to *ex-parte* applications only. The appellate court said there was no sound reason to extend the principle to ordinary motion proceedings. But I also find none for not extending it either.
> In my view, the underlying reason why an applicant may be non-suited when he conceals material information from the court, as Vis Count Reading CJ said in *Ex-parte Edmond de Polignac*, *supra*, is to protect the court itself. That is, my view, to protect its integrity. It is to prevent an abuse of its process. There are several instances when a litigant's infraction or misconduct is so gross as to warrant the court withdrawing its jurisdiction altogether, in spite of the inherent power reposed in it to punish such misconduct by a punitive order of costs. For example, a litigant coming to court with dirty hands has no right of audience. A litigant guilty of contempt of court may not be heard. A litigant that continuously overburdens the court with endless, frivorous or spurious suits may be silenced perpetually. In my view, the court's decision to refuse to entertain a matter on the merits because of some wrong done by a petitioning litigant must to some extent, depend on the nature of the litigant's misconduct and the circumstances surrounding it."

I fully associate myself with the sentiments expressed by MAFUSIRE J. In an earlier judgment involving, the same parties, HH 469/15, MATANDA MOYO J remarked at p 3 of the cyclostyled judgment;

> "The withholding of such information by the applicants was a ploy to mislead this court and to keep this court in the dark and trying to make this court believe that the first to fifth respondents simply woke up and declared themselves the new management committee of the first applicant through a newspaper article of 29 April 2015. It is settled law that a person who approaches the court for relief ought to be candid with the court. Such an applicant ought to disclose all the material or important facts and refrain from suppressing facts within his knowledge. Once found out such an applicant ought to be denied the relief sought… It is the duty of any applicant seeking relief before the court to bring any material fact before the court."

In *George Katsimberis and Anor* v *Kenneth Raydon Sharpe and Ors*, HC 6202/20, MAFUSIRE J was once again seized with the question of material non-disclosure of facts.

His remarks, at pages 8-9 of the cyclostyled judgment, are apposite;

> "That this court once dealt with this dispute in HC 8943/18 is completely absent from the applicant's founding papers. I only get to know about it from the opposing papers. If this was mere inadvertence, then it is monumental blunder. But if this was deliberate then this is the height of misconduct. Either way, such an omission is fatal. No court can relate to a cause of action on the merits when some material facts surrounding it have been concealed from it. In no way could Katsimberis move the court to deal with the issue of an interdict in these circumstances, when concealed somewhere in his memory box is a whole folder on the judgment of MUZENDA J, but which he does not open to share with the court. I cannot even begin to emphasize the folly and imprudence of a litigant's failure to take the court into his or her confidence. I have stressed this before in several of my judgments: see *Nyoni & Ors* v *Officer in Charge, Minerals Section, Mt Darwin* No HH 663/20; *Nehanda Housing Cooperative Society & Ors* HH 987 /15 and *Sadiqi v Mutswa & Ors* HH 281/20.
>
> I have repeatedly stressed that a litigant must display the utmost good faith, or *uberrima fides*, when he or she approaches court for relief on urgent basis. Concealment of material information makes one unworthy of the protection or assistance of the court. When you seek relief, you must take the court into your confidence. You must lay bare all the relevant facts on the matter."

In casu, the applicant is in the same untenable predicament. Its founding papers have not disclosed information critical to a determination of the application. It was aware of this information. The lack of *uberrima fides* is graphically reflected in the following submission in paragraph 2.3 of the first respondent's heads of argument;

> "There can be no great act of bad faith and unethical behavior in business than to pretend that you are serious to settle a matter and cause the first respondent to part with a further USD 17 000.00 (*Seventeen thousand United States Dollars*) so that you get full payment of USD46 927.00 (*Forty-six thousand nine hundred and twenty-seven United States Dollars*) only to turn around and seek to dismiss the matter and claim that you have abandoned negotiations or settlement when no such communication was ever given to the other protagonist."

Disposition

In the circumstances, the point *in limine* relating to non-disclosure of material facts is well founded and must be upheld. If upheld, it disposes of the matter. There is no need to delve into the other preliminary points.

It is my observation that the preliminary point is of a nature that, unavoidably, also traverses material aspects of the merits of the matter. It touches on the key question of whether or not the delay in setting down the main matter was justified. The information relates to that fundamental question. Thus, upholding the preliminary point is tantamount to a finding that the application for dismissal for want of prosecution has no reasonable basis. An order of dismissal of the application, instead of merely striking it off the roll, is proper in the circumstances. Where

the defect or irregularity in an application goes to the root of the application, no meaningful purpose is served by striking such application off the roll. It must be dismissed. This is an approach the Supreme Court adopted in *Fadzai John* v *Delta Beverages Limited* SC 40/17. GUVAVA JA stated, at pages 5-6 of the cyclostyled judgment:

> "Although it is generally accepted that dismissing matters on technicalities is not desirable the defects in the present application were of such a nature that they went to the root of the application. Where the court is presented with a defective application the applicant must seek indulgence of the court in order for the irregularities to be condoned….
>
> There comes a time when the court; in the exercise of its discretion, must decide that there is a limit to which such indulgences can be granted to an applicant and such applications will be dismissed where they fail to comply with the rules of the court. Striking the matter off from the roll does not finalise the matter but merely means the matter will be filed again thus dogging the court system with recycled cases. In my view there is a limit to which the court will indulge a litigant, as there must be finality to litigation."

In casu, the defects or omissions noted in the applicant's founding papers go to the root of the application. In fact, they border on bad faith, as information necessary for a just and proper resolution of the matter was withheld. The applicant essentially seeks a technical disposal of the matter, where such disposal is not justified, given the material facts withheld. The relief sought cannot be granted in the circumstances.

The lack of *uberrima fides* reflected in this application justifies an order of costs on the higher scale.

In the result, it is ordered that;

1. **The application be and is hereby dismissed.**
2. **The applicant bears the respondent's costs on the legal practitioner and client scale.**

Jiti Law Chambers, Applicant's Legal Practitioners
Matipano & Matimba, first Respondent's Legal Practitioners