

JETHRO SIBANDA

Versus

MTHOKOZISI MOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 JULY 2011 & 2 JANUARY 2012

N Mazibuko for applicant
M. Ndlovu for respondent

Judgment

NDOU J: The applicant seeks the dismissal of the respondent's application under case number HC 1820/09 for want of prosecution. The salient facts are that the respondent filed a court application for review under case number HC 1820/09 on 11 November 2009. The applicant thereafter filed his opposing papers on 17 November 2009 and the respondent filed his answering affidavit on 15 December 2009. After more than a month had lapsed without the matter being set down to prosecute the matter this application was made in terms of Order 32 Rule 263 (4) of the High Court Rules, 1971 for the dismissal of the respondent's application for want of prosecution. It is trite law that the object of Rule 236 of the High Court Rules, 1971 ("the Rules") is to ensure that the court may dismiss an application if the principal litigant does not prosecute its case with due expedition. The court may, instead of dismissing the application, make such other order as it thinks appropriate – *Scotfin Ltd v Mtetwa* 2001(1) ZLR 249 (H). The respondent managed to have the application under HC 1820/09 granted by "default" on 30 June 2011. The applicant did so by using duplicate file. That order was obtained by error as the applicant had already filed his heads of argument on 30 November 2010. Mr *Ndlovu*, for the respondent, has conceded the error and says he abandoned the order granted to the respondent by default. In the circumstances, I rescind the order granted by this court on 30 June 2011 in terms of Rule 449 of the Rules. I will proceed to deal with this application on its merits. It is clear that both parties have filed their heads of argument since April 2010. The matter is awaiting set down date. The file must have been misplaced at some stage as a duplicate one was opened on June 2011. It is difficult for me to say that the delay was caused by the respondent's failure to prosecute his review application under HC 1820/09 without due diligence and expedition. Rule 236 gives this court discretion to either dismiss this application or make an appropriate order. I believe justice will be done by the set down of the matter at the earliest available date.

Accordingly, I set the matter down for the 24th February 2012 at 1000 hours with costs being costs in the cause.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Mlweli Ndlovu & Associates, respondent's legal practitioners