Judgment No. 92/2003
Case No. HC 1654/2003
HC 1760/2003

THANDEKO MNKANDLA

Versus

SHADRECK MUDZVITI

And

TOBAIWA MUDEDE – REGISTRAR-GENERAL

And

RIDO MPOFU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 AND 29 AUGUST 2003

N Mathonsi for the applicant
C Dube for the 2nd respondent

Urgent Chamber Application

NDOU J: In the main application the parties appear as reflected above. In HC 1760/03 the second respondent, the Registrar General is the applicant and applicant is the respondent. The latter is an application for condonation by the second respondent to file opposing papers out of time. On account of time constraints the parties' legal practitioners requested that I hear submissions in both matters and then make one composite and final decision. I agree that it is convenient to proceed in that fashion and accordingly granted leave for the same. In the main application this court had granted a provisional order in the following terms:-

"Terms of Final order Sought

1. That first, second and third respondents make available to the Registrar of this court and applicant's legal practitioners all documents constituting the nomination papers of the third respondent filed at the nomination court in Gwanda on 21 July 2003 within 48 hours of

service of this order upon them or some other official in their respective offices.

2. That in the event that third respondent's nomination documents do not meet the requirements of the law, his nomination be and is hereby nullified and he is prohibited from contesting the mayoral elections set for 30 and 31 August 2003.
3. That the costs of this application be borne by the first, second and third respondents jointly and severally, the one paying the other to be absolved.

Interim Relief Granted

Pending the finalisation of this matter the applicant is granted the following relief:-

4. That the first and second respondents or the one or other of them be and are hereby ordered and directed to file with the Registrar of this court the original documents constituting the nomination papers filed by the third respondent at the Nomination Court on 21 July 2003 for the Gwanda Mayoral Elections and serve copies of the same documents upon the applicant's legal pracitioners, Messrs Coghlan & Welsh, within 48 hours of service of this order upon them.

Service of provisional order

The order should be served upon the respondents."

It is evident that it was only the first and second respondents who were required to produce the nomination papers filed by the third respondent. The interim order granted does not require the third respondent to do so. The application and the interim order were only served on second and third respondents. The salient facts of the case are that the applicant and third respondent are candidates for the Gwanda Mayoral Elections which have been pencilled for 30 and 31 August 2003. The applicant is a Movement for Democratic Change candidate and third respondent is a ZANU(PF) candidate. These elections are being held in terms of the Urban Councils Act [Chapter 29:15] as amended (hereinafter called "the Act".

On 21 July 2003, a Nomination Court presided over by the first respondent sat to receive nominations of both applicant and the third respondent. Not being happy

with the acceptance of third respondent's papers the applicant requested permission from both the first and second respondents to inspect the nomination papers in question but permission was not forthcoming. No reasons were given to the applicant for this. In the result, the applicant launched this urgent application for the provisional order as outlined supra, which was granted on 15 August 2003.

I propose to deal with the applications in turn.

APPLICATION FOR CONDONATION BY SECOND RESPONDENT: HC 1760/03

Although one application was filed, I agree with Mr *Mathonsi*, for the applicant, that there are in essence two issues involved here. First, the second respondent was in contempt in that he failed to produce the third respondent's nomination papers within 48 hours. Second, the second respondent seeks to file opposing papers out of time and seeks the indulgence of this court to do so. In his founding affidavit the second respondent seems to confuse the two issues. Mr *Dube*, for second respondent, seems to confuse the two issues in his submissions but nevertheless alludes to the issue of contempt as well. On the issue of contempt it is trite that I have a discretion. The court will usually refuse to hear a person who has disobeyed an order of court until he has purged his contempt. The fact that a party has disobeyed an order of the court is not in itself a bar to his being heard, but if his disobedience is such that, for as long as it continues, it impedes the course of justice by making it more difficult for the court to ascertain the truth or to enforce its orders, the court may in its discretion refuse to hear him until the impediment is removed. *The Civil Practice of the Supreme Court of South Africa* by L D van Winsen, A C Cilliers and C Loots (4 ed) at pages 827; *Di Bona* v *Di Bona & Anor* 1993(2) SA 682(C) at 688G and 689B-E; *Hadkinson* v *Hadkinson* [1952](2) ALL ER 567 (CA) at

575B-C; *Clement* v *Clement* 1961(3) SA 861(T) at 864-5; *Byliefeldt* v *Redpath* 1982(1) SA 702(A) at 714F-G; *Jackman* v *Jackman* 1969(2) RLR 534; *Garfield* v *Minister of Defence* 1986(2) ZLR 112H and *Sabawu* v *Harare West Rural Council* 1989(1) ZLR 47(H).

In *casu*, the question of urgency has to be taken into account – *Clement* v *Clement (supra)* at 867. Applying these legal principles to the facts of this case I am persuaded to exercise my discretion in favour of the second respondent being heard. This conduct, however, will be relevant factor in the determination of the question of costs. The second respondent's disobedience does not impede the course of justice by making it difficult for me to ascertain the truth.

I will now consider the question of condonation for late filing of opposing papers. Order 32 rule 233 of the Rules of this court provides-

> "233(1) The respondent shall be entitled within the time given in the court application in accordance with rule 232, to file a notice of opposition in form 29A, together with one or more opposing affidavits.
>
> (2) …
>
> (3) A respondent who has failed to file a notice of opposition and opposing affidavits shall in terms of sub-rule (1) <u>be barred</u>" (emphasis added)

The removal of the bar is an indulgence resting in my discretion. A party who applies for the removal of a bar should set out in his affidavit, first, what his defence is; and, second, the facts on which he relies for his defence i.e. a defence that is good in law. The test is the same as that applied to a defendant's affidavit in summary judgment – *Markides & Anor* v *Levendale* 1954(4) SA 181(SR) at 183H- *in fine*; *Broadly NO* v *Stevenson* 1973(1) SA 585 (R); *Van Aswegen* v *Kruger* 1974(3) SA 204(O); *Flugel* v *Swart* 1979(4) SA 493(E) at 497F-H and *The Civil Practice of the Supreme Court of South African (supra)* at 554. Is there good cause for the removal

of the bar? It is trite that I have a wide discretion in this regard. The courts are inclined to grant applications for removal of bar where –

(a) a reasonable explanation for the applicant's delay is forthcoming;

(b) the application is *bona fide* and not made with intent to delay the other party's claim;

(c) it appears that there has not been a reckless or intentional disregard of the rules of the court;

(d) the applicant's case is not obviously without foundation, and

(e) the other party is not prejudiced to an extent which cannot be rectified by a suitable order of costs – *Smith NO* v *Brummer NO & Anor*; *Smith NO* v *Brummer* 1954(3) SA 352(O) at 357 *in fine* – 358B and *Du Plooy* v *Anwes Motors (Edms) Bpk* 1983(4) SA 212(O). Lack of diligence, or negligence, on the part of the applicant or his legal practitioners, even if gross, is not necessarily a bar to relief – *Gordons & Anor* v *Rondinson* 1957(2) SA 549 (SR) at 552C-D. The rationale for the above position is easily understandable *via* the words of McNALLY JA in *Songore* v *Olivine Industries* 1988(2) ZLR 210(S) at 213A-B-

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence."

The court has to carry out a balancing act. As aptly pointed by the learned Judge of Appeal at 211E-F-

> "While courts are inclined to frown upon plaintiffs who 'snatch at their judgments' the impression must not be gained that the rules may be flouted with impunity and that as long as you are only a day or two late rescission will be granted on request … But one who puts forward a 'reason' which is an

> insult to the intelligence of the court may have more difficulty in satisfying the court of his good faith."

See also *Saitis and Co* v *Fenlake* [2002] 4 ALL SA 50 and *Challenge Auto (Pvt) Ltd and Ors* v *Standard Chartered Bank of Zimbabwe Ltd* HH-221-02. Factors which the court takes into account in applications for condonation for non- compliance with the rules of court were admirably set out in *Bishi* v *Secretary for Education* 1989(2) ZLR 240(H) as being-

(a) the degree of non-compliance with the rules;

(b) the explanation therefor;

(c) the prospects of success on the merits;

(d) importance of the case;

(e) the convenience of the court; and

(f) the avoidance of unnecessary delay – see also *Moyo* v *President, Board of Inquiry & Ors* 1996(1) ZLR 319(H); *Mlilo* v *Chairman, Public Service Commission* HB 51-90 and *Vrystaat Estates (Pvt) Ltd* v *President, Administration Court and Ors* 1991(1) ZLR 323(S) at 329G-H.

The foregoing requirements are cumulative and not alternative and bare assertions in this regard will not suffice – *Petras* v *Petras* SC 71-91 and *ZIMBANK* v *Masendeke* 1995(2) ZLR 400(S). In *casu,* the delay is brief. Second respondent was supposed to file his opposing papers on 25 August 2003 but only approached the court on 27 August 2003.

This, however, does not mean that I should grant the application for condonation on mere request. The second respondent has to justify his application. His explanation is that of time constraints and distance between his head office where

he is based and the Gwanda office, the subject matter of these proceedings. He also cited the issue of instructing the Civil Division in the Attorney General's Office, who in turn instructed a Bulawayo based private law firm. He articulated his difficulty in meeting the deadline. Having regard to the fact that the Urban Local Government elections are taking place throughout the country during the same days as the Gwanda Mayoral Elections his position is understandable. It is notorious fact that elections in this country are preceded by litigation against, *inter alia*, the second respondent. Bearing in mind that the issue here in one of interpretation of statute there are prospects of success on the merits. Litigation resulting from mayoral elections or elections for that matter is a matter of great importance to the electorate. It is in the interest of justice and convenience of the court to condone the non-compliance with the rules. The cumulative facts placed before me establish a case for the condonation and I accordingly allow the late filing of the opposing papers.

MAIN APPLICATION

Although a copy of the third respondent's Ordinary Level General Certificate of education was produced, I gave the second respondent leave until the end of business on 28 August 2003 to produce a legible copy. The original certificate was filed on 28 August 2003 in the morning. In the circumstances the only issue for determination is whether the third respondent qualified to stand as a mayoral candidate. For the record, the third respondent is the sitting mayor of Gwanda who is seeking re-election. The applicant contends that the third respondent does not posses the requisite academic qualifications to stand as a mayoral candidate and he wants his nomination to be rejected for that reason. The relevant provision is contained in section 103H of the Act which reads:-

"103H **Qualification and Disqualification for Election as Mayor**

(1) Any person who –
(a) is a citizen of Zimbabwe; and
(b) has attained the age of 40 years; and
(c) …
(d) holds academic or professional qualifications to at least the following levels –
(i) *a general certificate of education with passes in at least five subjects including English at ordinary level;*
(ii) either –
A. a general certificate of education with passes in at least two subjects at Advanced Level; or
B. a post-ordinary level qualification in any profession or calling obtained after pursuing at least two years of studies; and
C. has a working knowledge of either Shona or Ndebele language; and
D. is not disqualified in terms of subsection (2) and (3) shall be qualified for election as mayor of a municipal" (emphasis added)

Third respondent passed five ordinary level subjects in 1969, viz *Literature in English*, Bible Knowledge, Geography, Ndebele and General Science (emphasis added)

The Act requires "a pass in English". The contention in this matter lies in the interpretation of a pass in English. Does the Act require a pass in an ordinary level subject known as "English Language" only or would a pass in a subject known as "Literature in English" suffice? Did the lawgiver intend that a pass in English means a pass of the subject known as "English Language"? According to the applicant the dictionary definition of English excludes Literature in English. Reliance is placed on the definitions in *Webster's New International Dictionary*, Vol 1 2Ed where English is defined as follows –

> "The language of the English and of the people of the United Stated and most of the British Colonies."

Literature is defined in the dictionary as pages 1442-3 as follows:-

> "Literary culture acquaintance with letters, book knowledge … Literature is now used chiefly of writings distinguished by artistic form or emotional appeal as literature consists of all the books were moral truth and human passion are touched."

In *Reader's Digest Oxford Complete Wordfinder* (a combination of dictionary and therasus) at page 487 English is defined as – "the language of England, now used in many varieties in the British Isles, the United States and most Commonwealth countries and often internationally." According to the applicant, the literal meaning of a pass in English is a pass of the subject known as English Language. It must however be noted that – "what seems a clear meaning to one man may not seem clear to another … The literal meaning is not something revealed to judges by a sort of authentic dictionary, it is only what individual judges think is the literal meaning." *Savage* v *Commissioner for Inland Revenue* 1951(4) SA 400A at 410 per SCHREINER JA. The context of a provision may in certain circumstances compel departure from the ordinary meaning of its words - *Oertel* v *Direkteur Van Plaaslike – Bestuur* 1983(1) 354A at 370 and *Reynolds Bros Ltd* v *Chairman, Local Road Transportation Board*, JHB 1984(2) SA 826 W 828. The applicant contends that I utilise the literal rule of interpretation because the words in the Act are precise and unambiguous. In Sussex Peerage Claim (1844) quoted by INNES CJ in *Venter* v *R* 1907 TS 910 at 913 it was said –

> "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words alone do in such a case best declare the intention of the lawgiver."

Further, the applicant relies on the *expressio unius est exclusio alterius* maxim also stated as *expressum facit cessare tacitum* (that which is expressed puts an end to that which is silent) – *Dean* v *Wiesengrund* [1955] 2 QB 120. I do not think that this

maxim is applicable in *casu* because the legislature did not expressly state that an ordinary level subject known as English Language is a requirement. I think it has to be accepted that the legislature did not qualify a pass in English. At the time of the passing of the piece of legislation the legislature was aware that there was in existence two ordinary level subjects known as English Language and Literature in English could easily have restricted the requirement to a pass in English Language, the subject. It did not expressly do so. Sentences in the section are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have them as separate words – per STAMP J in *Bourne* v *Norwich Clematorium,* Ltd [1967] 2 ALL ER 576 at 578. A formulation of the intentionalism was stated in *Farra's Estate* v *Commissioner of Inland Revenue* 1926 TPD 501 at 508 as follows –

> "The governing rule of interpretation – overriding the so-called "golden rule" – is to endeavour to ascertain the intention of the lawmaker from a study of the provisions of the enactment in question …"

In *casu,* the lawmaker intended to require a pass in English, which could either be a subject commonly known as English Language or one known as Literature in English. This, in my view, is the intention of the legislature. In light of the above finding it follows that I should discharge the provisional order issued on 15 August 2003. The only issue left is one of costs. I alluded that the first and second respondents' contempt is relevant in this regard. I feel that their conduct forced the applicant to launch these proceedings. They had in their possession the original documents requested by the applicant. They did not produce them for inspection by the applicant. Even after the interim order was granted they failed to produce the

same. In the circumstances they must be visited with the order of costs. The position of third respondent is different. The documents requested by the applicant were no longer in his custody, a factor obviously known to the applicant. He is not in contempt because the order did not seek him to do any within 48 hours. In the circumstances it would be unfair to order him to pay costs. In the circumstances I make the following order:-

1. That the provisional order issued by this court on 15 August 2003 be and is hereby discharged.
2. That the costs of this application shall be borne by the first and second respondents jointly and severally the one paying the other to be absolved.

Coghlan & Welsh, applicant's legal practitioners
Paradza, Dube & Associates instructed by *Civil Division of the Attorney-General's Office,*second respondent's legal practitioners