

Judgment No. HB 138/06
Case No. HC 460/06
X-Ref: HC 2388/03 & 1021/05

ENOCK SITHOLE

Versus

THOKOZILE KHUMALO

And

SALLY DUBE

And

CECIL MADONDO N O OF TUDOR HOUSE CONSULTANTS

And

DEPUTY MASTER OF THE HIGH COURT, BULAWAYO

And

THE REGISTRAR OF DEEDS

And

SEMIC & SONS PROPERTY (PVT) LTD

And

IMPACT TRUST & EXECUTORS

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 23 NOVEMBER 2006

Advocate S Nkiwane, for the applicant
R Moyo-Majwabu, for 1st respondent
M Nzarayapenga for 3rd respondent

Opposed Matter

NDOU J: This matter was set down for hearing on 17 November 2006.

At the commencement of the hearing, *Advocate Nkiwane*, for the applicant raised two

points *in limine*. In brief, he submitted that the 1st and 3rd respondents are barred. I will deal with each point in turn.

Is 1st respondent barred?

Applicant's heads of argument were filed of record and served on the respondents on 29 June 2006. The *dies induciae* for filing the 1st respondent's heads of argument expired on 13 July, 2006. 1st respondent's heads of argument though filed on 13 July 2006, were actually served on 14 July 2006, at 15:50 p.m after the *dies*. It is common cause that the 1st respondent was not out of time as far as the filing of the heads of argument in terms of Order 32 Rule 238 (2a) of the High Court Rules, 1971. The only issue is whether the 1st respondent complied with sub-rule (2) of Rule 238 which provides:

“Where an application, exception or application to strike out has been set down for hearing in terms of sub-rule (2) of Rule 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with sub-rule (2a), heads of argument clearly outlining the submission relied upon by him and setting out the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party.” (emphasis added)

This issue hinges on the interpretation of the highlighted words. Where a statute requires anything to be done “immediately”, that is the same thing as “forthwith” and it implies speedy and prompt action and an omission of all delay, in other words, that the thing to be done should be done as quickly as is reasonably possible – *R v Berkshire Justices*, 4 Q.B.D. 469; *R v Aston* 196 L.J.M.C. 236; *Griffiths v Taylor*; *Thatcher v Taylor* 2 CPD 19.

In *Strouds Judicial Dictionary* J S James (Vol 3 4th Ed) at 1283 the learned author rightly observed:

- “(1) The word ‘immediately’, although in strictness it excludes all mean times, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing (*Pybus v Mitford*, 2 Lev. 77). “The court cannot say it absolutely excludes all *mesne acts*’ (*R v Francis*, ca.t.Hard. 115); but “immediately” implies that the act to be done should be done with all CONVENIENT SPEED (PER Rolfe B., *Thompson v Gibson*, 10 L J Ex. 243).
- (2) Thus, as regards a judge’s certificate which any particular statute says shall be given “immediately”, that does not mean ten minutes, or a quarter or half an hour; but such a lapse of time as excludes the possibility of other business intervening to alter the impression made on the judge’s mind ...
- (3) ...
- (4) ...
- (5) So, where a statute requires anything to be done “immediately” that is the same thing as “forthwith”, and implies “speedy and prompt action and an omission of all delay; in other words, that the thing to be done should be done as quickly as is reasonably possible ...”

Looking at the entire Rule 238 (2) in context, what is intended is that the delivery to any other party should be done within a reasonable time after the filing of the heads with the Registrar’s office. Delivery must, in other words, be within a reasonable time in the circumstances of each case – *R v Paphitis* 1968 (2) SA 652 (RA); *R v Sikhumbuzo* 1967 (4) SA 604 (RA); *R v Goetz* 1952 (3) SA 272 (SWA) and *Lockhat v Idris* 1954 (4) SA 120 (N). Where a statute requires that something shall be done “immediately” it should be understood as allowing a reasonable time for doing so - *Toms v Wilson* (1863) 32 L.J.Q.B 382 and *Maxwell On Interpretation of Statutes* (10th Ed) by G G Sharp and B Galpin at p. 351-2.

The lawmaker restricted the period within which the respondent may file heads of argument to ten days, but, did not do so in respect to the delivery of the same heads of arguments to other parties, It chose to use the language “immediately thereafter.” In so doing the lawmaker left the determination of the period in the hands

of the court. Looking at all the circumstances of this case, delivery a day after the filing of the heads with the Registrar is within a reasonable time. In the circumstances, 1st respondent is not barred and she is properly before me.

Is 3rd respondent barred?

Mr *Nzarayapenga*, for the 3rd respondent has rightly conceded that 3rd respondent is indeed barred. He, however, sought to make an oral application for condonation and upliftment of the bar. The issue of the bar was brought to the attention of 3rd respondent well in advance by the applicant's legal practitioner. 3rd respondent was also informed that applicant would oppose the upliftment of automatic bar. He had all the time to file a substantive application for the court's indulgence. He did not do so. This is a grave non-compliance with the Rules. It is the substantive application that triggers the consideration of the condonation. In the absence of a substantive application there is nothing for me to consider in respect of the condonation – *Forestry Commission v Moyo* 1997(1) ZLR 254 (S); *Mpofu and Anor v Parks and Wild Life Management Authority & Ors* HB-36-04 and *Agim v The Regional Controller, ZIMRA Beitbridge* HB-79-05. In the circumstances, 3rd respondent remains barred and cannot be heard.

It is, therefore, ordered that:

1. 1st respondent is not barred and is properly before the court.
2. 3rd respondent's automatic bar is still operational and he cannot be heard.

Mabhikwa, Hikwa and Nyathi, applicant's legal practitioners
James, Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners
Dube & Partners, 3rd respondent's legal practitioners

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