

DINKY SIFISO MOYO

Versus

ELEANOR THOKOZILE DLODLO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 8 JUNE 2022 & 3 AUGUST 2023

Opposed application

R. Ndlovu for the applicants
T. Moyo for the respondent

TAKUVA J: This matter was set down for hearing on the opposed roll on 8 June 2022. On that date, respondent had not served applicant with her heads of argument which were said to have been filed on the 25th of January 2022. Applicant therefore raised a preliminary point to the effect that respondent is barred for non-compliance with r59 (20) of SI 202/2021 for failure to serve her heads of argument immediately after filing of the aforesaid heads of argument.

Applicant submitted that on the date of hearing he was laboring under the belief that respondent had not filed its heads of argument. He only learnt on inquiry few minutes before the court sat, that respondent had filed her heads of argument on the 28th January 2022.

Rule 59 (2) provides;

“(20) Where an application, exception or application to strike out has been set down for hearing in terms of rule 65 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, heads of argument clearly outlining the submissions relied upon by him or her and setting out the authorities, if any, which he or she intends to cite and immediately thereafter he shall deliver a copy of the heads of argument to every other party.”

Quite clearly, the filing of heads of argument under Rule 59(20) is two pronged, that is the actual filing with the Registrar of the court and the delivery of the said heads of argument to the other party. *In casu* respondent had not served her heads of argument to the applicant at all which was a non-compliance with the rules of the court and as a result she was barred.

Respondent concedes that whilst its heads of argument were filed on the 28th of January 2022, the respondent omitted or failed to have the same immediately thereafter served upon that applicant.

Issue

Whether or not the respondent in these proceedings stands barred for failure to serve its heads of argument upon the applicant immediately after filing such heads of argument and whether the matter must now be treated as unopposed.

Applicant's contention that respondent is barred for failure to serve the applicant with its heads of argument is based on a judgment of this court in *Sithole v Khumalo & Ors* HB-139-06 wherein NDOU J ruled that in circumstances similar to the ones *in casu* a respondent who had failed to serve its heads of argument immediately after filing them was barred.

Rule 57(22) of the Rules afore cited is couched thus;

“Where heads of argument that are required to be filed are not filed within the period in sub rule (21), the respondent concerned shall be barred and the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll.”

The rule is clear and unambiguous about what must happen when heads of argument required to be filed are not filed within the time stipulated in the rules, such party stands barred. However, the rules are silent on what should happen when heads of argument have been filed but were not immediately thereafter served or delivered to every other party.

Faced with a similar situation as the one *in casu*, MAKONI J (as she then was) commented as follows;

“It is imperative for a party filing heads of argument to immediately deliver a copy of the heads of argument to every other party and file with the registrar of such delivery. The rule is silent on what happens when the heads are not immediately afterwards served. In my view, where a party does not immediately serve heads of argument and it is put in issue, it must give an explanation as to why it failed to serve heads of argument as soon as was reasonably possible in the circumstances. Where the delay does not cause prejudice to the other party, that should be the end of the matter, where there is prejudice, then the defaulting party must be visited with costs. (my emphasis)

In my view, this interpretation of the rule afore stated is consistent with the basic tenets of statutory interpretation namely;

- (a) If the language in a statute is plain and unambiguous, the words therein used should be given their ordinary meaning unless doing so would lead to an absurdity or inconsistency with the intention of the legislature. A provision should be given a meaning which is consistent with the context in which it is found (see *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264D-E. See also *Madada v Tanganda Tea Co. Ltd* 1990 (1) ZLR 274 (S) at 377.
- (b) That which has been excluded, is not included; and
- (c) That the legislature has spoken through the language used in the statute as to reveal its intentions.

I take the view that the legislature's intention is clear with respect to situations where a party has filed heads of argument but failed to serve them on other parties, that there is no bar to be expected on such but that should such non-compliance cause prejudice to the other party such prejudice must be dismissed by an appropriate order as to costs as against the non-compliant party. If the other party does not show itself to have suffered prejudice as a result of the offending party's failure to deliver within reasonable time after filing, the matter should end there.

Applicant seeks that the matter be treated as unopposed. I disagree. The rules should not be implored to prevent the resolution of substantive legal disputes on merit. Respondent has filed its opposing papers in the matter and has filed heads of argument timeously although it failed to serve its heads of argument immediately thereafter on the applicant. Barring a mishap that can only be laid at its legal practitioner's doorstep, respondent has substantially complied with the rules of this court and exhibited a serious intention to prosecute her case. I take the view that the matter should not be treated as unopposed but be allowed to proceed as an opposed matter to enable the court to have the dispute between the parties resolved on substance as to bring finality to the dispute between the parties. The preliminary point has no merit.

As regards costs, the respondent breached the rules of this court and he admitted so. Respondent must be ordered to pay costs on the ordinary scale.

Disposition

1. The preliminary point be and is hereby dismissed.
2. The respondent is not barred and is properly before the court.
3. The matter should proceed to the merits.
4. The respondent be and is hereby ordered to pay applicant costs.

R. Ndlovu and Company, applicant's legal practitioners
Ncube Attorneys, respondent's legal practitioners