

BGM TRAFFIC CONTROL SYSTEMS  
versus  
THE MINISTER FOR TRANSPORT  
and  
ZIMBABWE NATIONAL ROADS ADMINISTRATION  
and  
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE  
MAKARAU JP  
HARARE 11 and 12 February 2009.

OPPOSED APPLICATION

*Adv H Zhou* for the applicant  
*Mr N Mutsonziwa* for the 1<sup>st</sup> respondent.  
2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents in default.

MAKARAU JP: The first respondent is represented by the Civil Division of the Attorney-Generals' Office. In application proceedings between the parties, the respondent, through its representatives, was served with the applicant's heads of argument on 10 September 2008. In terms of the rules of this court, the respondent had to file its heads within ten days of being served with the applicant's heads. No heads were filed on behalf of the first respondent until the morning of the set down date, that is on 11 February 2009.

In an application for the uplifting of the automatic bar against first respondent, *Mr Mutsonziwa* declined to have the matter postponed for the purposes of filing an affidavit explaining the reasons for the delay. He opted to make an oral application before the commencement of the hearing. He then proceeded, much to the discomfort of *Adv Zhou* and myself, to testify as to the difficulties that the officers in the Attorney-General's Office are experiencing currently due to the economic situation prevailing in the country. I say the testimony from *Mr Mutsonziwa* in this regard was much to our discomfort as evidence led from the bar places both the court and the other legal practitioners at a distinct disadvantage in

that it can neither be countered nor tested by way of cross-examination. On the other hand, the court and the other lawyer are compelled to accept to accept the evidence for to decline to do so has the effect of calling into question the integrity of the lawyer testifying.

It is trite that where legal practitioners wish to place facts before the court, even facts that they believe are notorious, they must do so by way of affidavit, as an affidavit is sworn testimony. Where a response to such facts is deemed necessary, then an affidavit refuting the facts in the first affidavit is filed. Anything short of this procedure in my view will allow the proceedings to degenerate into social exchanges between counsel that are neither evidence nor submissions based on evidence, something that the legal practitioners can engage in outside the courtroom.

In explaining the delay of over 5 months that occurred in this matter, *Mr Mutsonziwa* advised that he was not given the file of the matter in time to enable him to settle the necessary heads of argument. He further advised that there is an acute shortage of staff in the attorney-general's office, that staff attendance at work is erratic and control of support staff has become difficult in the circumstances. He reports that the incidence of locked offices without staff in sight is now rampant and is common knowledge in the legal circles.

I have repeated in detail the report by *Mr Mutsonziwa* for the benefit of the Attorney-General, to whom I shall make this judgment available. I make no finding as to whether or not I believe *Mr Mutsonziwa* in this regard.

The report in my view paints a grim picture of the Attorney-General's office and one in my view, if the reports by *Mr Mutsonziwa* are true, that should be corrected with all necessary speed. The Office of the Attorney-General competes on an equal footing with all other law firms in the land. It is not exempted from abiding by the rules of court. There is in my view no basis upon which this court can accommodate excuses from this office that it does

not in the ordinary course of events, accommodate from any other firm of lawyers. To accept from the legal profession as reasonable the excuses that *Mr Mutsonziwa* attempted to proffer in this matter in my view will be to open the entire system to disorder and erratic filing of pleadings to an extent where the system may collapse. Courts that bend over backwards to accommodate excuses for ineptitude and complete disregard of its rules by the office of the Attorney- General open themselves up unnecessarily to suggestions that they are partial to the executive, the clients that are solely represented by this office.

In my view time is nigh that the office of the Attorney- General shapes up or faces the legal consequences of its failure to discharge its constitutional duty efficiently and within the rules of the court.

Turning to the merits of the application, it is trite that in considering an application of this nature, the court has a discretion in the matter. In addition to considering the reasonableness of the excuse for the delay, the court also takes into account various factors including the importance of the case, the respondent's interest in reaching finality in the matter, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. (See *United Plant Hire (Pvt) Ltd v Hill and Others* 1976 (1) SA 717 (A) at 720).

The main application in this matter is dealing with an alleged agreement of 2004. This was concluded five years ago and according to the applicant's papers, the Permanent Secretaries in the first respondent's ministry have changed twice already. In my view, it is not in the interests of any of the parties that this matter be dragged further by the granting of a technical default judgment in favour of the applicant which may be set aside by another court.

I also consider that the issues raised in the main application are important and that the matter should be resolved on its merits rather than on the technical basis that the office of the Attorney- General has been found wanting in terms of complying with the rules of court.

Therefore, despite my findings against the first respondent's legal practitioners, I would use my discretion to grant the application for condonation.

In the result, I make the following order:

1. The late filing of the first respondent's heads is hereby condoned.
2. The first respondent shall bear the costs of the application.
3. The Registrar of this court shall cause a copy of this judgment to be handed over to the Attorney-General.

*Manase & Manase*, applicant's legal practitioners.

*Civil Division of the Attorney –General's Office*, 1<sup>st</sup> respondent's legal practitioners.