AUTOMATION TECHNOLOGY (PRIVATE) LIMITED
and
PHILEMON MACHEKA
versus
THE SHERIFF OF ZIMBABWE N.O
and
CENTRAL AFRICA BUILDING SOCIETY
and
CENTRAL AFRICA BUILDING SOCIETY, HARARE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 21 JULY 2017 AND 3 AUGUST 2017

Opposed Matter

B Dube for the applicants
S Chamunorwa for the 2nd and 3rd respondents

MOYO J: This is an application to declare the sale of stand number 8470 Bulawayo Township of Bulawayo Township Lands, Bulawayo null and void and that it be set aside.

The brief facts of this matter are that the first respondent sold in execution the aforestated stand. The applicants raised an objection which was later overruled by the first respondent. The applicants want the actions of the first respondent in overruling the objection reviewed and then sale set aside.

The respondents have raised two points *in limine,* firstly that the application which is being filed in terms of rule 359 is out of time as the application should have been filed within one month of the applicant being notified of the sheriff's decision. The other point, is that there are additional grounds for review which were not before the sheriff. The submission in the heads of argument in relation to this ground is that the additional grounds be expunged from the court record. I will initially deal therefore with the first ground as it is the one that determines whether or not applicants should be heard in this matter.

From the papers applicant admits that the application was not filed within a month as prescribed by the rules, but quickly submits that it can be condoned by the invocation of rule 4C.

It is trite that where a party is out of time, condonation must be sought timeously through a written application. A party cannot sit back in my view, when it concedes that it is out of time and do nothing about seeking condonation on the belief that when it comes to court on the date of hearing it will ask the court to invoke rule 4C. That in my view is a flagrant breach of the rules which the court should frown at regardless of the merits of the case. Refer to the case of at the *Ready Wholesalers Pvt Ltd t/a Power Sales* v *Innocent Katsande and 5 others* SC 7/03. That an application for condonation must be made first prior to the applicant being heard in the matter has been decided in numerous cases.

Refer to the case of *Viking Woodwork Pvt Ltd* v *Blue Bells Enterprises Pvt Ltd* 1998 (2) ZLR 249 (SC) *Sibanda* v *Ntini* 2002 (1) ZLR 264 (SC), *Mlondiwa* v *Regional Director Education, Midlands Province N.o and another* HB 19/94. The applicant can therefore not succeed in its bid to hide behind the provisions of rule 4C.

Applicants' counsel, at the hearing of the matter sought to argue that a month had not elapsed by the time they filed their papers as the Interpretation Act, section 33 thereof provides that a month means a calendar month. He submitted further that NDOU J held in the case of *Darky Automative Pvt Ltd* v *Matabeleland Hauliers Pvt Ltd and 3 others* HB 129/11 that a month being a calendar month in terms of section 33 of the Interpretation Act cannot mean from the middle of one calendar month to the other.

Respondents' counsel argued that applicant conceded that they are out of time in their papers and therefore they cannot seek to abandon the admission without formally making an application to amend it and that in any event, this court cannot re-assess the point of whether applicant is out of time or not when in fact its papers admit as such. I agree with respondent's counsel on this point however, since the submission made is on the law, I believe there is need to consider the weight of the argument.

The line of reasoning in this case is such that if a person receives a correspondence wherein he should act within a month on say the 5th day of a month, in essence, the person shall have to act within the next calendar month, meaning that from the 5th of the current month to the beginning of the following month the month "has not begun to run in terms of section 33 of the Interpretation Act." A High Court decision being persuasive rather than binding, I beg to differ

with the learned judge's interpretation of a month in the High Court Rules. My reasons are that the Interpretation Act also provides under section 2 on the application of the Act that:

1) Section 2 (1) the provisions of this Act shall extend and apply to every enactment as defined in this Act, --- except in so far as any such provisions.

a) are inconsistent with the intention or object of such enactment, (emphasis mine) or

b) would give to any word, expression or provision of any such enactment an interpretation inconsistent with the context. (emphasis mine)

There are three parts of the rules wherein a party is expected to act within a month. These are rule 236 on applications for dismissal for want of prosecution, rule 63 on applications for the rescission of judgments and rule 359 on applications against the sheriff's decision. One would assume that the definition of a month in the rules be so as to be consistent with all these references to a month as the rules cannot have different definitions for the same word contained within the rules.

If one looks at rule 63 of the High Court Rules, a party is deemed to have had knowledge of a judgment within two days of its having been made.

Again, the spirit of the time limits prescribed in the High Court Rules, is to ensure that a party acts within a reasonable period of time, say within a month, so that the administration of justice is efficient and that matters move within a reasonable period to finality. It therefore, could not have been the spirit of the rules that a month therein could mean anything up to two months. I say so for the the interpretation given in that case in the cited case would in essence mean that a party who gets to know of a default judgment say on the 4th of the current month, has until the end of the following month (which will be a full calendar month) within which to act. This would defeat the whole purpose of the Rules whose spirit is to set time limits that are reasonably practicable and just in the circumstances. It would not be appropriate that a party who gets to know of a judgment on the 5th day of the current month has until the end of the next month which is yet to begin (3 weeks away), to act in relation to that judgment. Which is precisely the reason why the rules provides for a presumption that a party knew of the judgment within two days. I hold the view that the interpretation accorded to a month in that case causes a

discord in the spirit of the rules and their applicable time limits. It therefore cannot be correct in my humble view. Section 2 of the Interpretation Act clearly allows a departure from the definitions as given in the Interpretation Act if their application would be inconsistent with the context as it cannot be held that rules that seek to curtail the time within which a party can act to a month could also mean that he can take up to two months to act.

It is for these reasons that I believe a month in the context of the rules means 30 days. The online dictionary defines a months as

1) one of the months as named in the calendar

2) the period from a day of one month to the corresponding day of the next month or a period of 30 days.

It therefore follows that the ordinary grammatical meaning of a month is either a calendar month or a period of 30 days from a day of one month to the corresponding day of the next month. It could not have been the intention of the crafter of the High Court Rules that a calendar month, which can commence after 20 or 15 or 10 days to the end of the current month, be the "month" that a party is expected within which to act, as this in essence would amount to giving the party almost two months within which to act.

I will accordingly depart from the aforestated case and hold that a month within the context of the High Court Rules is a period of 30 days. I will accordingly uphold the point *in limine* and hold that the applicant is out of court, and without a proper application for condonation having been made applicants are out of court. The applicant's conduct of a flagrant breach of the rules, and its conduct of forging ahead with a crippled application deserves to be frowned at with punitive costs as sought by the respondents. I would accordingly dismiss the application at the legal practitioner and client scale.

It is accordingly ordered that the application is dismissed with costs on a higher scale.

Sengweni Legal Practice, applicants' legal practitioners
Scalen & Holderness C/o Calderwood, Bryce Hendrie & Partners, 2nd & 3rd respondents' legal practitioners