SUPREME COURT OF QUEENSLAND

CITATION:	*Mbuzi v Hall & Ors* [2012] QSC 243
PARTIES:	**JOSIYAS ZIFANANA MBUZI** (applicant) **v** **ELIZABETH HALL** **(**first respondent) **AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMITED** **(**second respondent) **CLIFFORD ROWE CHUTER** (third respondent) **CHERREL HIRST** (fourth respondent) **MARTIN DOUGLAS EBERLAIN KRIEWALDT** (fifth respondent) **CHRISTOPHER SKILTON** (sixth respondent)
FILE NO/S:	6243 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application for extension of time
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2012
JUDGE:	Martin J
ORDER:	**Application dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – TIME – DELAY SINCE LAST PROCEEDING – where applicant seeks extension of time to make written request and receive written reasons for costs assessors decision – where applicant has not provided an explanation for the two year delay – whether an extension of time should be granted *Uniform Civil Procedure Rules* 1999, r 737, r 738, r 740, r 742 *Mbuzi v Hall & Ors* [2010] QSC 359 *Mbuzi v Hall & Ors* [2010] QCA 356

COUNSEL:	J Z Mbuzi (in person) J Davies for the third, fourth, fifth and sixth respondents
SOLICITORS:	J Z Mbuzi (in person) Rodgers Barnes & Green for the third, fourth, fifth and sixth respondents

[1] The applicant seeks orders granting an extension of time until 28 May 2010 for him to make a written request of a costs assessor for written reasons for decisions included in the costs assessor's certificate filed on 1 February 2010 and an extension of time for that costs assessor to provide written reasons in response to the request.[1]

Background

[2] In June 2009 Mr Mbuzi applied for judicial review of a decision made by a magistrate. The third, fourth, fifth and sixth respondents were joined by him to the application. On 9 July 2009 White J (as her Honour then was) ordered that the applicant's application so far as it concerned the respondents be dismissed and that he pay their costs. Her Honour made a costs order in the following form: that the applicant should pay the third to the sixth respondents' costs of and incidental to the application, but with the costs of the 29 June 2009 before Mullins J specifically not included.

[3] A costs statement was filed on 18 September 2009 and on 27 October 2009 the applicant filed a notice of objection to that statement. The issue of costs was referred to a costs assessor and Mr Bloom, the costs assessor, filed his certificate in the sum of $13,556.50 on 1 February 2010.

[4] On 26 February 2010 the Registrar made an order assessing the respondents' costs payable by the applicant in the sum of $13,556.50.

[5] On 9 March 2010 the applicant filed an application seeking to set aside or vary the order of the registrar.

[6] On 10 May 2010, Alan Wilson J dismissed that application.

[7] On 7 June 2010, the applicant filed an application for leave to appeal the decision of Alan Wilson J.

[8] On 16 July 2010, the respondents filed an application seeking, among other things, security for costs in relation to the applicant's application for leave to appeal.

[9] On 22 September 2010, Applegarth J delivered his reasons in which he ordered the applicant to provide security for the prosecution of his application for leave to appeal.[2]

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1 The applicant required leave to file this application because of an order made by Applegarth J pursuant to r 389A of the *Uniform Civil Procedure Rules*: *Mbuzi v Hall & Anor* [2010] QSC 359.

2 *Mbuzi v Hall & Anor* [2010] QSC 359.

[10] On 14 December 2010, the Court of Appeal refused the application for leave to appeal.[3]

[11] A further application was made by the respondents for various orders including the dismissal of the judicial review application.

[12] On 28 March 2011, Boddice J made a number of orders including an order dismissing the applicant's application for judicial review.

[13] On 24 April 2012 the applicant was the subject of a declaration under the *Vexatious Proceedings Act* 2005. That does not affect these proceedings.

[14] On 4 May 2012, a bankruptcy notice issued based on the amount contained within the Registrar's order.

[15] On 19 July 2012, the Registrar of the Federal Magistrates Court of Australia made an order for substituted service of the applicant.

[16] About one month later, the applicant brought this application seeking leave to proceed.

Relevant Rules

[17] Part 3 of Chapter 17A of the *Uniform Civil Procedure Rules* 1999 ('UCPR') provides for the means by which costs assessors may be appointed and their powers. Rule 737 provides:

> "**737 Certificate of assessment**
> (1) At the end of a costs assessment, a costs assessor must certify the amount or amounts payable by whom and to whom in relation to the application, having regard to—
> (a) the amount at which costs were assessed; and
> (b) the costs of the assessment.
> (2) The certificate must be filed by the costs assessor in the court within 14 days after the end of the assessment and a copy must be given to each of the parties."

[18] One of the issues in this application was whether or not the applicant had been given a copy of the certificate filed by the costs assessor within 14 days.

[19] Rule 738 provides:

> "**738 Written reasons for decision**
> (1) Within 14 days after receiving a copy of a cost assessor's certificate of assessment, a party may make a written request to the costs assessor for reasons for any decision included in the certificate.
> (2) If a costs assessor receives a request under subrule (1), the costs assessor must—

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[3] *Mbuzi v Hall & Anor* [2010] QCA 356.

(a) within 21 days give written reasons for the decision to each of the parties who participated in the costs assessment; and

(b) give a copy of the written reasons to the registry of the court in which the certificate was filed.

(3) A party requesting reasons must pay the costs assessor's reasonable costs of preparing the reasons and those costs form part of the party's costs in any subsequent review.

(4) The court may publish written reasons in the way it considers appropriate."

[20] The applicant made a written request for reasons on 28 May 2010 and therefore seeks an extension until that time.

[21] Rule 740 requires the Registrar to make an appropriate order having regard to the certificate of assessment after it is filed. Such an order takes effect as a judgment of the court.

[22] Rule 740(3) provides:

> "(3) However, the order is not enforceable until at least 14 days after it is made and the court may stay enforcement pending review of the assessment on terms the court considers just."

[23] Rule 742 allows for a review of a costs assessor's certificate of assessment:

> "**742 Review by court**
>
> (1) A party dissatisfied with a decision included in a costs assessor's certificate of assessment may apply to the court to review the decision.
>
> (2) An application for review must be filed within—
>
> (a) if reasons are requested under rule 738(1)—14 days after the party receives those reasons; or
>
> (b) otherwise—14 days after the party receives the certificate.
>
> (3) The application must—
>
> (a) state specific and concise grounds for objecting to the certificate; and
>
> (b) have attached to it a copy of any written reasons for the decision given by the costs assessor; and
>
> (c) state any other matter required by a practice direction made in relation to this rule.
>
> (4) The applicant must serve a copy of the application on all other parties to the assessment within 14 days after the application is filed.
>
> (5) On a review, unless the court directs otherwise—
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> (a) the court may not receive further evidence; and
>
> (b) a party may not raise any ground of objection not stated in the application for assessment or a notice of objection or raised before the costs assessor.
>
> (6) Subject to subrule (5), on the review, the court may do any of the following—

(a) exercise all the powers of the costs assessor in relation to the assessment;
(b) set aside or vary the decision of the costs assessor;
(c) set aside or vary an order made under rule 740(1);
(d) refer any item to the costs assessor for reconsideration, with or without directions;
(e) make any other order or give any other direction the court considers appropriate.

(7) Unless the court orders otherwise, the application for review does not operate as a stay of the registrar's order."

Was the costs assessment certificate given to the applicant within 14 days?

[24] Mr Bloom was not informed of the making of this application, even though, if it were successful he would be required to answer with a request for reasons for a decision he made in January 2010. He should have been alerted to this, particularly in the light of two affidavits he filed in these proceedings two years ago. In an affidavit of May 2010 he swore that he forwarded a letter, together with his certificate, to the solicitors for the respondents and to the applicant. The letter to the applicant was sent to a post office box which is one he regularly used and which is referred to in his many affidavits as his address for service. In Mr Bloom's letter of 29 January 2010 he provided some reasons for his assessment and, in particular, referred to some of the objections raised by the applicant.

[25] In a further affidavit of 30 June 2010, he exhibited an excerpt from the mail register maintained by his firm which recorded the despatch of the letter to which I have just referred.

[26] The latter affidavit was no doubt filed in response to an affidavit of the applicant filed on 24 June 2010 in which he said that he had not been served with a costs assessor's certificate.

[27] On 10 May 2010 Alan Wilson J heard an application by the applicant to set aside or vary the costs order made by the registrar. His Honour said:

> "It became clear in the last 10 minutes or so of the proceedings that although his affidavit does not specifically depose to the fact that he has never been served with the certificate of the costs assessor, he does assert that.
>
> That assertion is a little surprising in the face of the letter … written to Mr Mbuzi by the solicitors for the third to sixth respondents on the 24th of March 2010, which points to the fact in paragraph bearing ordinary Arabic number 1, that following his receipt of the certificate relating to the order of Justice White dated the 9th of July 2009 he did not request reasons for any decision and, secondly, that he did not file an application to review the decision of the costs assessor in accordance with rule 742.
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> What it became apparent late in the hearing Mr Mbuzi contends is that, as I mentioned a moment ago, he never received the costs certificate. If that is so, and he can prove it, he is still, it appears, able

> to bring an application under rule 742 for a review of the costs assessor's certificate.
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> I said a moment ago that the fact that he has pressed these proceedings is a little surprising in light of the reference the solicitors made to rule 742 about six weeks ago, and the word 'surprising' is not inappropriate when his submissions before me today have made extensive reference to various rules within the UCPR in circumstances suggesting that although, as he makes the point frequently, he is not a lawyer, he is someone who is more than capable of finding relevant rules within the UCPR and referring Courts to them when and if he thinks it is necessary."

[28] Later in his Honour's reasons he said:

> "If, in truth, he has not received the costs assessor's certificate, then as the solicitors for the second to sixth respondents plainly asserted him so long ago as the 24th of March 2010, he ought to have brought an application to review under rule 742. It may be that if he has never been served with the costs assessor's certificate that remedy is still open to him."

[29] His Honour then dismissed the application made by Mr Mbuzi.

[30] On this application, Mr Mbuzi seeks an extension of time. Rule 7 of the UCPR provides for a power to extend a time set under the rules. Rule 7 should be regarded as a remedial provision conferring on a court a broad power to relieve against injustice, but it is manifestly a power to be exercised with caution.[4] The burden is on an applicant for an extension of time as a party does not have any right to an extension of time.[5]

[31] In any application for an extension of time it will usually be a requirement for success that the applicant provides some explanation for the delay which has occurred. In this case, the applicant did serve the request for reasons upon Mr Bloom. In a letter addressed to the Supreme Court, a copy of which was sent to the applicant, Mr Bloom referred to the applicant's request for reasons and noted that the applicant was out of time to seek those written reasons.

[32] Since May 2010 the applicant has been engaged in further litigation of matters associated with this judicial review application but he has not provided any reason or excuse for his delay, which exceeds two years, in bringing this application.

[33] The applicant does submit that in the decision of the Court of Appeal of December 2010,[6] the court found that there was merit to his challenge of Mr Bloom's assessment. That is a mischaracterisation of what was said by the Court of Appeal. The applicant also made that submission to Justice Mullins when seeking leave to bring this application on 14 August 2012. Her Honour said:

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4 See *FAI General Insurance Company Limited v Southern Cross Exploration NL* (1988) 165 CLR 268, 283; *Mango Boulevard Pty Ltd v Spencer* [2007] QSC 27.

5 *Pollard v Incorporated Nominal Defendant* [1972] VR 955.

6 *Mbuzi v Hall & Ors* [2010] QCA 356.

> "In support of his seeking leave to file his application today, Mr Mbuzi relied on the observation made in the Court of Appeal's judgment, *Mbuzi v Hall & Ors* [2010] QCA 356, in which Mr Mbuzi applied for leave to appeal against the orders made by Justice Applegarth on 22 September 2010. In the course of the leading judgment of Fraser JA, with whom the other members of the Court agreed, Fraser JA stated, 'The applicant argued that it was inappropriate to restrict him in his attempt to challenge Mr Bloom's assessment of costs. But if he otherwise has any such entitlement, and there is arguable merit in such a challenge, then he need only seek leave to bring the challenge. The requirement that he first obtain the leave of the court before he brings any such challenge was entirely justified by the circumstances identified by Applegarth J."

[34] Her Honour went on to say:

> "Justice Fraser was not saying that there was arguable merit in the challenge, but was pointing out that if Mr Mbuzi can point to arguable merit then he may be able to obtain the leave. The problem that Mr Mbuzi will face in applying for the leave is the delay since he made the request on 28 May 2010, but that will be a matter that he will need to address in any further affidavit that he may file in support of his application."

[35] I agree with her Honour's characterisation of what was said by the Court of Appeal. It is also relevant to note that her Honour pointed out, on 14 August, that Mr Mbuzi would need to address the delay since he made the request on 28 May 2010. The applicant has not done that. The applicant has been informed on a number of occasions by various members of this Court about the capacity to make an application of this type. He has delayed in bringing this application for over two years. He has offered no excuse or reason for his delay and it appears the only matter which has motivated him is the service upon him of a bankruptcy notice. In the absence of any explanation at all for the delay I dismiss his application.

[36] I will hear the parties on costs.