TANNERS AND SHOE MANUFACTURING ASSOCIATION
versus
ZIMBABWE LEATHER SHOE AND ALLIED WORKERS UNION
and
NATIONAL EMPLOYMENT COUNCIL FOR LEATHER AND TAXIDEMY, FOOTWEAR, SPORTS EQUIPMENT, TRAVEL AND CANVAS GOODS MANUFACTURING INDUSTRIES.
and
REGISTRAR OF LABOUR

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 2 April 2014 and 28 May 2014

Opposed application

C. Chingoma, for the applicant
R. Matsikidze, for the first respondent
No appearance for the second respondent
C. Garise-Nheta, for the third respondent

NDEWERE J:

Introduction:

The first part of this judgement deals with applications for upliftment of bar by the first and third respondents.

Background

The main applicant filed an application to set aside an arbitral award in terms of Article 34 of the Arbitration Act [*Cap* 7:15] on 23 May, 2013.

On 29 August, 2013, the main applicant filed heads of argument with this court. The heads of argument were served on the first respondent in the main application on the same day, 29 August, 2013 and they were served on 2 September, 2013, on the third respondent's legal practitioners.

The first and third respondents filed opposing papers. The second respondent did not file any opposing papers. The second respondent is therefore barred in terms of r 233(3) of the High Court Rules.

In terms of r 238 (2a) of the High Court Rules, both the first and third respondents in the main matter should have filed their heads of argument not more than 10 days of being served with the applicant's heads of argument. The first and third respondents did not file the heads of argument within 10 days, in contravention of r 238 (2a).

In terms of r 238 (2b), a party who contravenes r 238(2a) is automatically barred. So, both first and third respondents were automatically barred.

Both first and third respondents did nothing about the automatic bar until the main matter was set down for argument.

The notice of set down was issued on 22 October, 2013 and served on both first and third respondents' legal practitioners on the same day.

Third Respondent's Application for upliftment of bar

On 11 November, 2013, third respondent's counsel (third respondent in main application); filed an application for upliftment of the bar.

The founding affidavit for that application says in para 2.

> "I was allocated this file when the law officer who was handling the matter went back to her Ministry."

The court is not told the date when the deponent was allocated the file, or the name of the law officer who went back to her Ministry or the name of the Ministry. The court is not told the date when this nameless law officer went back.

Paragraph 2 continues thus;

> "She was attached to our office on secondment and she went without filing heads of argument in this matter and we filed them out of time."

The law officer is still nameless and no supporting affidavit from her is attached. Paragraph 3 says

> "It is submitted that it was not an act of wilful default."

Unfortunately, the court cannot come to the conclusion that this was not an act of wilful default when all relevant facts have been left out from para 2 as indicated and there is no supporting affidavit from the law officer being referred to. In this regard, the case of *Paul Gary Friendship* v *Cargo Carriers Ltd and Anor* (SC) 1/13 is a case in point. In that case the court said the fact that the applicant placed the blame for the default on his legal practitioners

but filed no affidavits from them was the reason for the dismissal of the application. The court has no choice but to dismiss the third respondent's application for upliftment of bar as well.

The first respondent's application for upliftment of bar

On 4 November, 2013, when it was already out of time, first respondent purported to file its heads of argument. It did not apply for upliftment of the bar up until the date of the hearing.

First respondent filed its application for upliftment on 13 March, 2014. In the application, first respondent argues that because of the proviso to r 238 (2a), it does not think it is barred.

As far as the court is concerned, that proviso is very clear and there is no ambiguity whatsoever. The proviso was meant to cater for a situation where applicant's heads are served nearer the day of hearing; or where a respondent who was previously unrepresented gets legal representation after applicant's heads have been filed or where an unrepresented litigant chooses to file heads of argument. That proviso is covering all possible scenarios and saying whatever your situation, make sure heads of argument are filed at least five days before the hearing. The above position is clarified beyond doubt in the case of *Shadreck Vera* v *Imperial Asset Management Company* HH 50-2006 where the learned Judge said the immutable rule was that heads of argument be filed within 10 days of being served if a respondent is represented by a legal practitioner.

In the absence of any other explanation for the delay beside the wrong interpretation of r 238 (2a), the court has nothing else to rely on to justify upliftment of the bar against first respondent.

The facts narrated above in both the first and the third respondent's applications militate against them in an application of this nature. In *Friendship v Cargo Carriers Limited and Another* (SC) 1/13, the Supreme Court said,

> "certain criteria have been laid for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extent of the delay and the reasonableness of the explanation therefore, the prospects of success on appeal, the interest of the court in finality of judgements and the prejudice to the party who is unable to execute his judgement. The list is not exhaustive."

In the present applications for upliftment of bar, no reasonable explanations were given for the delays. The delays are quite a lot in that up to the date of set down, third

respondent had not prepared any heads of argument while first respondent purported to file its heads more than a month later, instead of within 10 days. First respondent also did not timeously apply for upliftment of bar.

On prospects of success the court is of the view that another tribunal may come to a different conclusion because the arbitrators did not give reasons for awarding 4.5% across the board plus allowances when the employer had offered a 3% across the board on wages only, without allowances, in the alternative.

The applications for upliftment of the bar by first and third respondents are therefore dismissed, with both first and third respondents paying the costs of the applications.

Court Order in the main application by Tanners, and Shoe Manufacturing Association

The first and third respondents' applications for upliftment of bar having been dismissed, the respondents remain barred and they have no right of audience before the court. The main application will therefore proceed as if it is unopposed in terms of s 238 (2b) of the High Court Rules.

The court will however strike out para 2 of the applicant's draft order because the matter of the registration of the award as an amendment to the parties collective bargaining agreement is not the case that was before the court.

It is accordingly ordered as follows:-

1. The Arbitration Award dated 5 April, 2013 be and is hereby set aside.
2. The respondents shall pay the costs of suit.

Messrs Dube, Manikai and Hwacha, applicant's legal practitioners
Messrs Matsikidze and Mucheche, first respondent's legal practitioners
Civil Division, Attorney General's Office, third respondent's legal practitioners