KUDAKWASHE NYAKAMBANGWE
versus
JAGGERS TRADOR (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAVANGIRA J,
HARARE, 12 November, 2002 and lst October, 2003

Applicant in person
Adv *P Nherere* for the respondent

OPPOSED APPLICATION

MAVANGIRA J: In this matter the court had first to hear and determine an application for condonation and upliftment of the automatic bar that was operating against the respondent herein. The automatic bar had been brought into effect by the respondent's failure to file heads of argument timeously.

I granted the application and indicated that my reasons would be given in my judgment on the main matter.

The parties shall be referred to in this judgment in dealing with both the application for condonation and the main application, in the manner they are cited in the main action, that is Kudakwashe Nyakambangwe as the applicant and Jaggers Trador (Pvt) Ltd as the respondent.

The applicant filed a Court application in Case No HC 3002/2002 on l8 March, 2002. Opposing papers were filed on 27 April, 2002. On l6 April, 2002 the applicant filed an answering affidavit as well as heads of argument. The respondent contends that as the High Court was on vacation from 26 March, 2002 to 2 May, 2002, the *dies induciae* for filing its heads of argument in that (main) matter only began to run in terms of Rule 238 2A1 of the High Court Rules, 1971, on 2 May, 2002. The respondent's heads of argument thus ought to have been filed by 16 May, 2002.

The respondent submitted that it attempted to instruct counsel to draw up heads of argument on its behalf but counsel was unable to do so timeously, resulting in the respondent retracting the brief to draw heads of argument and forwarding it elsewhere thus resulting in the late preparation of its heads of argument.

The applicant's stance is that the respondent's heads of argument ought to have been filed by no later than close of business on 2 May, 2002. Thus although both parties agree that the respondent's heads of argument were filed late, they differ only in regard to the extent of the delay as the respondent's stance is that its heads of argument ought to have been field by 16 May, 2002, a difference of 2 weeks with the applicant's calculation.

Rule 238 of the High Court Rules provides:

> "(2) Where an application … has been set down for hearing in terms of subrule (2) of rule 223, and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with subrule (2A) heads of argument … and immediately thereafter he shall deliver a copy of the heads of argument to every other party.
>
> (2a) Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after the heads of argument of the applicant … were delivered to the respondent in terms of subrule (1):
> Provided that -
>
> (i) no period during which the court is on vacation shall be counted as part of the ten-day period.
>
> (ii) The respondent's heads of argument shall be filed at least five days before the hearing".

It appears to be clear, in my view, on a reading of the above quoted rules, that the respondent is correct in its contention that the *dies induciae* for the filing of its heads of argument only began to run after the expiry of the High Court vacation period.

The considerations that the court takes into account in considering application for condonation "include the degree of non-compliance, the explanation for it, the

importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice", per **Herbstein and Van Winsen** in *"The Civil Practice of the Supreme Court of South Africa"* 4th ed at pp 897-898 wherein reference is made in this regard to *Federated Employers Fire and General Insurance Co Ltd & Another* v *McKenzie* 1969(2) SA 360 (A) at 362 F-H; and also *Reinecke en 'n ander* v *Nel en 'n ander* 1984(1) SA 820 (A) at 830G.

The learned authors also state the following at page 901:

> "As a result the applicant for leave must allege, and the court if it grants leave will have to be satisfied that the appeal has some chance of success on the merits. *Bantu Methodist Church* v *Barclays Bank* 1935 TPA 372; *Massey-Harris Co (Pvt) Ltd* v *Eksteen* 1927 OPD 29. *De Villiers* v *De Villiers* 1947 (1) SA 635 (A). Though it has been held that the applicant must show that the appeal has a 'reasonable chance of success', the Appellate Division in *De Villiers* v *De Villiers* at 637 refrained from using that term as requiring apparently something stronger than is required in a case like the present. It is only where, from the judgment itself, it is quite clear that the applicant has "no prospect of success on appeal" that ordinarily condonation will be refused upon that ground alone.
> The applicant may be able to show such merits as justify the court in granting relief even though the delay is abnormal. *Cairns Executors* v *Gaarn*, 1912 AD 181 at 186 and conversely there may be such lack of merit as justifies the court in refusing the indulgence sought even though the delay is both short and satisfactorily explained. *De Villiers* v *De Villiers* 1947 (1) SA 635 (A) at 636-7; *Meintjies* v *H D Combrinck (Edms) Bpk* 18961 (1) SA 262 (A) at 265 A-B".

In relation to the main matter the facts are as follows.

The applicant was discharged from his employment with the respondent following misconduct proceedings. He appealed against his discharge and his appeal was dismissed by the local Joint Committee. A further appeal was allowed by the Negotiating Committee. In allowing his appeal the Negotiating Committee directed that he be reinstated in his employment with no loss of benefits.

The respondent then noted an appeal against the determination of the Negotiating Committee with the Labour Relations Tribunal.

The applicant then filed the present application indicating that the respondent refused to comply with the determination of the Negotiating Committee on the basis that its operation is suspended by the said noting of the appeal.

The applicant however contends that the noting of the appeal does not have the effect of suspending the operation of the decision of the Negotiating Committee that has been appealed against, pending the determination of the appeal. Secondly that in any event, there is no appeal validly pending before the Labour Relations Tribunal as the respondent's appeal was not timeously noted.

The respondent on the other hand contends that it is for the Labour Relations Tribunal, and not for this Court to decide on the validity or otherwise of a notice of appeal lodged with the Labour Relations Tribunal. It would thus be inappropriate for this Court to grant the declarator sought in paragraph 2 of the applicant's draft order. Furthermore, that in any event, firstly, any declarator that the determination of the Negotiating Committee is "operational" would be totally meaningless and of no use or relevance to the applicant. Secondly, there is no procedure, statutory provision or other law whereby a determination of the Negotiating Committee of the Commercial Sectors of Zimbabwe may be registered as a civil judgment, be it of the High Court or Magistrates Court and be enforced as such. Thus in the absence of a law equivalent or comparable to section 96(2), (3) and (4) of the Labour Relations Act, Chapter 28:01, or Article 35 of the Uncitral Model Law, this Court does not have the power to register as a civil judgment a determination made by the Negotiating Committee of the Commercial Sectors of

Zimbabwe. Such determination may not, as such, be enforced as a civil judgment of either the High Court or the Magistrates Court.

The respondent thus prays for the application to be dismissed with costs.

The order sought by the applicant is in the following terms:

"IT IS ORDERED'

1. That the determination of the Negotiating Committee of the Commercial Sectors of Zimbabwe issued on 25 July, 2001 be and is hereby declared to be operational and the applicant is hereby given leave to register it as a civil judgment and to enforce the judgment.
2. That there is no appeal validly pending before the Labour Relations Tribunal between the parties.
3. That the respondent pay for the costs of this application".

It is clear from the draft order that the applicant seeks two declarators and consequential relief. The declarators relate to the order that the determination of the Negotiating Committee be declared to be operational and the declaration that there is no appeal validly before the Labour Relations Tribunal. The consequential relief relates to the part of the order that the applicant be given leave to register the said determination as a civil judgment and to enforce the judgment.

In terms of section 14 of the High Court Act, Chapter 7:06 the High Court may in its discretion grant declaratory relief. The applicant's basis of seeking the declaratory and consequential relief is that the appeal was not timeously noted with the Labour Relations Tribunal, (the Tribunal). Section 10(1) of the Labour Relations (Settlement of Disputes) Regulations, S.I. 30 of 1993 stipulates that an appeal to the Tribunal in terms of the Act shall be noted within fourteen days of the receipt of the decision, determination, order or direction appealed against. The said section must be read in the light of section 26 of the same Regulations which states that the chairman of the Tribunal may condone any failure

to comply with these Regulations or authorize any departure from Regulations. In the circumstances, I am in full agreement with the respondent's counsel's submissions that it is for the Tribunal and not this Court, to decide whether or not the appeal was noted timeously. In the circumstances, it would be inappropriate for this Court to grant the declarator sought in paragraph 2 of the draft order.

As regards the declarator that the determination in question is operational and the leave of this Court for the applicant to register it as a civil judgment and enforce it, I am also in full agreement with the respondent's counsel's submission that this Court does not in the circumstances have the power to register as a civil judgment, a determination made by the Negotiating Committee of the Commercial Sectors of Zimbabwe for the following reasons. Section 96(2), (3) and (4) of the Labour Relations Act provides for the registration as judgments of the Magistrates Court, determinations by Labour Relations and Senior Labour Relations Officers. Article 35 of the Uncitral Model Law and the first schedule of the Arbitration Act, Chapter 7:15 provides for the registration and enforcement of arbitral awards. As highlighted by the respondent's counsel, the determination of the Negotiating Committee of the Commercial Sectors of Zimbabwe would have been made in terms of a registered Code of Conduct (S.I. 145/1993). Codes of Conduct are provided for in section 101 of the Labour Relations Act which Act does not provide for enforcement of determination made under or in terms of Codes of Conduct nor does the Act have provisions equivalent or comparable to subsections (2), (3) and (4) of section 96. Clearly, therefore, and in the light of sections 92 and 101(8) of the said Act, the intention of the Legislature was that the *status quo* be frozen and maintained pending the exhaustion of the appeal process. In this case the appeal by the

respondent was properly filed with the Labour Relations Tribunal, a lawfully constituted body with the powers and functions to determine whether the appeal is validly before it.

I am also in full agreement with the respondent's counsel that even if the declaratory orders sought were to be granted, there would still be other issues to be decided. The parties would still have to pursue further litigation. Neither of the declarators would dispose of the dispute between the parties. Thus neither declarator would be of advantage to the applicant.

As submitted by the respondent's counsel, without the registration and enforcement of the determination of the Negotiating Committee, any declarator that it is "operational" would be totally meaningless and of no use or relevance to the applicant.

It thus appears that not only is the relief sought by the applicant incompetent, there is also no justification for it. In the circumstances the application cannot succeed. It is for the above reasons, which in themselves encompass the various considerations that the Court had to take into account that the application for condonation and upliftment of the automatic bar was granted.

In the result the application is dismissed with costs.

Gill, Godlonton & Gerrans, respondent's legal practitioners