

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/60/2014

**HARARE, 17 OCTOBER, 14 NOVEMBER,
28 NOVEMBER 2013 & 14 FEBRUARY 2014**

CASE NO LC/H/890/2012

In the matter between:-

AVERAGE TACHIONA

1st APPELLANT

And

RANGANAI UTETE

2nd APPELLANT

Versus

TASABERG (PRIVATE) LIMITED

RESPONDENT

Before The Honourable L Kudya : Judge

For the Appellants

G Pendei (Trade Unionist)

For the Respondent

H Mutasa (Legal Practitioner)

KUDYA J:

This matter was enrolled as an appeal by the appellants' employees against the respondent employer following an award which was granted by the arbitrator against the appellants.

On the set down date the appellants applied from the bar that the respondent employer be barred from responding to the appeal. Their argument was that, the respondent had not filed its response within the time limits set by the rules hence it was not properly before the court. They therefore moved the court to enter a default judgment against the respondent.

The respondent company strenuously opposed that application. It is that application which is the subject of this judgment.

The background to the matter is that the appellants were once in the employ of the respondent. At a later stage they formed their own cooperative which began dealing with the respondent as such. The appellants however, went before arbitration and argued that they were employees of the respondent. The respondent opposed that and demonstrated to the satisfaction of the arbitrator that indeed the appellants were contractors and not employees of the respondent. He therefore dismissed their claim.

Aggrieved by the arbitral award the appellants appealed to this court against the arbitrator's award. Before the appeal could be heard the parties got embroiled in the arguments which now form the basis of this judgment.

On the part of the appellant their argument was that, after lodging their appeal with the Labour court the appeal found its way to the respondent firstly by physical visits to the respondent's operating space and attempts to serve same to the staff thereat. Secondly the appellants says that, the appeal got to the respondent through D.H.L mail which the respondent received, read but chose to return to the appellants.

The appellants maintained that it was therefore not correct for the respondent to argue that it could not file its notice or response timeously because it was not aware of the appeal. They therefore requested that the court in the circumstances grant a default judgment against the respondent.

The appellants also maintained that even though the L.C.2. (notice of appeal form) which was sent to the respondent did not bear a case number, the respondent should nevertheless have filed its response as it was aware who the parties to the case were at least from the face of the form.

The appellants also mentioned that, they have a good case on the merits even though they conceded that some of the grounds of appeal were not couched properly and did not satisfy the test for proper grounds of appeal. They were therefore adamant that the respondent's conduct had demonstrated disdain and disrespect for the court and its rules and should therefore not expect any lenience from the court. They thus maintained that the matter be simply disposed of without getting into the merits as the respondent had not complied with the rules as required by the Labour Court.

On the other hand the respondent persisted in its request that its failure to file a notice of response on time be condoned. Its argument was that it genuinely believed that there was no appeal pending before the court.

Further to that it argued that, due to the fact that it is not schooled into the niceties of how appeals, orders etc operate, it genuinely believed that after the arbitrator had ruled that the appellants were contractors without any employee entitlement that was the end of the matter.

The respondent maintained that, after it received the appeal documents without a case number, it tried without success to obtain the case number from the Labour Court registry as well as the other documents pertaining to the case. In that light it therefore, found it difficult to comply with the rule relating to filing of the notice of response yet there was no case number on the matter in question.

The respondent also argued that, the manner in which the appellants had couched its prayer for relief was not provided for in the rules. In this respect the argument which it advanced was that, if the appellant was keen on obtaining relief by way of default judgment, they should have made a

proper formal application instead of making the request from the bar as they did.

In the same manner, the respondent was adamant that, the appellants' appeal was bad at law as it did not comply with the standard provided for by law. It argued further that, the conclusions arrived at by the arbitrator were factual hence not appealable as there was no evidence of gross misdirection on the facts by the arbitrator given all the facts of the matter.

The respondent also went on to argue that the reason why it refused to have audience with the appellants when they attempted to serve process on it was because of the misunderstandings which it had had earlier on with them. It thus deemed it prudent not to engage with the appellants and in the process missed out on the need to fulfil the rules of court requiring it to file its response on the appeal.

This matter speaks to a situation where both parties have not complied with the rules in one way or another. The reasons proffered by them are also circumspect. At the end of the day the major question, which the court has to answer is whether interests of justice in this case would best be served by being technical and adopt a strict application of the rules or would it be just to have the matter concluded on the merits once and for all.

The law is settled in respect of all the issues at stake. In the first place it is clear that rules are made for the court and not the court for the rules. In the same vein it is also imperative that rules be observed for the due administration of justice.

It therefore becomes a balancing act of whether the court approaches the matter from a rule rigid or rule flexible

perspective with the ultimate aim that whatever approach is adopted should give the net result of giving effect to due administration of justice.

On another plane, it is also pertinent that, before fault is found with a party all the other factors of the matter should be properly in place. In this respect where a party is served with an appeal without a case number as happened to the respondent, it would be difficult to envisage how such a party is expected to file its own papers on the matter. As however, admitted by the respondent's counsel, it was regrettable that the respondent went on to return the appeal process which it had been served with by DHL at the expense of having the notice of response filed out of time.

It is also important to note that, if one looks at the grounds of appeal, they also do not give a credible picture in respect of their prospects. That again tilts the scales against the appellants. Whilst it can be accepted that the respondent did not adduce more evidence to show it failed to file response in time, the very appeal which needed a response is also on the face of it shaky for reasons already mentioned above.

The argument about the format of the application for default judgment, though not decisive also demonstrates the haphazard approach adopted by both parties to the whole matter. Indeed if the appellant was keen on making an application for default judgment, it was imperative that the application takes the correct form as in all applications provided for in the rules. However whether the application took the correct form or not, it is still debatable on the merits whether the court would have been persuaded to grant it if one looks at the arbitral award as a whole.

In the ultimate, the court is persuaded that facts of this instant case call for invoking rule 26 so that the matter can be concluded on the merits. However, given the intertwined nature of the application for default judgment and the merits of the main appeal, it can only be just and equitable that the main appeal be dealt with by a different Judge whose mind has not been clouded by the interim application issues adjudged herein.

IT IS ORDERED THAT

Application for default judgment in the appeal for want of timeous filing of notice of response by the respondent company being without merit, it be and is hereby dismissed.

The bar operating in respect of the respondent for filing notice of response is uplifted.

The respondent is to file its response and heads of argument within seven days of receipt of this judgment after which both the appellant and respondent are to approach the Registrar to have the main appeal set down on a date which is mutually convenient to both parties.

The appeal is to be set down before a different Judge.

Each party to bear its own costs.

ZCPAWU Legal Advisor, for the appellants

Gill Godlonton & Gerrans, for the respondents