CAIRNS FOODS LIMITED

versus

STANFORD SELEMANI

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 8, 9, 11 and 21 May 2012

**Opposed Application**

*T Nyamasoka*, for the applicant

The respondent in person

BERE J: On 8 September 2011 after hearing the application for the upliftment of the bar by Mr *Nyamasoka* for and on behalf of the applicant, (Cairns Food Limited) I dismissed the application. I have been asked to furnish the reasons for that dismissal. Here they are:

**The background**

On 4 October 2010, the respondent filed a chamber application for the registration of a labour court judgment in case number 6961/10 which was placed before my sister Judge, CHATUKUTA J who granted the order in default on 18 November 2011.

The applicant subsequently filed a chamber application for rescission of judgment on the basis that when CHATUKUTA J granted default judgment the applicant had already filed a notice of opposition and therefore default judgment ought not to have been granted in the first place.

After the respondent had filed his notice of opposition, Justice CHATUKUTA then directed that the application for rescission be heard on the opposed roll.

In compliance with the court rules and in particular r 236 (3)[[1]](#footnote-1) the respondent proceeded to set the matter down after he had filed and served his Heads of Argument upon the applicant’s legal practitioners on 10 May 2011.

The applicant failed to file Heads of Argument as required by the Court Rules. It is this upliftment of the bar in terms of r 83 (b)[[2]](#footnote-2) which has been brought to my attention for determination. The respondent has strongly opposed the application for the upliftment of the bar.

I granted Mr *Nyamasoka* the opportunity or leave to address the Court on the upliftment of the bar to pave way for him to deal with the substantive application for rescission.

My impression after hearing Mr *Nyamasoka* together with the respondent who was a self-actor was that the applicant did not file the Heads of Argument in time mainly because of ineptitude on the part of the applicant’s legal practitioners. Conveniently when the applicant’s legal practitioner’s casual approach in handling the timeous filing of Heads of Argument was exposed by the respondent, the applicant’s legal practitioner took it upon himself to extend the blame on the doorsteps of his secretary.

In my view that further compounded the position of the applicant because the approach adopted reflected a poor way of presenting evidence which is supposed to be on oath. The accepted and rich practice of our Courts which is hinged on tradition and precedent is that in such a situation the secretary must herself have spoken and must have done so through her own affidavit and not for the legal practitioner to speculate on her behalf by making unsupported submissions from the bar.

The respondent could not have been further from the truth when he alleged in his simple submissions that the applicant through its legal practitioners had not expeditiously handled this case by failing to file its Heads of Argument in time.

I am more than satisfied that the approach adopted by the applicant in this matter was a casual one. My view is that the applicant through its counsel has failed to create an opportunity to have the bar uplifted.

In *Kingborough Town Council[[3]](#footnote-3)* the court held that:

“The court never hesitates to penalise a litigant for the shortcomings, if any of his attorney.”

I find this approach to be apposite in this matter. The explanation given by the applicant’s counsel for failing to file the Heads of Argument more so after having been furnished with Heads of Argument by a self-actor dissuades me from exercising my discretion in having the bar uplifted.

It was for these reasons that after hearing submission on 8 September 2011 I summarised my position in the following:

“I am satisfied that counsel is not on balanced feet in making this application for the upliftment of bar. The founding affidavit suggests an administrative bungling in so far as the failure for timeous filing of the applicant’s Heads is concerned. The rules of court must be applied in a strict manner in so far as they relate to law firms and lawyers as opposed to self-actors.”

It was for these reasons that I dismissed the applicant’s application for the upliftment of the bar.

*Atherstone & Cook*, applicant’s legal practitioners

1. Order 32 Rule 236(3) of High Court Rules 1971 [↑](#footnote-ref-1)
2. Order 12 Rule 83 (b) of High Court Rules 1971 [↑](#footnote-ref-2)
3. Kingsborough Town Council v Thirlwell and Anor 1957 (4) SA 533 (the headnote) [↑](#footnote-ref-3)