

CONSTABLE A. GANI  
versus  
THE TRIAL OFFICER  
(SUPERINTENDANT MAHANYI)  
and  
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 2 February 2017 and 22 November 2017

### **Opposed Application**

Mr *N Mugiya*, for applicant  
Mr *K Chimiti*, for respondent

MAKONI J: The applicant approached this court seeking the following order:

- “1. The application for condonation of late noting of application for review be and hereby granted.
2. The Applicant is ordered to file his application for review within eight (8) weeks from the date of this order.
3. The costs shall be in the cause.”

The background of the matter is that the applicant, a former police officer, was arraigned before a Trial Officer for contravening paragraph 35 of the Schedule to the Police Act [*Chapter 11:10*] (The Act), which provides: “Acting in an unbecoming or disorderly manner or any manner prejudicial to the good order or discipline or reasonably likely to bring discredit to the police force.” The applicant was convicted and sentenced to 14 days imprisonment. Dissatisfied with the outcome of the matter, the applicant appealed to the second respondent against both conviction and sentence on 4 December 2013. The first respondent replied to the grounds of appeal on 17 December 2013. The applicant did not respond as is provided for in terms of s 11(4) of the

Police Trials and Boards of Inquiry Regulations 1965, resulting in the dismissal of the appeal. The applicant then filed the present application.

The applicant took a point in *limine*, that the second respondent's opposing affidavit is improperly before the court and must be expunged from the record. On the merits

On the merits, the applicant gives the basis for the application in para 8 of the founding affidavit where she states:

"8. I would have liked to prosecute my appeal had it not been of the reasons stated and I have also noted that my conviction by the 1<sup>st</sup> respondent was grossly misdirected and I have approached this court so that I could be condoned for late filing of an application for review."

I must, at this stage, observe that the only paragraph where reference to condonation is made. In all the other paragraphs, she is giving the background to the matter. She comes close to giving the nature of the application in para 13 but again she fell short of telling the court the nature of her application when she states:

"13. I was not properly and legally advised and when I then sought for legal advise, I then realized that I should have applied for review which I ought to have done within eight weeks of my conviction and sentence hence this application."

The respondent also raised three points *in limine*, firstly, that the application for condonation was not made within the prescribed time limits. Secondly, that the application is defective in that the draft order does not state the decision sought to be reviewed and lastly, grounds of review are not stated in the application. On the merits, the respondent opposed the application on the basis that the applicant has failed to satisfy the requirements for an application for condonation.

I will deal with the points in *limine* first.

### **COMMISSIONING OF OPPOSING AFFIDAVIT**

The applicant raised a point in *limine*, that the respondent's opposing affidavit is not properly before the court, on the basis that the affidavit was improperly commissioned as it was commissioned by a lawyer who represents him (second respondent) in the present matter. She states in her answering affidavit:

“a) The second Respondent’s purported opposing affidavit is improperly commissioned as it was commissioned by his lawyer who represent him in this matter. The law regarding the commissioning of documents is common cause. The second respondents’ opposing affidavit should be expunged from the record therefore.”

In response, the respondent argued that the officer who commissioned the affidavit works in Civil Division of the Attorney General and was not dealing with the matter.

The Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*] s 8 provides the following:

“8 Power to administer oaths

A justice of the peace or commissioner of oaths may within the area for which he has been appointed administer an oath to any person:

Provided that he shall not administer an oath—

- (a) in respect of any matter in relation to which he is in terms of any regulation made under section eleven, prohibited from administering an oath; or
- (b) if he has reason to believe that the person in question is unwilling to make an oath.”

Section 2 of the Justices of the Peace and Commissioners of Oaths (General) Regulations 1998 (SI 183/98), provides:

“2. (1) No justice of peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest.

(2) Subsection (1) shall not apply to the affidavits specified in the Schedule.”

Section 2 of the schedule provides:

“Affidavits attested by a member of the Public Service where –

- (a) his only interest in the affidavit arises out of the performance of his duties in the Public Service; and
- (b) the primary interest in the affidavit is that of the State.”

The authors Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 5 ed at p 453 state:

“On the other hand, the word ‘interest’ in the subregulation must be given a limited meaning, and cannot be extended to cover the remote and indirect interest that an employee of an attorney has in the matters dealt with in the attorney’s office. Consequently, where the respondent had applied for the dismissal of an application on the ground that all

affidavits of the applicants had been attested before an attorney in the employ of the employ of the attorney acting for the applicants, the application was refused. ....

It has been held that to be interested means to have a pecuniary interest or a proprietary right; interest merely from a social or ethical point of view, or out of curiosity or a love of the information or amusement or devotion to duty, is not included.”

In *casu*, the second respondent is represented by the Civil Division in the Attorney General’s Office. The officer dealing with the matter is Mr Chimiti. The affidavit was commissioned by Chikomborero Saruwaka who is an officer in the Civil Division. He has no interest in the matter between the parties in this matter. His only interest in the affidavit arises out of the performance of his duties. In any event the primary interest in the affidavit is that of the State.

The point raised by the applicant has no merit and I find that there is a valid affidavit before me.

In view of the above, I dismiss the point in *limine*.

### **FAILURE TO FILE AN APPLICATION WITHIN PRESCRIBED TIME**

The second respondent contended that in terms of section 70 of the Act any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under the Act be brought within eight months after the cause of action has arisen. He further averred that, the cause of action arose on 2 December 2013 and the applicant filed an application for condonation 12 months after the decision of the trial officer and 9 months after the decision of the Commissioner General of Police. He submitted that the matter has prescribed in terms of the Act.

The issue is whether the matter has prescribed.

Section 70 of the Act provides:

#### **“70 Limitation of actions**

Any civil proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any such civil

proceedings and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:14*]"

In *casu*, the applicant filed the present application on 2 December 2014. If it is the decision of the Trial Officer that she seeks review, then the cause of action arose on 2 December 2013. If it is the second respondent's, then the cause of action arose on 28 February 2014. There was a delay of 12 and 9 months respectively.

The applicant does not seriously address the issue in her answering affidavit. She makes reference to the Prescription Act and yet the second respondent is very clear that the matter would have prescribed in terms of s 70 of the Act. The applicant feebly suggests that in the event that prescription operates then it was interrupted by "correspondence pursuant to filing this application". One wonders what that means. In any event, the applicant did not give the factual basis of the correspondence that she refers to.

Review proceedings are civil proceedings and any party who intends to institute such proceedings against the state or any member of the Police must comply with s 70 of the Act. Such proceedings must be brought within eight months after the cause of action has arisen. Further, notice in writing of any such proceedings and grounds thereof must be given in terms of the State Liabilities Act [*Chapter 8:15*].

In *casu*, the applicant did neither of the above and did not seek condonation.

The point in *limine* is upheld and the application is not properly before me.

Assuming I am wrong I will go on to consider the other points in *limine*.

### **DECISION SOUGHT TO BE REVIEWED NOT STATED**

Mr *Chimiti*, for the respondents submitted that the application is fatally defective in that the draft order does not state the decision sought to be reviewed. He further submitted that the founding affidavit mentions two decisions, the decision of the trial officer and that of the Commissioner General. It is not clear as to which decision the applicant seeks to review.

On the other hand, the applicant gives a very curt response that the draft order is very clear on the order sought.

The Draft Order in paragraph 1 states:

“1. The application for condonation of late noting of application for review be and hereby granted.”

In her founding affidavit, the applicant attacks both the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent. At the outset, I have quoted the paragraphs that appear to give an indication of the nature of the application before the court. As is clear from those paragraphs, one is left wondering which of the two decisions the applicant seeks review by this court.

The learned authors Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 5 ed at p.439 provides that:

“(iv) *The grounds on which relief is claimed*

The supporting affidavit must set out a cause of action. If they do not, the respondent is entitled to ask the court to dismiss the application on the ground that it discloses no basis on which the relief can be granted.

In application proceedings the affidavits constitute not only the evidence but also the pleadings and, therefore, while it is not necessary that the affidavits ‘should set out a formal declaration or [an answering] affidavit set out a formal plea, these documents should contain, in the evidence they set out, all that would have been necessary in an trial’.”

In other words, an affidavit must contain facts necessary for determination of the issue in applicant’s favour. The necessary allegations must appear in the founding affidavit.

In *casu*, the applicant failed to do so. Her founding affidavit does not set out the necessary allegations for the determination of the matter in her favour.

The respondents seem to put emphasis on the Draft Order. My view is that the respondents should be taking issue with the founding affidavit. A draft order is just a draft and can always be amended provided that there are necessary averments in the founding affidavit which support the draft order.

I will therefore uphold the point in *limine*.

## **GROUND FOR REVIEW**

Mr *Chimiti*, contended that the applicant did not state the grounds of review which enables the court to assess the applicant's prospects of success. He further submitted that the applicant only gave a narration of what transpired without necessarily stating the grounds for review.

Mr *Mugiya*, on contrary submitted that the present application is for condonation of late noting of an application for review. It does not require that the grounds of review be set out.

In considering, an application for condonation the court looks, inter alia at the prospects of success in the main matter. See *Kodwa v Secretary of Health and Another* 1999 (1) ZLR 313.

In an application for review, in terms of r 257, the grounds for review must be set out clearly and concisely in the court application. In my view, these grounds should be set out in the founding affidavit in an application for condonation for late noting of an application for review. Otherwise how else can the court assess the prospects of success without knowing what ground for review applicant is relying on. Applications for review which do not state the grounds have been dismissed for failure to comply with the rules. See *Zimbabwe Posts (Private) Limited v Communication and Allied Services Union* SC 20/16. The same fate should befall applications for condonation which do not set out the grounds for review.

In *casu*, the applicant does not state the grounds but gives a narration of what transpired. In my view, this is fatal to the application.

In view of the above, I will uphold the point in *limine*.

In view of my findings in respect of the points in *limine*, it will not be necessary for me to determine the merits of the matter.

I will therefore make the following order:

1. The application is dismissed with costs.

*Mugiya and Macharaga Law Chambers*, applicant's legal practitioners  
*Civil Division of the Attorney General*, respondents' legal practitioners