CONSTABLE DUMBA 064859Y
and
CONSTABLE CHANGWARA 079943T
versus
THE TRIAL OFFICER –SUPERINTENDENT NDOU
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 January and 8 March 2017

Opposed Application

N Mugiya, for the applicants
J Mumbengegwi, for the respondents

TAGU J: The two applicants are constables in the Zimbabwe Republic Police. On 3 March 2015 they appeared before, and were tried by the first respondent for contravening para 34 of the schedule to the Police Act. The trial progressed to the stage where the first respondent postponed the matter for judgment. They have approached this court seeking that the proceedings presided over by the first respondent in respect of them to be set aside. Further, they are requesting that a trial *denovo* be ordered before a different trial officer and in a different policing district. They want the respondents to be ordered to pay costs of suit.
The respondents opposed the application.

At the hearing of the matter the counsel for the applicants Mr *N Mugiya* took a point *in limine.* He submitted that this application is not opposed and must be treated as an unopposed matter for the simple reason that the opposing affidavits deposed to by the respondents were fatally defective. He said that opposing affidavits were fatally defective in that the deponents to the opposing affidavits signed the affidavits on 27 March 2015 but were purportedly signed by the commissioner of oaths on 30 March 2015. He said the affidavits do not comply with the requirements stated in Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa*, 5th ed vol 1.

The court is of the view that the papers filed in this case are shoddy to say the least. It is indeed true that the opposing affidavits do not comply with the requirements of an affidavit. It is indeed true that the deponents to the opposing affidavits did not sign their opposing affidavits on the same day before the commissioner of oaths. The counsel for the respondents conceded the same but argued that it was a mistake that the deponents signed their opposing affidavits on different dates with the commissioner of oaths. I found this explanation to be unacceptable. The application is deemed to be an unopposed application and the opposing affidavits and all attachments are not considered.

However, be that as it may I also found the application by the applicants to be unhelpful as I will demonstrate below.

The applicants in their founding affidavits stated among other things that the trial was conducted in a militant manner such that it contravenes the principles of a fair trial and the rules of natural justice. The first applicant said the first respondent put the second applicant who was sick and who was visibly ill and who even produced a medical card to that effect where he was given two days off duty. Secondly the first respondent decided to conduct the trial in the absence of their lawyer who was at the time appearing at the High Court who even communicated and sent a letter together with a notice of set down to the High court. Further, they said the first respondent proceeded with the matter even after they told him that their lawyer had all the paper work or the state papers. They went on to say that the first respondent even told them that the High Court did not take precedence over his trial. During the trial the first respondent failed to explain to them their constitutional rights. Finally they averred that the trial officer altered the record of proceedings as the record of proceedings attached hereto was not what transpired on the day in question as per Annexure "A". Hence they prayed for an order in terms of the draft.

As I said earlier the papers in this application are shoddy in a number of respects. Firstly, no medical card was attached to support their averments that the second applicant was ill and had been given two days off. Secondly, no copy of the letter from their lawyer was even attached to confirm that he was appearing at the High Court. Thirdly, no notice of set down was attached to confirm that indeed their lawyer had a matter at the High Court. Fourthly, and most importantly to make matters worse they referred the court to Annexure "A" as a copy of the altered court record, but no such record was attached to their application to prove that their constitutional rights were not explained and that the trial was conducted in a military manner.

In my view an application stands or falls on its papers. No adequate information was placed before the court, and the mere fact that an application is treated as unopposed does not mean that it will be automatically granted if in adequate information has been placed before the court.

Further, this application for setting aside was made at a time the proceedings had been adjourned for the first respondent to prepare his judgment. In my opinion a review of unterminated proceedings is not countenanced. In *Jane Linda Rose* v *State* HC 2634/08 HUNGWE J held that

> "The fact that all the authorities confirm that the reason why a review of unterminated proceedings is not countenanced is to avoid creating situation such as here where proceedings are unnecessarily interrupted."

The courts are slow to interfere with unterminated proceedings unless there are gross injustices.

In *casu* the application for review was filed just before the trial was completed based on the fact that the applicants were refused their right to a legal practitioner and that the trial officer must have recused himself and also that one of the applicants was ill. With the greatest of respect these contentions which have not been proved are baseless. The application will fail.

In the result it is ordered that:

1. The application is dismissed.
2. The applicants to pay costs.

Mugiya And Macharaga Law Chambers, applicants' legal practitioners
Civil Division of the Attorney – General's Office, respondents' legal practitioners.