

THE TRIAL OFFICER (SUPRENTENDENT DUBE)  
and  
COMMISSIONER-GENERAL OF POLICE  
versus  
SERGEANT MAKONI K L 061625H  
and  
CONSTABLE MAKONESE W 058289G  
and  
CONSTABLE KATAMBUDZA K 074380X

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 21 & 23 March 2017

### **Opposed Application**

*M. Gezera*, for the applicants  
*N. Mugiya*, for the respondent

ZHOU J: This is an application for the dismissal of the application for review which was filed by the three respondents under Case Number HC 9652/14. The application is being made in terms of Order 32 r 236 (3) (b) of the High Court Rules, 1971, on the ground that the respondents, having been served with the applicants' notice of opposition and opposing affidavits, failed to file an answering affidavit or to set the matter down for hearing within one month after the filing of the opposing papers. The application is opposed by the respondents on the ground that after they had filed their application for review the applicants failed to make available to them a copy of the record of the proceedings which are the subject of the review application.

The facts, which are common cause, are that on 31 October 2014 the three respondents filed a court application for the review of proceedings in which they were charged for offences committed under the Police Act. The court application was served upon the respondents on 4 November 2014. The applicants, as the respondents in that matter, filed their notice of opposition

and opposing affidavits on 17 November and served them upon the respondents on 19 November 2014. After that the respondents did not file an answering affidavit. They also took no steps to set the matter down for argument.

In terms of r 236 (3) (b) where the respondent has filed a notice of opposition and opposing affidavits and the applicant fails to either file an answering affidavit or set the matter down for hearing within a month after the filing of the opposing papers, the respondent is entitled to either set the matter down for hearing or to make a chamber application to dismiss the matter for want of prosecution. In *casu* the applicants elected to apply for the dismissal of the respondents' application for review. The requirements for such an application to be made are clearly satisfied in that the respondents have not filed an answering affidavit or sought to set the matter down for argument for a period in excess of two years after being served with the applicants' opposing papers.

The respondents submitted that the application should not be granted because the applicants did not file the record of proceedings referred to in r 260 of the High Court Rules. But the filing of that record is not a prerequisite for the making of the application for dismissal for want of prosecution. Further, and in any event, the respondents never sought to ask for the filing of that record for more than two years after they were served with the applicants' opposing papers in the application for review. The degree of non-compliance with the rules, which is more than two years, and the explanation for that default which is clearly unreasonable do not excuse the respondents from the consequences of r 236 (3) (b).

The respondents invited the court to consider making "such other order on such terms as (it) thinks fit". In particular, Mr *Mugiya* for the respondents submitted that the court should order the applicants to file the record of proceedings in the review application. The respondents had all the time to seek such an order prior to the filing of the instant chamber application for dismissal if they genuinely believed that they were incapacitated from filing an answering affidavit by the non-availability of that record. They did not do that for more than two years. I do not believe that it would be a proper exercise of the discretionary power given by the rules to make such an order at this stage. After all the respondents did not even seek condonation for their non-compliance with the requirements of the rules. See *Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa* 2010 (1) ZLR 267 (S) at 275 F-G.

In the circumstances, the court is convinced that the application for dismissal is warranted.

In the result, IT IS ORDERED THAT:

1. The court application for review filed by the respondents as the applicants under Case No. HC 9652/14 be and is hereby dismissed for want of prosecution.
2. The respondents shall pay the costs of this application and Case No. HC 9652/14 jointly and severally the one paying the others to be absolved.

*Civil Division of the Attorney-General's Office, applicants' legal practitioners  
Mugiya & Macharaga, respondents' legal practitioners*