TRIAL OFFICER
(SUPERINTENDENT MADUNGWE)
and
THE COMMISSIONER GENERAL OF POLICE
versus
CONSTABLE MUCHETO 079281Z

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 6 July 2018 & 4 October 2018

Opposed Chamber Application

D Jaricha, for the applicants
A Mugiya, for the respondent

MANZUNZU J: This is chamber application by the applicants seeking the dismissal of the court application under case No. HC 8289/16 filed by the respondent against the applicants. The chamber application is brought in terms of r 236 (4) (b) of the Rules of the High Court which reads;

> "(4) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either—
> (a) set the matter down for hearing in terms of r 223; or
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other on such terms as he thinks fit."

The grounds in support of this application were outlined by the applicants as follows

"1. The respondent has neglected or failed to timeously prosecute his application for stay which he instituted before this Honourable Court under Case No. HC 8289/16.

2. A period in excess of one month has lapsed after the applicant filed his Notice of Opposition and Opposing Affidavit. Respondent has neglected to set down the matter for hearing as mandated by the Rules of this Honourable Court.

3. Respondent has neglected and or shown a lack of interest in prosecuting his court application for condonation to finality and I am entitled as I hereby do to make an application for dismissal for want of prosecution."

The brief back ground to this application is that:

1. The respondent, a member of the Zimbabwe Republic Police, appeared and was charged and convicted by first applicant of certain charges under the Police Act. Such decision was handed down on 27 June 2016.

2. On 22 August 2016 the respondent filed a court application for review of the decision under case No. HC 8289/16.

3. Perusal of the record in case No. HC 8289/16 shows that a notice of opposition was filed on 12 September 2016. Served on the applicant now respondent on 13 September 2016.

4. Respondent who was then applicant filed heads of argument on 22 September 2016.

5. Applicants filed heads in responds on 18 October 2016 though out of time were condoned by the order of this court on 30 November 2018 in case No. HC 10859/16.

In opposing this application the respondent raised a point *in limine* to the effect that an affidavit deposed to by a legal practitioner in support of an application without stating that he has been so authorised by the applicants is so fatally defective to the extent that the application must be dismissed on that basis alone.

On the merits the respondent said he had a reasonable explanation as to why he did not set the matter down as required by the rules. The explanation is that, the application for review in HC 8289/16 could only be adequately prosecuted in the presence of the record of proceedings to be reviewed. He said the applicants failed to avail the disciplinary hearing proceedings despite requests.

At the commencement of hearing of this application Mr *Mugiya* who appeared on behalf of the respondent raised a new point *in limine* that of the form of the application. He argued this application was on form 29B when it ought to have been in Form 29.

After hearing both counsels on this point *in limine*, I dismissed it as I did not find any merit in it. I must at this stage of the judgment sent a word of caution to legal practitioners who want to raise points *in limine* in this fashion when they had full and ample opportunity to do so in their papers. No explanation was given as to why this point *in limine* was not raised at the appropriate time in order to give the other party enough time to respond.

Points *in limine* must not be raised for the sake of raising dust in a matter. Legal practitioners must be discouraged from throwing missiles in all directions with the hope that one might catch up with the target.

Deposition to an affidavit by a legal practitioner on behalf of a client

By way of a point *in limine* the respondent has challenged the validity of the founding affidavit by the legal practitioner for the applicants. To be specific, that she had no authority to depose to such affidavit and more specifically that she failed to state such words as "I have the necessary authority to depose to this affidavit on behalf of applicants." It was argued that such an omission renders the affidavit so fatally defective to render the dismissal of the application. In other words if there is no founding affidavit then there is no application to talk about. I want to recite the first part of the founding affidavit which is under attack;

"I, the undersigned, TARIRO SHARON MUSANGWA do hereby make oath and swear that:

1. I am a legal practitioner, duly sworn and admitted and am presently practicing as a law office in the Civil Division of the Attorney General's Office. I am the law officer currently ceased with the court application filed by respondent as applicant under Case No. HC 8289/16 and in that capacity I can swear positive to the facts contained herein.
2. …..
3. The facts I depose to herein are with my personal knowledge and are the best of my knowledge, information and belief true and correct.
4. …….
5. This is an application to dismiss for want of prosecution in terms of rule 236 (4) (b) of the High Court Rules, 1971, the above mentioned court application wherein the respondent hereto was applicant, the basis of this application is outlined hereunder."

The nature of the application is therefore for dismissal of an application for non-compliance with the Rules. Most issues are common cause because they are easily ascertained by perusal of the record in case No. HC 8289/16.

It must be noted that an affidavit in support of the notice of opposition is also by the legal practitioner one Tafadzwa Muvhani who in the first paragraph states,

> "I am the legal practitioner for the respondent in this matter and have the necessary authority to depose to this affidavit on his behalf. The facts I depose to herein are to the best of my knowledge and belief, true and correct."

The fact that in certain circumstances, a legal practitioner as an agent of his client can depose to an affidavit is not in dispute. The respondent's contention is that the issue of authority was not pleaded. The issue is, is the absence of stating that one has been authorised fatal and if so what consequences must befall such affidavit. Heads of Argument by Mr *Mugiya* on the point *in limine* was brief and relied on one *South African authority of Eskom* v *Soweto City Council*, 1992 (2) SA 703. The case is not quite in point.

Where a legal practitioner has been acting for a party as an agent it is not necessary to always state that he/she has been authorised. See *Zimbabwe Banking Corporation Limited* v *Trust Finance Limited and Registrar, High Court of Zimbabwe* HH 130-2006; and the authorities cited therein.

The deponent to the founding affidavit was involved in the application for review which is intended to be dismissed. The present application, though carrying a different case number, is not completely independent of the application for review. It must also be noted that the agency in the present case is a creature of constitutional provision as derived from s 114 of the Constitution on the functions of the Attorney General.

I did not find the absence to state that one is authorized to be of any consequence to the affidavit. There was no evidence to suggest that the deponent was not authorized by the applicants. Given the relationship between the Attorney General and the applicants there is presumption of authority unless the contrary is proved. The point *in lime* must fail and is hereby dismissed.

MERITS

Respondent does not deny that he failed to comply with the Rules in that he failed to set the matter down for hearing when it was due. The respondent said it was because applicants failed to avail the record of proceedings despite requests. He does not say how he requested, when and how many times. He also does not say why he did not find it necessary to compel the applicants to comply with their statutory duty through court process. For more than a year the application for review remained dormant. Respondent did not say what action he was going to take, if any. Our current court rules are litigant driven. It is the duty of the litigants that once they initiate court process they must prosecute it to finality.

While the applicants could have set down the application for review, its optional, and they cannot be faulted for not having done so. The primary duty to set the matter down rests with the applicant now respondent in this matter.

Rule 260 (1) of the Rules of High Court which obligates the tribunal to avail record of proceedings to the Registrar reads thus:

> "260. Preparation and lodging of record and fees
>
> (1) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record."

Perusal of the case in HC 8289/16 shows that though filed outside the 12 day period, the record of proceedings was filed as far back as 18 October 2016. Rule 260 says parties to the review who require copies f the record shall obtain them from the official who prepared the record. The respondent said he requested but when and how? If he had requested as he alleged why would the applicants deny him a copy when they had filed a copy with the Registrar. Mr *Jakachira* who appeared for the applicants correctly pointed out that r 260 does not create a duty to serve the other party with record of proceedings.

This is a matter where the respondent cannot cry foul when the applicants seek the dismissal of his action. Justice is certainly not for the sluggards. There is every reason why this application must succeed.

Accordingly:

It is ordered that:

1. The court application for review filed by the respondent as applicant under case number HC 8289/16 be and is hereby dismissed for want of prosecution.
2. The respondent to pay costs of this application.

Civil Division of the Attorney General's Office, applicants' legal practitioners
Messrs Mugiya & Macharaga Law Chambers, for the respondent's legal practitioners