ERISON MADUMIRA
vs
The ASSISTANT COMMISSIONER OF POLICE MASVINGO PROVINCE
MR NYAZEMA (THE ACTING PROPOL)
And
THE COMMISSIONER GENERAL OF POLICE, MR MATANGA

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO 29 SEPTEMBER 2020 and 27 AUGUST 2021

Opposed Matter

F Chirairo for applicant
T. Undenge for 1st respondent

WAMAMBO J: On 29 September 2020 I made a default order after giving an *ex tempore* judgment. The first respondent has requested for full reasons why the order was granted. The matter came before me on the opposed role. The applicant is a sergeant in Zimbabwe Republic police based at Ngundu police station. He avers as follows in his founding affidavit: On 15 April 2020 1st respondent issued a radio directing the Dispol Masvingo West to institute disciplinary proceedings against him and another workmate. On the same date another radio was issued by first respondent effectively transferring applicant to Mashoko Police Station. On 16 April 2020 applicant sought for reasons for what he terms a "drastic transfer" from the officer in charge, Ngundu Police Station. Annexure "C" is a letter written to the officer in charge, Ngundu, requesting reasons for the transfer. In the said letter applicant cites the Constitution of Zimbabwe and section 6 of the Administration of Justice Act, [*Chapter 10:28*] and avers that his rights were infringed for he was transferred and ordered to be charged before his side of the story was heard.

The background as sketched by applicant is that the charges against him were formulated against a false allegation made by one of his police colleagues. On the date of the hearing the prosecutor declined to prosecute citing lack of evidence. On 11 May 2020 applicant's legal practitioners wrote to first respondent who immediately instructed the Dispol Masvingo to charge applicant for another offence and to ensure that the trial would be finalised by 20 May 2020 as I do not share powers over him with any lawyer".

The matter where in prosecution was declined was revived and set down for a hearing on 19 May, 2020 at Masvingo Police Station. Applicant's legal practitioners wrote to the prosecution seeking a trial at, Masvingo Central Police Station citing fears of COVID-19 among other requests.

Against the above background and specifically against the order to transfer applicant to Mashoko Police Station, the applicant made the instant application. First respondent filed an opposing affidavit while second respondent filed none.

First respondent denies that the transfer of applicant was done as a way of fixing him. He avers that transfers are administrative mechanisms provided for by the law which empower the first respondent as the Officer Commanding Province to transfer officers of the rank of assistant inspector and below within the same Province. First respondent avers that the applicant's transfer was not as a result of "false allegations" against applicant.

Applicant filed an answering affidavit where he points out *inter alia* that first respondent skirted answering various paragraphs of the applicants founding affidavit particularly paragraphs 8 to 10. Applicant filed heads of argument on 30 June 2020. A certificate of service reflects that applicant's legal practitioners served the Attorney General's Office, Civil Division, Passport Office, Masvingo on *Mr. Undenge* the legal practitioners for first and second respondents with the applicant's heads of argument on the same day at 10:30 am.

Thereafter this matter was set down for hearing on 28 September 2020. *Mr. Chirairo* for the applicant sprung up and raised a point *in limine* that 1st respondent's heads were filed outside the 10 day period as provided for in Order 32 Rule 238 (2) (a) of the Rules. Respondent only filed and served his heads of argument on 24 September 2020. *Mr Chirairo* submitted that 1st respondent is barred. The fact that respondents may have filed their heads of argument five days before the hearing is neither here nor there according to *Shadreck Vera* v *Imperial Asset Management Company* HH 50/06.

Mr Jaricha who represented first respondent on that day conceded that 1st respondent is barred. He sought to make an application in terms of Rule 84 of the High Court Rules, 1971. He cited the difficulties of COVID-19 which caused the legal practitioners acting for first respondents to be unable to travel from Harare to attend to the matter. He applied that rule 4C should be applied in this case. He dismissed the application of Rules 83 and 84 to the instant matter.

I considered the above submissions and on 29 September 2020 I made an order as referred to earlier. On 29 September, 2020 *Mr Undenge* now represented the first respondent.

Rule 238 reads in part as follows:

(2a) *Heads of argument referred to in sub rule (2) shall be filed by respondent's legal practitioner not more than 10 days after heads of argument of the applicant or excipients as the case maybe were delivered to the respondent in terms of sub rule (I)*

Provided that

(i) *No period during which the court is on vacation shall be counted as part of the ten day period*

(ii) *the respondent's heads of argument shall be filed at least five days before the hearing.*

(2b) Where heads of argument that are required to be filed in terms of sub rule (2) are not filed within the period specified in sub rule (2a) the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll''

In *Shadreck Vera v Imperial Asset Management Company* HC 50/06 MAKARAU J as (*she then was*) unbundled the import and implications of Rule 238.

The Honourable Judge found that the respondent's counsel could not and did not make an application for condonation before the hearing of the matter.

She held that where heads of argument were supposed to be filed within the specific period the respondent shall be barred and the court may deal with the matter on the merits or direct that it be set down on the unopposed roll.

MAKARAU J (*as she then was*) went further and found that the bar against respondent in such circumstances is automatic and this brings forth a technical default and although a review of the merits of either case at this stage is provided for it may impinge on the discretion of a future court seized with an application to rescind the default judgement. The

Honourable Judge went on to use the discretion provided for in Rule 4C of the High Court Rules in the interests of justice and instead of directing the matter to be set down on the unopposed roll for the granting of a default judgement saved the incurring of further costs and delays by granting a default judgement in favour of the applicants. The route taken by MAKARAU J (*as she was then*) in the *Shadreck Vera* case (*supra*) is the route I specifically spelt out that I had taken.

> In the circumstances the default judgment in favour of the appellant reads as follows
>
> It is ordered that;
>
> a) The transfer of appellant to Masvingo police station be and is hereby set aside.
>
> b) That there be no order as to costs

Chirairo and associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners