

JAMES STEWART DRYNAN
versus
MAGISTRATE N. N KUTURE
and
ZIMBABWE NATIONAL ROADS ADMINISTRATION

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 24 June 2019

Opposed Application for Review

Applicant in person
M Mandevere, for the 2nd respondent

MUZENDA: On 18 September 2018 the applicant filed a court application for review seeking the following relief spelt out in the draft order:

1. The decision of the first respondent in which she made an order for the rescission of default judgment in court case number 127/18 in favour of second respondent be and is set aside.
2. The application of second respondent for rescission of default judgment be remitted for rehearing before a different magistrate.

On 28 September 2018 the second respondent filed its opposing papers.

BACKGROUND

On 5 February the applicant initiated summons at the Magistrates Court claiming US\$651-00 from the second respondent, Zimbabwe National Roads Administration. The applicant, on 21 May 2013 attempted to receive an exemption over a number of his motor vehicles from Zimbabwe National Roads Administration for the period extending 1 June 2013 to 31 May 2014. Zimbabwe National Roads Administration officials demanded a letter from a commercial garage certifying such automobiles in operative for a specified period. From 2013 to 2018 a number of correspondences took place between applicant and second respondent. In January 2018 the applicant was told by Zimbabwe National Roads

Administration to pay a total of \$696-00 licencing penalty and penalty fees up to 30 April 2018. Applicant admitted to pay \$45-00 but resolved to claim \$651-00 being the difference between \$699-00 and \$45-00 which amount he argued was excessive and unjustified in his view.

On 25 February 2018 a default judgment was granted in favour of the applicant. On 12 March 2018 Zimbabwe National Roads Administration filed an application for rescission of judgment. Second respondent also filed on the same date an *ex parte* application for stay of execution. On 26 March 2018 the applicant filed his opposing papers for the rescission of judgment as well as stay of execution. On 13 July 2018 the magistrate, first respondent in this application heard the application for rescission and stay and deferred her ruling to 27 July 2018.

It is common cause that both applications for rescission and stay of execution were granted. The second respondent was given leave by the magistrate to file a notice of appearance to defend. It filed it and then proceeded to file an exception to the current applicant's summons. Meanwhile the applicant embarked on a vitriolic attack of the judicial officer, the magistrate through writing of letters up to the Chief Justice. When the second respondent caused the exception to be set down for argument, the trial magistrate, recused herself, patently because of the attack by the applicant. The exception was set down for 11 September 2018 and postponed to 20 September 2018 so that a different magistrate would deal with the matter. Before the matter could be heard, as already indicated, the applicant filed a court application for review. Meanwhile the hearing of exception was deferred indefinitely until the finalisation of the review application.

On 24 June 2019 I gave the following order indicating that I would give reasons for that order.

“IT IS ORDERED THAT:

1. Points *in limine* raised by the 2nd Respondent is upheld.
2. Application for review is dismissed with costs on attorney client scale.”

On the very date, 24 June 2018, the applicant submitted a letter addressed to the Registrar which he wanted to be placed before me raising my attention “on matters which he might have overlooked in an attempt to deal expeditiously with the proceedings before him”, to use applicant's own words. As a matter of comment I read the letter but at that stage the court was *functus officio*. I could not revisit the proceedings. I opted not reply the letter, serve

to mention that the very points raised by the applicant had been extensively covered by the applicant in a document he produced in court. I had read the document and in principle covered the chronicle of what has built up in the matter before the application. I wonder why the applicant assumed that I had not appreciated what he had submitted but presumably because I had dismissed his application, he thought that I had missed the point. I had not and the following are my reasons for upholding the second respondent's preliminary points.

The second respondent submitted that the application for review is fatally defective for want of compliance with order 33 r 257 of the High Court Rules of Zimbabwe.

Rule 257 provides:

“The Court application shall state shortly and clearly the grounds upon the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for.”

The applicant did not outline these reasons on the application. They appear in paragraph 70 of his founding affidavit and stretches from paragraph 71 to paragraph 80. Even assuming that the grounds were stated by the applicant, they are not short and precise and maybe the applicant followed Rule 256. In addition, the exact relief prayed for by the applicant does not appear on the face of the application. It is peremptory that the provisions of Rule 257 must be complied with as well spelt out by MAKONI J (as she then was) in the matter of *Fabiola N. Gonye v Fadzai Mtombeni N.O and Others*.¹

“The import of the above rule is that an applicant seeking a review must approach this court by way of court application unless it is a proceeding in terms of any other law other than r.256. It is incumbent upon such application to state clearly in terms of which law is proceeding under in filing the application for review right at the outset. Where no such clear statement is made in the court application it will be taken that the applicant is proceeding in terms of r.256.”

Hence failure to comply with this rule constitute a fatal flaw.

“As regards the failure on the part of Chataura to comply with r. 257 of the High Court Rules, it seems to me that non-compliance would constitute good grounds for dismissing this application. R 257 requires that an application to bring proceedings under review shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. In the Pen Transport, Mushaishi and Marumahoko cases referred to earlier, the courts clearly stated that failure to comply with r. 257 constituted a fatal flaw. The time has surely come to say enough is enough and to dismiss the defective applications without considering the merits.”²

¹ HH 356/17

² Chataura v Zimbabwe Electricity Supply Authority 2001 (1) ZLR 30 (h) per SMITH J

In the matter of *Dandazi v Wankie Colliery Co. Ltd*³ the rationale of compliance with Rule 257 was reiterated and the court held:

“At this stage, I wish to make an observation which is relevant to many review applications that are brought to the High Court. In terms of Order 33 r. 257, it is a requirement that: The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. This is not an idle requirement. It was inserted in the rules of the court so that an applicant for review may apply his mind to the grounds upon which he seeks a review and be able to state them clearly and in brief form. Often, in review applications, all sorts of grounds are lumped together in the body by the founding affidavit making it very difficult for the presiding judicial officer to determine the grounds upon which the matter is to be reviewed. (my own emphasis).

This is exactly what the applicant did in this application. He vehemently argued that the grounds for review or relief sought, are part of the affidavit. I conclude that in the light of the above cases cited, that is a gross irregularity, such non-compliance with r. 257 goes to the root of the application, which only can be addressed by dismissing the application. Applicant’s grounds for review is that of bias and irrationality on the ruling of the Magistrate. Such a ground must equally be stated in the court application.⁴ A failure to do so is a gross irregularity which renders a matter improperly before the court and that is where the court held that:

“If as in the present case, the grounds are based on bias and gross irregularity in the proceedings, then those grounds must be stated in the application. A failure to do so, as was the case in this application, is a failure to comply with order 33 r. 257. The consequence of that failure is that the matter is not properly before the court and the applicant must not be heard.” (my own emphasis).⁵

I allowed the applicant to make submissions relating to both the points *in limine* and the merits. However having looked at the preliminary points capably addressed by the second respondent, I am of the view that the applicant’s papers are not in order and the points *in limine* were accordingly upheld with an order of costs on a punitive scale.

Kadzere, Hungwe & Mandevere, second respondent’s legal practitioners

³ 2001 (2) ZLR 298 (H)

⁴ See *Dandazi* case (*supra*)

⁵ See also the matter of *Minister of Labour & Others v Pen Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) per GUBBAY JA (as he then was)

