

**T.M. TRANSPORT**

**Versus**

**HAMANDISHE MUNDIYA**

**And**

**MAGISTRATE MUTUKWA N.O.**

IN THE HIGH COURT OF ZIMBABWE

MABHIKWA J

BULAWAYO 3 OCTOBER 2019 & 30 SEPTEMBER 2021

**Unopposed application**

**MABHIKWA J:** The applicant issued summons against the 1<sup>st</sup> respondent out of the Magistrates' Court at Kwekwe in case number KK 07/19. The now 1<sup>st</sup> respondent was the defendant whilst the now 2<sup>nd</sup> respondent was the trial magistrate in that case. The facts of that matter are not important in this judgment but briefly, they related to an alleged improper use of a hire truck belonging to the applicant. The 1<sup>st</sup> respondent, who was an employee of the applicant, allegedly misused the truck for hire for personal gain. The applicant demanded the value of the hire fees from him. 1<sup>st</sup> respondent filed appearance to defend the action. The 2<sup>nd</sup> respondent granted absolution from the instance in favour of the 1<sup>st</sup> respondent at the close of the then plaintiff's case.

The applicant has now filed this application in terms of Order 33 Rule 256 of this court's rules. The matter appeared before me on the unopposed roll. However, I directed counsel for the applicant to file submissions on the propriety of service of the application on the 1<sup>st</sup> respondent as he continuously said that 1<sup>st</sup> respondent's former lawyer was properly served in terms of the rules. There was also the issue of whether the matter could properly be brought by way of application for review.

In making this current application, the applicant served a copy of it on the legal practitioners who represented the 2<sup>nd</sup> respondent in the Magistrates' Court in case number KK 07/18. There was no response and the matter was set down on the unopposed roll.

In my view, it has erroneously become common practice by legal practitioners that once a person is represented by certain lawyers, then all process is served on those lawyers especially if the matters are related. This is not necessarily so. A lawyer who applies for an accused's bail has not necessarily been engaged for the trial. It would be wrong for instance for a prosecutor to just serve him or any lawyer from the firm with the state papers for that accused. A lawyer who represented a party in a trial or other hearing in court has not necessarily been engaged to represent the party in an appeal to a higher court. The lawyer needs specific instructions to represent that party in the appeal. It cannot be the other way round where the lawyer takes the appeal or review papers to his former client and asks for instructions. Every new case with its own case number notwithstanding the fact that it originates from another case, should be served directly on the litigant, who in turn would "retain" his legal practitioners services for the new matter. It is improper to simply assume that legal practitioners should be served with an application for review because they represented the party in a lower court in a related matter. In the absence of a general power of attorney, a legal practitioner does not represent a litigant in all or every matter relating to that litigant. There were many reasons for directing that counsel address that issue.

In court, counsel for the applicant argued that once the service was made and no papers were filed, it was not for the court to argue the 1<sup>st</sup> respondent's case. In his submissions as directed, counsel admits that the application for review was served on the 1<sup>st</sup> respondent's legal practitioners as shown by the certificate of service. Counsel further argues that it is common cause that the 1<sup>st</sup> respondent was represented at the Magistrates' Court trial. He further argues that the issues raised in the current application are purely legal in nature and prompted by a desire to have that lower court's decision reviewed. According to counsel, serving the application upon the respondent directly would amount to going behind another lawyer's back which would be equivalent to the legal practitioner communicating directly with the 1<sup>st</sup> respondent when he "is aware that 1<sup>st</sup> respondent is represented by a legal practitioner. In my view the two scenarios are different. Counsel is still making the same mistake of failing to make a difference between two (2) separate matters despite the fact the parties are the same and that an earlier trial matter gave rise to the current application at the High Court. It is certainly not the same case. Rule 39 of Order 5 cited by the applicant in the submissions do not apply in my view.

Counsel argues also that 1<sup>st</sup> respondent's legal practitioners, who had represented him at the trial should or would have refused to accept service if they

had not been contracted for this matter. One may add that or at least the legal practitioners should have had the courtesy to advise both the applicant and the court that they had no instructions pertaining to the application. In fact in court, counsel went further to insinuate that the 1<sup>st</sup> respondent and the legal practitioners who had been served, were well aware of the application and were not opposed to it.

On the issue of whether the matter was properly a review matter or an appeal in nature, I believe the applicant is right. Applicant argues that the said respondent made a completely irrational decision that was likely to have been an innocent legal error on the part of the 2<sup>nd</sup> respondent, not that it was based on malice or any ulterior motive. He submitted that an order for absolution from the instance in the circumstances was inappropriate.

Having gone through the papers together with the submissions later filed, I would agree that in such circumstances, it may appear as if the judicial officer is arguing the matter on behalf of a party who has not appeared before it. It would be up to the 1<sup>st</sup> respondent to take up the matter if need be and explain his default.

The 2<sup>nd</sup> respondent, who was cited in his official capacity and perhaps for obvious reasons, did not file any papers.

Accordingly, I make the following order,

1. The order for absolution from the instance in case number KK 07/19 is set aside.
2. The matter is remitted to the Magistrates' Court, Kwekwe for the continuation of trial.
3. There is no order for costs.

*Mhaka Attorneys c/o Majoko & Majoko, applicant's legal practitioners*  
*Mavhiringidze & Mashayare Legal Practitioners, 1<sup>st</sup> respondent's legal practitioners*