

EX-CONSTABLE THEBE MELULEKI 069816E  
versus  
THE COMMISSIONER-GENERAL OF POLICE  
and  
POLICE SERVICE COMMISSION  
and  
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 27 September & 13 November 2018

### **Opposed Application**

*N. Mugiya*, for the applicant  
*Ms M. Gezera*, for the respondents

ZHOU J: This is an application for an order that the alleged refusal or failure of the respondents to furnish the applicant with reasons for her discharge be declared to be unlawful and for the setting aside of the discharge of the applicant from the Zimbabwe Republic Police consequent upon the finding, as prayed for, that the discharge is wrongful and unlawful. The applicant also seeks costs against the respondents on the attorney-client scale. The application is opposed by the first respondent.

At the hearing of the matter the applicant objected *in limine* to the respondent's opposition on the ground that the opposition is invalid. The objection is predicated upon two grounds, namely (a) that the opposing affidavit was not properly commissioned as the stamp which appears below the signature of the commissioner of oaths states, *inter alia*, the following: "Certified true copy of original". The second ground of objection is that the commissioner of oaths who commissioned the affidavit is "the legal practitioner for the respondents". The other points *in limine* which had been taken were abandoned by Mr *Mugiya* for the applicants. For the first respondent, the objection taken is that the application is one for review in its substance, and ought to have complied with the requirements for the filing of an application for review as set out in Order 33 of the rules of this court. It is not possible for this court to relate to that point without inquiring into the

substance of the application, as that exercise entails assessing the grounds upon which the application is anchored. For that reason, the point taken in this respect pertains to the merits of the application itself and ought not to have been raised *in limine*.

The last part of the affidavit of Tandabantu Godwin Matanga which the applicant complains of contains the usual statement: “Thus done and sworn to at Harare this 8<sup>th</sup> day of March 2018”. Immediately below this statement is the portion where the deponent signed just above his typed names. The left side bears the word “signed” to signify that the line over the typed names of the first respondent is for his signature. Below the names of the deponent is the portion where the commissioner of oaths signed. The words “Before Me” then appear on the left side of the page opposite the line over which he inscribed his signature. Immediately below the line are the words “Commissioner of Oaths”. Then immediately below that appears the rectangular stamp which contains the following words: “Certified True Copy of the Original; 08 March 2018. Ephraim Mukucha, Commissioner of Oaths.”

In submitting that the use of the stamp of the commissioner of oaths described above invalidated the affidavit, reliance was placed upon the judgment of this court in *Mavis Muzamani v The Managing Director HR (E. Phiri) – Public Service Commission & Others* HH 610 – 17. That case does not assist the applicant, as the court in that case found that “the founding affidavit is a certified copy of the original as shown by the stamp”. The affidavit filed in this case is clearly the original copy which was signed by the deponent and by the commissioner of oaths. It is not a photocopy of the original, which makes it different from the affidavit in the *Mavis Muzamani (supra)* case. The answer to the applicant’s objection is authoritatively given in the case of *Firstel Cellular (Private) Limited v Netone Cellular (Private) Limited* SC 1 – 2015, where the same objection was taken to the stamp used to commission the affidavit on the same grounds raised herein. At pp. 4 – 5 of the cyclostyled judgment PATEL JA makes the following remarks which decidedly seal the fate of the applicant’s objection *in limine*:

“The respondent’s founding affidavit in the court below was sworn before one Raymond Moyo, a registered legal practitioner, who appended his signature above the designation “Commissioner of Oaths”. The stamp used for the purpose is one that would ordinarily have been used to certify copies of original documents as being true and correct. However, it also denotes Raymond Moyo as a commissioner of oaths and notary public . . . It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identify the

person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner. *In casu*, it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognized commissioner of oaths. The respondent has therefore verified its cause of action in an affidavit, deposed to by its functionary duly authorized thereto, before a clearly identified commissioner of oaths. That, in my view, suffices for the intended purpose of adducing evidence under oath and renders the validity of the respondent's founding affidavit manifestly impervious to challenge."

I would add that there is no requirement at law that the commissioner of oaths must stamp the document that he or she has commissioned. The commission is authenticated by the signature which is appended after the oath has been administered to the respondent. A stamp only helps in identifying the name of the commissioner of oaths where it does not appear in the affidavit or document which he has commissioned. For these reasons, the objection *in limine* is without merit and ought to be dismissed.

The other objection is that the affidavit was commissioned by the first respondent's legal practitioner. In this respect it was submitted that Ephraim Mukucha, the commissioner of oaths "is the legal practitioner for the respondent", merely because he is employed in the Civil Division of the Attorney-General's Office. It was submitted on behalf of the respondent, and was not challenged by the applicant, that Ephraim Mukucha is not the legal practitioner who is handling this case for the respondents. He is therefore not a legal practitioner for the first respondent but merely a public officer by reason of being employed in a Government department. On this account, the objection must fail.

As for costs, ordinarily these would have been left to be determined in the cause. But there is now an unprecedented obsession with the raising of misconceived points *in limine* which is permeating and pervading the legal profession. This approach to litigation must be censured and discouraged by awarding costs against those who unnecessarily delay the finalization of matters through the raising of unnecessary objections in order to avoid dealing with the substance of the dispute before the court. In future the court might have to consider mulcting the legal practitioners who raise unnecessary points *in limine*, as was done on behalf of the applicant *in casu*. Some of the objections raised were not even persisted with. Also, the case of *Firstel Cellular (Private) Limited v Netone Cellular (Private) Limited (supra)* which resolves one of the grounds of objection was actually cited by Mr *Mugiya* for the applicant, yet he persisted with the objection in the face

of that authority. This, in my view, is an appropriate case for the applicant to be ordered to pay the costs occasioned by the raising of the points *in limine* on the attorney clients scale.

In the result, IT IS ORDERED THAT:

1. The objections *in limine* raised by the applicants are dismissed.
2. The applicant shall pay the costs occasioned by the raising of the points *in limine* on the attorney client scale.

*Mugiya & Macharaga Law Chambers*, applicant's legal practitioners

*Civil Division of the Attorney-General's Office*, first respondent's legal practitioners