

CONSTABLE MUKANYA G. 081592L
and
CONSTABLE MUCHETU M. 085303V
and
CONSTABLE MUGWAGWA R 85490Y
versus
THE TRIAL OFFICER (SUPERINTENDENT NYAHANANA)
and
THE COMMISSIONER-GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 1 April & 24 July 2019

Opposed Application

N Mugiya, for the applicants
D Jaricha with him *Ms M. Makuvire*, for the respondents

ZHOU J: This is an application for permanent stay of prosecution of the applicants for contravening para 35 of the Schedule to the Police Act. The applicants also ask for the setting aside of the decision to discharge them from the Police Service, and costs of suit on the attorney-client scale. The application is opposed by the respondents.

The background to the application is as follows. All the applicants were constables in the Zimbabwe Republic Police up to the time of their discharge. They were charged for contravening para 35 of the Schedule to the Police Act. The details of the allegations are not contained in their affidavits. Having been found guilty the applicants were each ordered to pay a fine of \$10. They state that they appealed to the second respondent on 19 February 2016 which was a day after they were found guilty and sentenced. Applicants state that the District Clerk refused to accept or stamp their notice of appeal. On 23 February they filed their notice of appeal with the second respondent.

The issue of the alleged refusal of the officers concerned to accept the notice of appeal was dealt with and disposed of in a separate matter, Case No. HC 3607/16.

The first respondent states that after this court granted the order in HC 3607/16 the applicants did not serve the notice of appeal upon him as the Trial officer as is required by the Police (Trials and Boards of Inquiry) Regulations, 1965. He argues that there is therefore no pending appeal as far as he is concerned.

The precise nature of this application is difficult to understand. The applicants seek permanent stay of their prosecution. But there are no prosecution proceedings which are pending against the applicants. Instead, the applicants were found guilty and were discharged from the Zimbabwe Republic Police. They are the ones who are seeking to appeal against their discharge from the force although there is a dispute as to whether their appeal has been properly noted. They are the appellants. At best, therefore, the only proceedings which are pending are those in which the applicants are the *dominus litis*. It does not make sense for the applicants to seek stay of those proceedings since they can just withdraw them if they do not intend to pursue them.

The second relief sought is equally confusing. The applicants seek the setting aside of their discharge from the Zimbabwe Republic Police and their reinstatement to their previous positions. But this is the same relief which they are seeking to achieve through the appeal which they refer to in this application. This court cannot sit as the appellate court by granting that relief pursuant to the application *in casu*. If there has been a delay in the determination of the appeal the applicants' remedy is not to seek stay of execution because they are the ones who have instituted the appeal proceedings.

At the hearing of the matter Mr *Mugiya* for the applicants moved that the application be struck off the roll with each party bearing its own costs. The respondents objected to that relief and insisted that the application be dismissed. A matter can only be struck off the roll if there is some irregularity on the papers. The instant case is one that lacks substance on its merits, in that the relief which is being sought is not supported by the papers filed. For this reason, the application must be dismissed.

The respondents have asked for dismissal of the application with costs on the attorney-client scale. Attorney-client costs are a punitive order which is granted against a party who has misconducted himself or where there are special reasons to justify its granting. In the instant case

the nature of the application is difficult to understand. The affidavit tells a story which bears no relation to the relief being sought and does not in any way support it. The applicant's papers show either serious deficiencies in the capacity of those who prepared the papers or just or lack of diligence in ascertaining the cause of action that is being brought before the court and how it must be presented. After obtaining an order from this court directing the respondents to accept the filing of the applicant's notice of appeal the applicants did not proceed to seek to file such appeal. Instead, they approached this court through the instant matter seeking stay of proceedings and their reinstatement. The application is an unacceptable abuse of the procedures of this court. This approach has caused unnecessary expense to the respondents who have had to defend the application. For these reasons the special order of costs is justified.

In the result,

IT IS ORDERED THAT:

1. The application is dismissed.
2. The applicants are to pay the costs on the attorney-client scale jointly and severally the one paying the other to be absolved.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners