

SUPERINTENDENT ERNEST HUNGWE

AND

COMMISSIONER GENERAL AUGUSETINE CHIHURI

VERSUS

SERGEANT ONISMAS MAWEREZA

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 16 JUNE 2010 AND 15 JULY 2010

Mr. L. Musika for 1st and 2nd applicants with Assistant Inspector Maphosa and 1st Applicant
Respondent in person

Rescission of Judgment

CHEDA J: This is an application for setting aside a provisional order granted by this court on 13TH May 2010 on the basis that the said order was erroneously granted in the absence of the affected party.

The background of this matter is that respondent a police officer was charged with contravention of paragraph 35 of the Schedule to the Police Act [Chapter 11:10] as read with section 34 of the said Act. This relates to an allegation that he acted in an unbecoming manner. The full facts are not relevant for these proceedings. He pleaded not guilty, but, was, however, convicted and sentenced to 6 days imprisonment. He appealed to second applicant. He however, lost the appeal and served his six days imprisonment. Dissatisfied with that decision he applied for review under case no. HC 667/10 wherein he sought to quash the conviction referred to (*supra*).

The said application was served on the 11 June 2010 on first and second applicants at Ross Camp, Bulawayo. On the hearing day, there was no appearance and the application was granted.

In the present application it is applicant's contention that the review application was not properly served on them as required by the rules of this court in particular Rule 43B which reads:-

"43B. Persons upon whom notice and process to be served

Where a person mentioned in the first column of the Seventh Schedule is the defendant or respondent in any proceedings to which this Order applies-

- (a) the notice of intention to bring the proceedings required by section 5 of the State Liabilities Act [Chapter 54]; and
- (b) all process by which the proceedings are instituted or by which effect is given to any judgment arising out of the proceedings;

shall be served upon the person specified in relation to the defendant or respondent in the second column of the Seventh Schedule, and copies of the notice and process shall be served, for information, upon the person or persons specified in relation to the defendant or respondent in the third column of that Schedule".

The Seventh Schedule relates to service of court process upon state officers of which paragraph 4(a) reads:-

"SEVENTH SCHEDULE (RULE 43B)
SERVICE OF PROCESS UPON STATE OFFICERS.

<i>Defendant or Respondent</i>	<i>Process to be Served on</i>	<i>Copies to be Served, for information, on</i>
4. <i>Minister of Home Affairs</i>		
(a) in respect of any act or omission by a member of the Police Force	Commissioner of Police, or his private secretary, at the Commissioner's office	(a) Director of the Civil Division of the Attorney-General's Office, at the Director's office (b) Deputy Secretary (Finance and Administration) of the Ministry of Home Affairs, at the Deputy Secretary's office.

The question then is, was first and second applicant properly served in terms of the rules of this court. First applicant was personally served at his offices at Ross Camp, that admits of no doubt and accordingly, there was proper service. Respondent argued that Rule 43B as read with Rule 43A applies to claims for money only and not any other claims. It was further his argument that second applicant is aware of this procedure and practice. It is for that reason that he authored a directive through a radio communication signal which reads:-

**“FROM COMPOL LEGAL SERVICES.
TO ALL STATIONS CLASS H ZIMBABWE.**

RDO BTM 15/09 DATED 30 JULY 2009
SUBJECT: POLICE DISCIPLINARY TRIALS: DENIAL OF APPEALS

- - -

- - - should the affected party take the matter on review or **appeal** comma the decision will stand up to judicial scrutiny stop further comma where the president of a board has been served with court process challenging the convening of a board or an officer has filed his or her appeal with the High Court comma it is directed that the court papers be forwarded to legal services by the most expeditious means possible stop once a matter is before the High Court comma it is prudent to stay the board proceedings until the finalization of the High Court matter or appeal stop”. (my emphasis)

In my view, Rule 43B which is under Order 5 should not be read in isolation but with Rule 43A which reads:-

**“Order 5A
SERVICE OF PROCESS IN PROCEEDINGS AGAINST STATE**

43A. Application of Order

This Order shall apply to claims for-

- (a) money, whether arising out of contract, delict or otherwise; or
- (b) the delivery or release of any goods;

whether or not joined with or made as an alternative to any other claim, where the claims are instituted against-

- (i) the State; or
- (ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or
- (iii) any officer or employee of the State in his official capacity.”

This order is unambiguous as it is as clear as day light to an extent that even he who runs can read. My interpretation of it is that personal service to the Commissioner General is required, only, where the claim is sounding in money. Any other court process should be served at any police station for onward transmission to second applicant. This makes sense as all police stations throughout the country are directly linked to the Police General Headquarters. Second applicant and all other police stations are aware of this practice hence the radio communication signal of the 30th July 2009 directing all police stations to forward court papers relating to either review or appeal matters to the legal services in Harare.

On issuing these instructions second applicant specifically directed his subordinates to expeditiously forward court process to him so that his officers can comply with all the legal requirements. The fact that, they probably did not act timeously is their own shortcoming which cannot be visited upon the respondent.

I, therefore, find that there was proper service upon both applicants and accordingly there was indeed wilful default on their part. The application is accordingly dismissed.

Cheda J.....

Civil Division Attorney General's Office, defendant's legal practitioners