JAMES STEWART DRYNAN
versus
MAGISTRATE N. MUCHINERIPI
and
WILDLIFE AND ENVIRONMENT ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 21 October 2019

Opposed Application

Applicant in person
1st and 2nd respondents in default

MUZENDA J: Mr James Stewart Drynan (Applicant) filed a court application for review seeking the following relief.

"Having heard the applicant in person and documents filed of record, it is ordered that:

1. The decision of the 1st respondent in civil case 1150/18 be and is set aside.
2. The second respondent's summons in civil case 1150/18 be and is hereby dismissed."

The second respondent opposed the application and filed even heads of argument but however on the date of hearing at 1130 hours it did not turn up. The return of service shows that the notice of set down was served at the receptionist of Messrs Maunga Maanda and Associates Legal Practitioners. As such the second respondent was in default. The applicant did not apply for a default judgment and the court requested him to address it on whether given the facts on papers and the nature of relief contained on the draft order he ought to have filed an appeal against the decision of the court *a quo* than file review proceedings. The applicant insisted that he had made a proper application for review without elaborating further that point.

Facts

The applicant commenced taking health strolls on a gravel road situated in the second respondent's properly from 2016. The label on the metal sign fixed to the entrance was written "WEZ MANICALAND" and 'CECIL KOP NATURE RESERVE" an emblem of a Kudu was drawn there. Applicant assumed that the place was a sub-branch of the National Parks. He

spoke to an employee who mans the entrance gate and informed him that he desired to walk along the thoroughfare for physical fitness, according to him, he was informed by the security guard that there was no need for a fare. He walked along the course for 2 ½ years.

Had the applicant not poked his nose into the goings on at the park he would have continued to use the gravel road without incidence. He started posting on social media about the degradation of the environment and subsequently invited the attention of the second respondent either for trespassing or using second respondent's facilities without payment. On 18 November 2018 applicant attempted to walk up the hill of second respondent and the gate keeper blocked him, for him to go in he had to pay $2-00. The applicant would have none of that, he returned to his home frustrated. On 10 November 2018 he received an e-mail from second respondent bringing to applicant's attention that he owed $2 190-00 for 1 095 days he had been going into second respondent's property without payment. On 11 November 2018 applicant responded to the demand stating that he was allowed by the gatekeeper to walk through for free, he was not obliged to pay. He was then slapped with summons for the $2 190-00.

The causes for the application for review according to the applicant's papers are scanty. However during the trial proceedings the applicant during cross-examination of the second respondent's witness tried to challenge the amount of $2 190-00 and without admitting liability stated that if he owed second respondent any money it would be 1 360-00 and not $2 190-00. The amount of $1 360-00 was then deduced by the trial court to be the amount admitted by the applicant and was granted as the judgment debt. The applicant has a good argument on that aspect but nevertheless brought review proceedings instead of an appeal against decision of the trial magistrate.

The court application for review on its face does not comply with the mandatory provisions of r 257 of the High Court Rules, 1971, the court application does not state shortly and clearly the grounds upon which applicant sought to have the proceedings in the court *a quo* set aside on review. In the applicant's founding affidavit the grounds of review specified on the face of the application: "illegality, irregularity, dishonesty, and bias" are not explained extensively. The applicant must establish his cause of action in his founding affidavit, failure to do so indeed constitutes a fatal blow to an application for review[1]. The cases cited have

[1] Minister of Labour v PEN Trnsport S 45-89
Mushaishi v Lifeline Syndicate & Anor, 990 (1) ZLR 284 (H)
Psc & Anor v Marumahoko 1992 (1) ZLR 304 (S)

stated that the failure to comply with r 257 is a fatal blow warranting the dismissal of an application for review.[2]

It is also important to register the displeasure of the court for litigants who unreasonably join a magistrate in his personal capacity, deliberately dragging a court official who was doing his or her work in an official capacity; that to the court is a fatal misjoinder to review proceedings. The citation of the magistrate should have the words "*Nomino Officio*) or "N.O" so as to avoid exposing such official to issues of costs etc. failure to cite the presiding judicial official in his/her official capacity is a violation of r 256 of the High Court Rules. Having done that the applicant goes on to allege bias and dishonesty on the part of the judicial officer and does not elaborate as to how biased he was nor how dishonesty he was. No grounds to justify such a serious allegations were laid by the applicant.

The court could have dismissed the application with costs but the second respondent chose not to attend the hearing.

Consequently the following order was returned.

"The application for review does not comply with rr 256 and 257 and is accordingly dismissed with no order as to costs."

Drynan v Magistrate Kuture & Anor HC 130/18

[2] Gonye v Mutombeni N.O and Ors,
Dandadzi v Wankie Colliery Co. Ltd 2001 (2) ZLR 298(H)