

NYANGA RURAL DISTRICT COUNCIL  
versus  
MUCHINERIPI N.O.  
And  
TABETH RAKABOPA

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE,

### **Opposed Application**

MUZENDA J: This application had been set for hearing on 31 July 2023 at 0900 hours. Parties then agreed that the matter be decided on the papers filed of record. As a result there was no appearance of counsel.

On 21 March 2023 applicant filed an “*application for review in terms of r 62 of the High Court Rules, 2021*” seeking the following relief:

***“IT IS HEREBY ORDERED THAT:***

- 1. The decision of the first respondent refusing the applicant to amend its pleadings be and is hereby set aside.***
- 2. The applicant’s pleadings shall be amended to include the amendment as set out in the notice to amend filed with Clerk of Court Nyanga on 22 February 2023.***
- 3. The pre-trial conference shall be held afresh before another magistrate.***
- 4. There shall be no order as to costs except in the event of the second respondent opposing this application, she shall bear the costs of this application.”***

Second respondent opposed the application.

### **Background**

The facts of the matter are well captured by the parties. On 24 October 2021 Tabeth Rakabopa (second respondent)’s property was damaged by Quick Blast Civil Engineering (Pvt) Limited, leading second respondent to sue applicant and Blast Civil Engineering for damages amounting to USD 2,644-00. Quick Blast Engineering had been contracted by applicant to do some civil works, during that process a rock boulder fragments struck and damaged second respondent’s house.

Parties went through the filing of pleadings until a date for a pre-trial conference was set. Blast Civil Engineering did not attend the pre-trial conference. Realizing the inadequacy of its plea to second respondent’s claim, applicant counsel made an application from the bar

seeking to amend applicant's plea, mainly submitting that it had unearthed new information which was not available to it at the time the plea was prepared. Second respondent opposed the application to amend.

In its ruling, first respondent, the magistrate remarked that, a court has a wide discretion on whether or not to grant an application for amendment of pleadings and went on to cite the matter of *Agricultural Bank of Zimbabwe Ltd vs Nickstale Investments* (2010(2) ZLR 419(H)). First respondent added that in the case before her the amendment “*was prejudicial to the plaintiff and malafide and cannot be (cured) by an order of costs.*” She added that the amendment was an afterthought and belated and referred the parties to the case of *UDC Ltd vs Shamva Flora (Pvt) Ltd* (2000 (2) ZLR 210 (H)). First respondent cautiously observed further in her ruling that she was alive to the fact that an application for amendment of pleadings can be made at any stage before judgment, but however concluded that the fact that was sought to be included in the amendment by applicant was essential to the applicant's defence and as such was ought to be the first to be pleaded. She proceeded to dismiss the application for amendment.

Aggrieved by the dismissal of the application, applicant decided to bring this application outlining grounds for review as follows:

1. *The decision of the first respondent to refuse the applicant the right to amend its plea before proceeding with the pre-trial conference hearing was erroneous and activated by bias and was a breach of the law in that she did not apply her mind to the facts and the law.*
2. *After a valid application to amend the pleading was made, the refusal by the learned magistrate to accept or allow applicant to amend its pleadings at pre-trial stage was a decision so outrageous in its defiance of logic or acceptable moral standards that a reasonable person who had applied her mind to the question to be decided could have arrived at it.*
3. *The decision was clearly faulty in that all case authorities cited for the learned magistrate to use did not support her decision but she nonetheless proceeded to refuse the amendment in circumstances which defies legal precedence.*

*WHEREFORE, Applicant prays for*

1. *That the application for review succeeds.*
2. *The decision of the first respondent at the pre-trial conference be and is hereby set aside.*
3. *The applicant's amended plea be and is hereby allowed to form part of the trial issues.”*

On 3 April 2023 second respondent opposed the application for review. In her opposing papers second respondent raised a preliminary point to the effect that the grounds set by applicant for review are badly drafted and effectively defective. To second respondent, applicant is challenging the correctness of the decision of the magistrate and not the court's procedural import. The lay-out of applicant's grounds for review amounts to an appeal against untermiated proceedings, second respondent added. She prays for the upholding of the point in *limine* and moved the court to dismiss the application with costs.

On the merits second respondent contends that there are no grounds laid by the applicant to trigger this court to interfere with the magistrate's proceedings. She added that the applicant's application for review is bad at law. Applicant was not supposed to apply for amendment of a plea but to seek admissions during the pre-trial conference proceedings. To second respondent the magistrate acted within the confines of the procedural boundaries at law and gave reasons for her decision.

In its answering affidavit applicant insisted that it had spelt out appropriate grounds for review. It emphasized that the magistrate in refusing to postpone the pre-trial conference exhibited partisanship or bias. The application was further based on the foundation of gross irregularity in the proceedings or decision on the part of the presiding judicial officer. It denies that the application is a disguised appeal. Applicant also refutes second's respondent allegations that the application for review is bad at law and adds that first respondent failed to apply her mind to the facts and the law. Further applicant alleges that first respondent did not avail reasons for her ruling. To applicant an application for review requires one to prove procedural irregularities and or bias, and applicant has managed to pass that hurdle in its papers. Applicant counter prays that the preliminary point by second respondent be dismissed and moves the court to grant the order on merits as per draft.

I will deal with preliminary point first and if the preliminary point is upheld then the application for review will be struck off but if it is dismissed I will then deal with the merits of the application.

### ***WHETHER THE APPLICATION IS DEFECTIVE***

In the case of *Zvomatsayi and Others v Chitekwe N.O and Another* 2019(3) ZLR 990(H) it was serminally held that:

*“A review is not concerned with the merits of the decision but whether it was arrived at in an acceptable fashion. The focus is on the process and on the way in which the decision maker came to the challenged decision. Instead of asking whether the decision was right or wrong, a court on review concerns itself with the procedural irregularities.”*

An appeal is thus based on the argument that the decision appealed against is wrong on the facts or in law. A review is based on the argument that the method used to arrive at the decision was wrong. In an appeal the parties are bound by the record, yet in a review the irregularity may not appear from the record and the applicant may have to prove facts outside the record. Hence there are three types of review. A review of the proceedings of an inferior court, review of decisions of quasi-judicial bodies, in this case the court takes into account the

principles of natural justice and thirdly reviews done in terms of particular statutory provisions. In all review proceedings arising from the three classes alluded to herein, all are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings.

**Applying the law to the facts of this application**

The first ground for review by applicant is that the magistrate “refused applicant the right to amend its plea before proceeding with the pre-trial conference hearing”. The second ground of review is that “*after a valid application to amend the pleading was made, the refusal by the learned magistrate to accept or allow applicant to amend its pleadings at pre-trial stage was a decision so outrageous in its defiance of logic or acceptable moral standards.*”

The third ground of review was crafted by applicant as follows “*the decision was clearly faulty.*”

The first and third grounds of review apparently relates to the question whether the decision was right or wrong, the second ground impugns the decision of the magistrate to refuse amendment and hence equally focuses on the ruling arrived at by the magistrate. It is the structure and format of the grounds for “*review*” that prompted second respondent to raise the preliminary points. In my view the exception or preliminary points are valid. The applicant’s focal point is centralized on the decision reached by the magistrate, they are all based on merits of the decision made by the trial court. None of the three grounds address the epitome of a review application, that is whether the decision was arrived at in an acceptable fashion. The real focus is fundamentally constructed and had edifice on the process, and on the way the decision maker came to the challenged decision, a review court concerns itself with the procedural irregularities. I am therefore persuaded by second respondent’s contention that the structure of the grounds are better defined as fit for an appeal than for review. Second respondent allowed applicant to make an application for amendment and second respondent was given an opportunity to respond, then a ruling was made. Applicant did not lay facts impugning that procedural trajectory taken by the magistrate, which procedural irregularity would justify intervention by this court. What is clear is that applicant was not happy with the decision of the court, believing that it was not correct, filed this application.

I uphold the point in *limine*.

The application for review is not properly before me for lack of compliance with applications for review. The application is struck off and applicant to pay second respondent's costs.

*Warara and Associates*, applicant's legal practitioners  
*Zimbabwe Lawyers for Human Rights*, 2<sup>nd</sup> respondent's legal practitioners