HMA 06-25
HMSC 126-24

GODWAY GURAJENA 551503W
versus
COMMANDANT CRISPEN MHERENDUKA N.O
(ZIMBABWE MILITARY ACADEMY)
And
ZIMBABWE NATIONAL ARMY
And
ZIMBABWE DEFENCE FORCES
And
MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 17 January 2025
Judgement delivered: 17 February 2025

Opposed application

N. Mugiya, for the applicant

T. Undenge for the respondents

ZISENGWE J: This is an application for a *declaratur* and consequential relief wherein the applicant seeks an order in the following terms:

IT IS ORDERED THAT:

1. The discharge of the applicant from the regular officer cadet training course and the army by the respondents be and is hereby declared to be unlawful and wrongful.
2. The respondents be and are hereby ordered to reinstate the applicant into the regular officer cadet training course at the Zimbabwe Military Academy – Gweru and the army at least not later than 14 days from the date of this order.
3. The respondents are ordered to pay costs of suit on a client-attorney scale.

The application comes in the wake of the applicant's discharge from the Zimbabwe National Army where he was undergoing training as an officer cadet at the Zimbabwe Military Academy in Gweru. The brief background to the application is as follows. The applicant was

attested into the Zimbabwe National Army (ZNA) on 1 January 2022. His position was that of officer cadet. All things being equal he would have completed his draining in 21 months. However, things did not go as planned as on 23 April 2023, he was discharged as aforesaid.

The reasons for his discharge are contested. As a matter of fact, the applicant avers in his founding affidavit that he was literally "thrown out" of the academy and was never furnished with the reasons for the discharge. He claims that to date he remains in the dark with regards to why he was discharged. He further avers that his efforts at trying to obtain reasons for his dismissal have been fruitless.

He however chronicled a series of events which he believes were the true reasons for his discharge. In a nutshell he surmises that he was victimised for having dared to expose wanton brutality against officer cadets by instructors at the academy. He avers that he was on the receiving end of a severe and sadistic beating for no other reason than that his name had been included in a list of cadets who were perceived as be problematic. That list had been compiled by an officer he identified as CBM Mavhoro. He claims that following the compilation of that list he was subjected to torture and was injured to the extent that he needed hospitalisation. He attached photographs of the injuries he says he sustained in the course of the torture. The torture according to him was to force him to admit and compile a report that he was one of the problematic officer cadets, which he flatly refused to do.

He claims that the director (presumably the Provincial Medical Director) compiled a damning report regarding the nature and extent of his injuries. The result was that a number of the instructors were transferred from the ZNA. From then on, according to him, things took an even more sinister turn as he was made aware in no uncertain terms that he had the choice of either leaving the training or face the spectre of his death should he dare remain.

He also recounted an incident which took place in February 2023 where he claims to have been tortured and assaulted by an officer he identified as Captain Damba in a bid to induce him to admit that he had been smoking dagga during training. In a word therefore, he expressed the belief that his discharge was for no other reason than that he caused the transfer of several officers from the academy and for having flatly refused to compile a repot implicating himself in acts of indiscipline, not least the smoking dagga during training.

The application stands opposed by the respondents. In this regard the first respondent deposed to an affidavit giving a version of events diametrically opposite to that of the applicant. In short, the first respondent avers that the applicant turned out to be an unrepented and incorrigible deviant (although he did not say so in as many words).

While confirming the applicant's averments regarding the assaults he received and his subsequent hospitalization and the disciplinary action taken against the offending instructors, he asserts that the applicant was discharged for persistent indiscipline. He described him as an officer cadet who did not heed to the several warnings which preceded the discharge. He attached eight warning certificates which he claims were issued to the applicant which failed to achieve the desired deterrent or reformative effects.

Further, the first respondent denied that the applicant's averment that he was not informed of the reasons for his discharge. He stated that as a matter of fact the applicant was advised that his discharge was on account of repeated acts of indiscipline.

The first respondent also averred that the applicant's academic performance was fell short of the standard expected by the academy. The first respondent also disputed the applicant's position that the respondents failed to respond to his appeal. He pointed out that for the applicant's appeal was filed out of time and that no application for condonation having been sought rendered it a nullity.

Apart from resisting the application on the merits, the first respondent also raised a preliminary point to which I will turn shortly.

In his answering affidavit the applicant distanced himself from the warning certificates. He claims that there are false and contrived by the respondents designedly to mislead the court and defeat the present application.

The point in *limine*

The first respondent urged the court to dismiss the application because, according to him, it is merely an application for review disguised as a *declaratur* so as to circumvent the time limits for review.

This was disputed by the applicant who in his answering affidavit insisted on characterizing the application as one for a *declaratur*.

It is trite that in determining whether an application is one for a review which has been disguised as one for a *declaratur*, the court considers its substance rather than what the parties elect to call it. Further, a party who would otherwise have been required to file an application for review within the specified time limits should not be allowed to circumvent those time limits by the subtle subterfuge of merely disguising it as one for a *declaratur*.

In City of *Mutare* v *Mudzime Ors* 1999 (2) ZLR 140 (S), the court referred to *Kwete* v *Africa Community & Publishing Trust & Ors* HH-216-98 where Smith J said at p 3 of the cyclostyled judgment:

> It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal from employment, the provisions of r 259 of the High Court Rules 1971 should be complied with, one should look at the grounds on which the application is based, rather than the order sought... It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review. One can imagine the case of a litigant who institutes an application for review and reinstatement well out of time. He applies for condonation, which is refused. All then he has to do is to institute a fresh application for review but instead of seeking reinstatement, he wants a declaratory order. Should he be able to get round the provisions of Order 33 of the High Court Rules 1971 that easily? I think not.

It is only in situations where the applicant has shown that the decision in question is null and void *ab initio* that a court should be slow to turn away a petitioner solely because he ought to have pursued a review instead of a declarator, *Musara* v *Zinatha* 1992 (1) ZLR 9 (H), or where there is just sufficient basis for the granting of a *declaratur*, *Geddes* v *Taonezvi* 2002 (1) ZLR 479 (S), *Bayat & Ors* v *Hansa & Ano* 1955 (3) SA 547 where at 552 C-D.

In *casu*, a perusal of the applicant's founding affidavit and heads of argument reveals that his case is primarily premised on the following grounds:

a) That he was discharged from the army without trial and without following due process (see paragraph 21 of the founding affidavit).

b) That he was never furnished with a discharge letter nor with the reasons for the discharge and that to date he is unaware of the reasons for the discharge (paragraph 23 of the founding affidavit).
c) That all efforts to obtain reasons for his discharge have been frustrated at every turn by the respondents (paragraph 24 of the founding affidavit).
d) That his attempt at appeal have been ignored (paragraph 26-29 of the founding affidavit).

The panoply of facts set out by the applicant are such as to lay just enough a foundation to bring the application under the realm of one for a *declaratur*. He appears aggrieved not just by the failure by the respondents to afford him a proper hearing prior to his discharge or by the fact that he was not furnished with reasons for his discharge. These two would have been quintessentially matters for review. The complaint that one was not subjected to due process in that no disciplinary proceedings whatsoever were conducted is typically a ground for review. It is basically a complaint that his right to be heard was violated. Similarly, a complaint to the effect that one was never furnished with a discharge letter nor with the reasons for the discharge and that he remains in the dark on such reasons is one that is subject to review. One only has to have regard to the s 3 (1) (c) of the Administrative Justice Act, [*Chapter 10:28*] which requires that reasons for any administrative decisions be furnished to appreciate that failure to provide such reasons can be challenged on review.

His grievance against the conduct of the respondents is much more than that. He claims that not only was he dismissed without a proper hearing, but also that he has been frustrated by the respondents at every turn in his quest to seek redress.

Section 14 of the High Court Act [Chapter 7:06] grants the High Court the discretion to grant declaratory orders. It reads:

> **14. High Court may determine future or contingent rights.**
>
> The High court may, it its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.

In interpreting this provision, GUBBAY CJ in Johnsen v Agricultural Finance Corp 1995 (1) ZLR 65, had this to say:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court of Zimbabwe Act, 1981 is that applicant must be an "interested person" in the sense of having a direct and substitutional interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties……"

The principles governing the granting of a declaratory order have since been distilled to consist of the following:

a) The applicant must be an interested person in the sense that he or she must have a direct interest in the right to which the order relates;
b) There is a right or obligation which becomes the object of the inquiry;
c) The applicant must not be approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
d) There must be interested parties upon which the declaration will be binding; and
e) Considerations of public policy favour the issuance of the *declaratur*.

See *MDC* v *The President of Republic of Zimbabwe & Ors* HH-28-2007 & *Family Benefit Society* v *Commissioner for Inland Revenue & Anor* 1995 (4) SA 130 (T).

There cannot be any doubt with regards to the applicant having met the first, third and fourth requirements. With regards the first, the applicant has a direct interest in the determination of the legality of his discharge. As far as the third requirement above is concerned, it is apparent that the determination he seeks is neither merely academic nor abstract. He seeks to be reinstated as an officer cadet within the ZNA. Finally, the fourth requirement, is amply satisfied, should the application succeed, it will be binding on the respondents whose discharge of the applicant from the academy will be set aside with the consequence that they will be required to reinstate the applicant.

The second requirement however is a different kettle of fish! As a prelude to interrogating the second and fifth requirements it in instructive to emphasize the discretionary nature of the granting of declaratory orders. Section 14 of the High Court Act gives this court the discretion whether or not to grant the declaratory order sought. In *RK Footwear Manufacturers (Pvt) Ltd* v *Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 it was stressed that before a court can grant a declaratory order it has to consider not only if the applicant is an interested person in any existing, future or contingent right but also whether the case is a proper one for the court to exercise its discretion. It is against this backdrop that the rights relied upon by the applicant will be inquired into.

The alleged arbitrary discharge from the academy.

The applicant claims to have been arbitrarily, without any hearing whatsoever, literally bundled out of the academy. The first respondent, however, in his opposing affidavit sought to set the record straight. He averred, as earlier stated, that the applicant turned out to be an unrepentant deviant who was constantly breaching the training regulations. He attached to his opposing affidavit eight warning certificates issued to the applicant for his unbecoming conduct. These warning certificates relate to various disciplinary transgressions, ranging from smoking dagga during training to absenteeism to impunctuality and to poor academic performance. Those certificates, entitled STI's (which should be an acronym for Standard Training Instructions) appear to bear the applicant's signature, although he attempts to distance himself therefrom.

What the applicant is therefore inviting this court to do is to disregard these warning certificates as being inauthentic. To do so, however, in my view is to take a quantum leap of faith. It would imply accepting at face value that the warning certificates are indeed fake as suggested by the applicant, and were manufactured by the respondents to mislead the court designedly to thwart this application. The applicant's own narration of events, however, gives the distinct impression that prior to his discharge, he had several serious run-ins with the instructors at the academy. This in turn lends credence to the respondents' position that the applicant was issued with the warning certificates in question.

The alleged failure to be provided with reasons for discharge.

The first respondent attached to his opposing affidavit documentary evidence showing that the applicant was served with the recommendation for his removal and that same was acknowledged by him. According to the first respondent the applicant pleaded to be afforded a second chance.

Again, what the applicant is inviting the court to do is to assume that this document was fraudulently manufactured by the respondents to achieve the same ignoble end of sanitising their illegal acts. Apart from the applicant's mere say so, there is no cogent reason for so concluding.

The alleged failure to process the applicant's appeal.

Here, the applicant's complaint is basically that his attempts at appealing his discharge have been frustrated by the respondents who chose simply to ignore it. The first respondent in countering this pointed out that for the applicant's appeal was filed out of time and that no application for condonation was sought rendering it a nullity.

From the evidence produced by the parties as whole and particularly the evidence adduced by the respondents in rebuttal of the applicant's averments, I do not believe that is a proper case for the court to exercise its discretion by granting the *declaratur* sought. The documentary evidence availed simply does not support the granting of such a declaratory order. Granting the declaratory order on the facts availed would (unjustifiably) require making far too many assumptions on the events that led to the applicant's discharge from the academy and the authenticity of the documents availed.

Public policy considerations

Further, given the specialised nature of military training with its attendant emphasis on discipline and the strict respect of the hierarchical structures, the court must be slow to set aside the respondents' disciplinary findings. This is particularly so where, as here, there is evidence of repeated acts of indiscipline by an officer or officer cadet. It is on this basis that I believe that public policy also demands judicial restraint before interfering with disciplinary action taken against a serving member or one in training.

In the final analysis, therefore, the application cannot succeed.

Costs

The general rule is that costs follow the cause. However, the respondents did not include a prayer for costs in either their opposing affidavit or the heads of argument, therefore none will be given.

Accordingly, the application is hereby dismissed with no order as to costs.

Mugiya Law Chambers, applicant's legal practitioners.
Civil Division of the Attorney General's Office; respondents' legal practitioners