EX-CONSTABLE MUKARAKATE N
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 01 July 2019 & 08 January 2020

Opposed Application

N Mugiya, for applicant
D Jaricha, for respondents

TAGU J: The applicant wants this court to declare that the discharge of the applicant from the police service be and is hereby held to be unlawful and wrongful, that the second respondent is ordered to reinstate the applicant into the Police Service without loss of salary and all benefits and that the respondents pay costs of suit jointly and severally, one paying the other to be absolved.

The facts from the papers are that the applicant then a constable in the Zimbabwe Republic Police was charged for contravening paragraph 34 of the Schedule to the Police Act [*Chapter 11.10*] and was convicted by a single officer in terms of section 29A of the Police Act and sentenced to pay a fine of $10 on the 10th of August 2012. It being alleged that during the course of his duties he connived contrary to his duties as a Police Officer, with a known stock thief one Elliot Rwatirera to steal a heifer at Farm Number 202, Zvidhuri Area, Dorowa and he went on to clear the said stolen beast. On the 29th of October 2012 the first respondent convened a board of Inquiry (Suitability) in terms of section 50(1) of the Police Act to look into the applicant's deteriorating conduct. The applicant was duly served with a notification Form 219 to appear and make representations in his defence. He duly signed the notification Form. The applicant was duly discharged from the Police Service through a radio signal by the first respondent. He appealed to the second respondent in terms of section 51 of the Police Act as read with section 15 of the Police (Trials and Boards) Regulations 1965 and was automatically but briefly reinstated. On the 31st of

July 2013 the applicant was again discharged from the Police Service by the second respondent who claimed to have dismissed his appeal.

It is the applicant's contention that when he was dismissed on two occasions he was not furnished with reasons in violation of s 68 (2) of the Constitution. He further submitted that when his appeal was dismissed he was not in terms of s 68 (2) given any reasons. Having failed to get reasons he filed the present application for a declaratur seeking the relief I stated above couched as follows.

"IT IS ORDERED THAT:

1. The discharge of the Applicant from the police service be and is hereby held to be unlawful and wrongful.
2. The 2nd Respondent is ordered to reinstate the Applicant into the Police Service without loss of salary and all benefits.
3. The Respondents to pay costs of suit jointly and severally, one paying the other to be absolved."

The respondents opposed the application and submitted that the applicant was advised that he was being discharged for being unsuitable for police duties and that the record of proceedings has since been mailed to the applicant's representatives Mugiya and Macharaga Law Chambers No. 8 Belvedere Road, Kopje Harare.

The applicant appeared before a single officer in terms of s 29A of the Police Act and was convicted and sentenced to pay a fine of $10.00 on the 10th of August 2012. The applicant appealed against conviction and sentence to the second respondent. His appeal was dismissed. He was ordered to appear before a suitability Board which confirmed his conviction and sentence. He was then discharged from the Police Service. He claims that he requested for reasons and same were not availed. Assuming he did so no proof has been availed.

However, pending his appeal to the second respondent the applicant was temporarily reinstated. After dismissal of his appeal by the second respondent and after attending a Board of Suitability Inquiry, the applicant was finally dismissed from the Police Service. His contention is that on both occasions he was not furnished with reasons for dismissal in contravention of s 68 (2) of the Constitution. He now wants this court to declare that his dismissal from the Police Service unlawful and wrongful and that he be reinstated back into the Police Service without loss of salary and benefits.

The issues to be decided in this case are whether or not the applicant Has brought an application for review couched as a declaratur, whether or not the applicant was not given reasons in terms of sections 68 and 69 of the Constitution, whether or not the applicant was supposed to be afforded the right to be heard on appeal and if not the remedies available to him.

Both respondents opposed the application.

According to the first respondent this application is fatally defective. He submitted that the applicant purports that this is an application for a Declaratur but paragraph 2 of his draft order reflects that he seeks reinstatement. It was further submitted that it is an established rule under s 14 of the High Court Act [*Chapter 7.06*] that an application for Declaratur as envisaged therein cannot claim a consequential relief upon such determination. It is a fact that a remedy of reinstatement without loss of salary and benefits is a consequential relief which cannot be granted in terms of s 14 of the High Court Act. The first respondent further averred that the only reasonable explanation as to why applicant has approached this court through a Declaratur is found on the fact that he is inordinately outside the time within which to file an application for review. Paragraph 5 of the applicant's affidavit attest to the fact that he was discharged from the Police Service in July 2012. The eight weeks within which he was required to file a review application lapsed hence applicant made an attempt to circumvent his delay to act within time by filing this disguised application. As to the allegations that the applicant was not advised of the reasons for discharge the first respondent submitted that the applicant was duly advised that he was being discharged for being unsuitable for police duties on the 31st of July 2013 as per radio signal marked Annexure "A".

The second respondent on the other hand denied that a request was ever made for the reasons and if same had been made it could have been submitted. However, the second respondent submitted that the record of proceedings was forwarded to the applicant's representatives Messrs Mugiya and Macharaga Law Chambers at No. 8 Belvedere Road. Kopje, Harare. As to the fact that the applicant was not accorded an opportunity to be heard when his appeal was heard, the second respondent submitted that he deals with appeals on paper. For that contention he cited s 51 of the Police Act [*Chapter 11.10*] which provides that-

> "A member who is aggrieved by any order made in terms of section forty –eight or fifty may appeal to the Police Service Commission against the order within the time and in the manner prescribed, and the order shall not be executed until the decision of the

> Commissioner has been given. The aggrieved member is required to submit his grounds of appeal on paper."

The second respondent therefore submitted that the appeal is decided on the written facts that the concerned member would have presented and the second respondent communicates the decision thereafter. The second respondent further said he does not hold inquisitorial sittings or hearings with applicants or respondents. His role being to observe whether procedural fairness was observed.

WHETHER OR NOT APPLICANT BROUGHT AN APPLICATION FOR REVIEW COUCHED AS A DECLARATUR?

Section 14 of the High Court Act provides that-

> "The High Court may, in 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."

My understanding of the wording of section 14 of the High Court Act is that all that a person can get is to have a declaration of rights and no other relief. In *Shabank & Others* v *Culemborg Banking Corporation Ltd and Another* 1962 (2) SA 450 the Court clearly defined the meaning of the contents of the above mentioned section. It held that the words ''notwithstanding that such person cannot claim any consequential relief upon the determination" prima facie imply that when a person can claim consequential relief it is not proper for him to seek bare declaration of rights. In the case of *Econet Wireless* v *Minister of Public Service Labour & Social Welfare & Others* (HC-2760/12) [2015] ZWHHC 350 it was rightfully argued and such argument was upheld by the Court that the Court must not look at the form but the substance of the application for a declaratur. In *Musana* v *Zinatha* 1992 (1) ZLR 9 (H) ROBINSON J at p 14 C-D said-

> "At the outset I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the audi alteram partem principle and bias, which relate to the subject of review…"

In the present case the applicant was first discharged from service on the 31st of July 2013, but it is no mystery that the applicant did not approach the High Court on review, since an application for review must be made within 8 weeks from the date on which the cause of action arose. He therefore brought this application for a review couched as a declaratur if regard is had to the substance of the application and the relief sought. In the past this Court lambasted such

approach of bringing review matters under the guise of declaratory orders in the leading case of *Kwete* v *Africa Community Publishing and Development Trust & Others* HH—226/98 where the Court held that-

> "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 provisions of order 33 of the High Court Rules 1971 that easily? I think not. See also *Mutare City Council* v *Madzime* 1992 (2) ZLR 140 (SC) at 143D."

What one can glean from the above authority is that if one was supposed to have applied for review and was late in doing so and he is lazy to do so one cannot come to Court under the disguise of a declaratory order.

WHETHER OR NOT THE APPLICANT WAS NOT GIVEN REASONS IN VIOLATION OF SEC 68 OF CONSTITUTION.

Section 68 (2) of the Constitution of Zimbabwe provides that-

> "Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct."

The administrative Justice Act [*Chapter 10.28*] is an act of Parliament that complements the provisions of section 68 of the Constitution. It actually provides in its preamble as follows-

> "To provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair, to provide for the entitlement to written reasons for administrative action or decisions."

In section 3 (1) (b) of the Administrative Act it is provided that-

> "An administrative authority which has the responsibility or power take any administrative action which may affect the rights, interests or legitimate expectations of any person shall…(c) where it has taken the action, supply written reasons therefore within the relevant period specified by law, or if there is no such specified period after being requested to supply reasons by the person concerned."

It is clear that the applicant was entitled to reasons for the administrative decisions that were made by the respondents. In the present case what is clear is that the applicant did not request for any reasons. The applicant is making bare assertions that are not supported by any copy of a letter of request for the same or any other evidence to that effect. Be that as it may, there was no violation of the above constitutional provisions because despite the applicant's failure to request for written reasons, the respondents went on to furnish the applicant with written reasons which are contained in the record of proceedings which was mailed to the applicant's legal practitioners. Such reasons were also communicated to the applicant at the time of his discharge. I say so because the applicant then used the reasons to appeal to the first and second respondents against the decision to discharge him hence the applicant's assertion is baseless and ought to fail. He was served with a Police Radio which advised him of the dismissal of his appeal as well as the dismissal from the Police Service.

IT IS ORDERED THAT

1. The application is dismissed.
2. The applicant to pay costs on a legal practitioner and client scale.

Mugiya and Macharaga law chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st and 2nd respondents' legal practitioners