HB 314/18
HC 1966/16

EX-CONSTABLE MUKOCHIWA

Versus

THE CHAIRMAN OF THE POLICE SERVICE COMMISSION

And

THE COMMISSIONER GENERAL OF POLICE

And

THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 6 NOVEMBER 2017 & 6 DECEMBER 2018

Opposed Application

N. Mugiya for the applicant
L. Musika for the respondents

TAKUVA J: This is an application for review against the decision taken by the respondents to dismiss applicant from the Police Service on the grounds that the respondents committed gross procedural irregularities as contemplated in section 27 (1) (c) of the High Court Act [Chapter 7:06] more particularly in that:

> "(1) The discharge of the applicant from the Zimbabwe Republic Police and subsequent dismissal of the applicant's appeal by the respondent is a result of gross miscarriage of justice and denial of the due process of law
>
> (b) The applicant was not furnished with proper written reasons why the respondents decided to take such drastic measures as contemplated in section 68 (2) of the Constitution".

The facts are common cause. They are:

Applicant was stationed at Mzilikazi Police Station at the time of his dismissal. On 29 December 2013 applicant left his place of duty without authority while at the Deputy Commissioner General' Sibanda's house in Montrose, Bulawayo. Applicant could not be located at his place of guard when Assistant Inspector Dube and Sergeant Basera carried out routine checks. The two left applicant's place of guard at 3:15 hrs without knowledge of his whereabouts. He was charged with contravening par 13(2) and 34 of the Schedule to the Police Act (Chapter 11:10) ("the Act"). The paragraph states, "without reasonable excuse failing to attend parade and committing or neglecting to perform any duty or performing any duty in an improper manner. Applicant was convicted and sentenced to 10 days imprisonment at Fairbridge Detention Barracks. He was also fined $10,00.

Meanwhile applicant was facing a theft charge in Chipinge. The 2nd respondent constituted a Board of Inquiry (Suitability) on 5 January 2015 in terms of s 50(1) of the Act. Applicant was subsequently discharged from the service as "unsuitable for police duties" on 12 February 2016. The 2nd respondent proceeded in terms of s50 (3) (1) of the Act. Applicant then appealed to the 1st respondent who on 2 June 2016 dismissed the appeal against discharge and up held the decision by the 2nd respondent to discharge the applicant from the police service.

Dissatisfied by this decision applicant filed this application. The respondents opposed the application. On the date of the hearing applicant raised a point *in limine* namely that the respondents were barred for failing to file their heads of argument timeously as required by o32 r238 (b) of the High Court of Zimbabwe Rules 1971. Applicant filed his heads of argument on 2nd November 2016 and caused same to be served on the respondents on the same day as more fully appears in the certificate of service field of record on page 30. However, respondents duly filed their heads of argument on the 6th day of October 2017 eleven months later. The respondents did not accompany the heads with an application for condonation nor was an oral one done at the hearing. In fact there was no explanation at all for the delay.

Rule 238 (2a) of the High Court Rules 1971 provides as follows;

> "Heads of argument referred to in subrule (b) shall be filed by the respondents' legal practitioner not more than ten days after the heads of argument of the applicant or excipient as the case may be, were delivered to the respondent in terms of subrule (1):
>
> Provided that:
>
> 1. No period during which the court is on vacation shall be counted as part of the ten day period.
> 2. The respondent's heads of argument shall be filed at least five days before the hearing."

The rule simply means the respondents were required to file their heads of argument within a period of not more than ten days from the date of receipt of the applicant's heads of argument.

In *Vera* v *Imperial Asset Management* H-50-06 MAKARAU J (as she then was) interpreted the rule thus:

> "The operative part of the rule is not to be found in the proviso. It is in the main provisions and is to the effect that the respondent is to file his heads or her heads of argument within 10 days of being served with the applicant's heads. That is the imputable rule. However, in the event that the respondent has been served with applicant's heads close to the set down date, he shall not have the benefit of the full 10 day period within which to file and serve heads stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule.
>
> It is my further view that as the bar against respondent in such circumstances is automatic and brings about a technical default, a review of the merits of the case at this stage, though provided for in the rules will unnecessarily fetter the discretion of a future court that maybe seized with an application to rescind the default judgment that the applicant is entitled to at this stage. In view of the above, I have used the discretion vested in me by rule 4 (c) in the interests of justice and instead of directing that the matter be set down on the unopposed roll for the granting of a default judgment, I will save the incurring of further costs and delays in the matter and grant a default judgment in favour of the applicant …" (my emphasis)

I entirely agree with the above reasoning. However, *in casu*, *Mr Mugiya* argued the matter on the merits. In his submissions, he contended that the applicant requested for reasons but none were supplied. He therefore argued that the applicant was not furnished with proper

written reasons why the 1st respondent decided to take such drastic measures. In short the argument was whether or not the 1st respondent violated s68 (2) of the Constitution of Zimbabwe (Amendment Act 20:13). As regards the 2nd respondent the applicant sought relief on the basis that the failure to reinstate him pending the determination of the appeal entitles him to be reinstated into the police service.

The issue that presents itself is, despite respondents being barred for non-compliance with r238, is the applicant's remedy competent and grantable at law? Dealing with the decision against 2nd respondent first, the applicant's contention is that because 2nd respondent failed to reinstate him in contravention of s51 of the Police Act, he must be reinstated permanently. I disagree for the simple reason that what the applicant is entitled to are damages for loss of income and benefits for the period from the date of the notice of appeal to the date of judgment by the Police Service Commission. It cannot nullify the 2nd respondent's decision to dismiss the applicant.

As regards the second rung upon which he seeks reinstatement, namely that because he was not furnished with reasons, the decision arrived at by the 1st respondent is *null* and *void.* The argument is based on s68 of the Constitution which provides:

> "68. Right to Administrative Justice
>
> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, pertinent, impartial and both substantively and procedurally fair.
> (2) 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.
> (3) An Act of Parliament must give effect to these rights and must –
> (a) provide for the review of administrative conduct by a court or where appropriate by an independent and impartial tribunal;
> (b) impose a duty on the State to give effect to the rights in subsection (1) and (2); and
> (c) promote an efficient administration". (my emphasis)

Section 3 of the Administrative Justice Act (Chapter 10:28) states:

"3. Duty of administrative authority

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectation of any person shall –

(a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law or if there is no such period, within a reasonable period after being requested to take the action by the person concerned; and

(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 <u>within a reasonable period after being requested to supply reasons by the person concerned.</u>

(2) …

(3) …

(4) …

(5) …

(6) <u>Application for and issue of order to supply reasons</u>

(1) Subject to this Act and any other enactment, any person –

(a) whose rights, interests, or legitimate expectations are materially and adversely affected by any administrative action; or

(b) who is entitled to apply for relief in terms of section four; and who is aggrieved by the failure of an administrative authority to supply written reasons for the action concerned within –

(i) the period specified in the relevant enactment; or

(ii) in the absence of any specified period, a <u>reasonable period after a request for such reasons has been made;</u>

may apply to the High Court for an order <u>compelling the administrative authority to supply reasons;</u>

(2) Upon an application being made to it in terms of subsection (1), of the High Court may; if it is satisfied that there has been a failure by the administrative authority concerned to supply any or adequate reasons for an administrative action, issue an order directing the administrative authority to supply written reasons to the applicant within such period as may be specified by the High Court.

(3) Where an administrative authority <u>fails to comply with an order in terms of subsection (2) it shall be presumed in the absence of proof to the contrary, that the administrative action concerned constituted an improper exercise of the power conferred by the relevant law or empowering provision.</u>

(4) The High Court may at any time vary or revoke an order made in terms of subsection (2)". (my emphasis)

Turning to the right granted in s68 of the Constitution, what is crystal clear is that it does not require the administrative authority to give reasons at the same time with the decision. This is demonstrated by the use of the word "promptly" which means without delay. The drafters avoided the use of words like "instantaneously", "simultaneously" or "at the same time". This means that a decision may be made and communicated to interested parties without reasons as long as those reasons are supplied promptly thereafter. In my view, this is consistent with how courts and administrative bodies operate, namely that an order is issued wit reasons to follow.

The issue in casu is whether or not the 1st respondent complied with s68 of the Constitution? In *Commissioner, South African Police Service & Others* v *Matimela & Anor* 2003 (S) SA 480 T DUPLESSIS J while interpreting a similar provision in the South African Constitution stated that:

> "When interpreting section 33 (c) of the Constitution, it must be borne in mind that the right to be furnished with reasons is very wide, it applies to every person whose right or interests are affected by any administrative action. In many instances the persons affected may not be interested in the reasons. The practical interpretation of section 33 (c) is that reasons must be furnished to persons who assert the right to be furnished with reasons. The purpose of section 33 (c) is not to oblige administrative decision – makers to furnish without a request, reasons for every single administrative action taken in this country. See Klaaran (in Chascalson and Ors Constitutional Law of SA (Revision Services, 1999) at 25-190)'.

An administrative decision-maker is in terms of s33(c) of the Constitution obliged to furnish reasons for administrative action within a reasonable time after receipt of a request for reasons by or on behalf of a person whose right or interest are affected by the administrative action. While the Commissioner's apparent practice to furnish reasons automatically is to be encouraged, that is not what the Constitution requires. A person entitled to reasons can, as the respondents did in this case, request reasons by means of serving a court application on the relevant decision maker. Such a procedure carried the risk of an adverse costs order if the reasons are furnished within a reasonable time after service of the application". (my emphasis)

In our jurisdiction, the right to administrative action and decisions that are lawful, reasonable and procedurally fair, together with the entitlement to written reasons for

administrative actions is provided for in the Administrative Justice Act *supra.* The golden thread that runs through the Act is that the person seeking relief or protection must request the administrative authority to supply reasons.

In the present matter, the applicant does not say in his founding affidavit he requested for reasons from the 1st respondent. *Mr Mugiya* while answering a question from the court during the hearing simply said applicant asked for reasons but he was not given any. It was not made clear how applicant requested for those reasons and to whom. It was not stated whether the request was orally made or it was in writing. The 1st respondent is an institution and the only reasonable method of requesting reasons would be to put it down in black and white. It would also be prudent to file proof of service for record purposes. In my view the probabilities favour the conclusion that applicant never requested for the reasons. He simply proceeded on the basis that reasons were supposed to be furnished "automatically". This is borne out by his pleadings.

Where like in casu, the applicant claims not to have been given reasons, the relief is not to apply to have the decision set aside, but to proceed in terms of the provisions of the Administrative Act *supra*, or the common law to compel compliance by way of a court application. Even s68 of the Constitution stipulates that an Act of Parliament must give effect to the rights it confers on litigants. See subsection (3). In my view, to simply proceed to set aside administrative decisions on the grounds that no reasons were given without following the administrative remedies laid out by the law would result in gross injustice.

In the final analysis I find therefore that, the applicant's prayer that he be reinstated because 2nd respondent committed a procedural irregularity has no merit and in the circumstances incompetent at law as a remedy. I find also that applicant's relief as against the 1st respondent's alleged violation of s68 of the Constitution is incompetent and not grantable at law as there is no evidence that the 1st respondent violated s68 of the Constitution.

Accordingly, the application is dismissed without an order of costs.

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