HB 315/18
HC 1703/16

**EX-CONSTABLE MARUMISA**

**Versus**

**THE CHAIRMAN 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 & L. Dube* for the respondents

**TAKUVA J:** The applicant, an ex-constable in the Zimbabwe Republic Police filed this review application against the respondents seeking an order in the following terms:

> "1. The 2nd respondent's failure to reinstate the applicant into the Police Service after he appealed in terms of section 51 of the Police Act is declared wrongful and unlawful.
> 2. The 1st respondent's failure to give the applicant written reasons for the dismissal of his appeal in terms of section 51 of the Police Act is held to be unlawful and wrongful.
> 3. The dismissal of the applicant from the Police Service by respondents is not in accordance with the law and is therefore set aside.
> 4. The respondents are ordered to reinstate applicant into the Police Service forthwith.
> 5. The respondents are ordered to pay costs of suit on a punitive scale".

The facts are as follows:

On 25 June 2015 at approximately 1730 hours, applicant was driving a Nissan Caravan "kombi" registration number ADU 0434 along Seke Road in Citungwiza with 18 passengers on

board. The vehicle was not registered as a public service vehicle. While negotiating a roundabout at Chikwanha, applicant lost control of the vehicle and encroached into the oncoming lane resulting in a head-on collision with another commuter omnibus travelling in the opposite direction. Resultantly six passengers were injured. Applicant also sustained serious injuries.

Prior to this 2nd respondent had suspended the involvement of all police officers in the passenger transportation business in all forms. Following the accident, applicant appeared before a Chitungwiza magistrate facing a charge of contravening section 52 (2) of the Road Traffic Act (Chapter 13:11), that is "negligent driving". He was convicted and sentenced to pay a fine of $150,00 or in default of payment 60 days imprisonment. In addition, six months imprisonment was wholly suspended for 5 years on good conditions.

Upon receipt of the result of applicant's prosecution, 2nd respondent discharged him from the service with effect from 15 January 2016 in terms of s48 (a) of the Police Act (Chapter 11:10) "the Act". Applicant was informed that he had been discharged for misconduct. Dissatisfied, applicant appealed to the 1st respondent on 18 January 2016. The appeal was in terms of s51 of the Act. Notwithstanding the noting of the appeal, 2nd respondent did not reinstate the applicant pending the outcome of the appeal in accordance with the provisions of s51 *supra.*

On 2nd June 2016, 1st respondent dismissed applicant's appeal and he was notified of this decision by letter which he received on 6 June 2016. Aggrieved, applicant filed this application on 12 July 2016. The grounds for review were listed as:

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

The relief sought is put as:

"1. The dismissal of the applicant from the ZRP be set aside.
2. The applicant be reinstated by the respondents into the Police Force."

Note that this is different from the relief sought in the "Draft Order" on page 11 of the record.

Be that as it may, the gist of applicant's argument is that firstly he should have been reinstated when he noted an appeal against 2nd respondent's decision. He relies on s51 of the Act. Further he argues that the failure to reinstate him renders the 2nd respondent's decision to discharge him unlawful and wrongful. As regards 1st respondent's decision, the criticism is centered on the failure to furnish him with "proper written reasons" for dismissing his appeal. Here, he relies on s68 (2) of the Constitution. Despite amendments to the court application for review by the applicant the above position remains the core argument advanced on his behalf.

The 2nd respondent opposed the application through the Civil Division of the Attorney General's Office on 26 July 2016. Subsequently, the same office filed heads of argument in respect of the "respondents" on 27 September 2016. The opposition is based on the following grounds:

1. As regards the meaning and effect of s51 of the Act, the 2nd respondent became "*functus officio* since the applicant was no longer a member of the Police Service". Therefore, so the argument went. The order of reinstatement sought from the 2nd respondent is "incompetent".
2. In respect of the alleged non-compliance with s68 (2) of the Constitution of Zimbabwe, the argument is that applicant was furnished with adequate reasons.

Let me deal with the 1st issue first. Section 51 of the Act is the natural starting point. It provides:

> "51. 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 Commission has been given". (my emphasis)

Section 48(a) of the Act provides:

> "If a member, other than an officer is convicted of any offence and sentenced therefore to imprisonment without the option of a fine, whether or not the execution of such sentence is suspended, the Commissioner General of Police may discharge the member". (my emphasis)

In casu, the 2nd respondent exercised his discretion and discharged the applicant. The question becomes, what is the effect of appealing to the 1st respondent against the 2nd respondent's decision? In my view section 51 of the Act grants police officers in applicant's position a stay of execution pending the determination of an appeal. It is so clear that an interpretation thereof becomes totally unnecessary. The 2nd respondent's order is automatically by operation of the law suspended. Further, the provision is peremptory in that it uses the word "shall". Therefore, the 2nd respondent must in labour law parlance reinstate the applicant to his original position without loss of salary and benefits. In this regard, I agree with *Mr Mugiya* for the applicant that failure to reinstate the applicant as soon as he launched his appeal was wrongful and unlawful.

My point of departure with *Mr Mugiya* is whether or not this failure to reinstate applicant pending the determination of his appeal, renders *null* and *void* the dismissal ordered by the 1st respondent pursuant to the dismissal of applicant's appeal. In my view, the error by the 2nd respondent has no bearing on the validity of the Commission's decision on applicant's appeal. Perhaps it is because of this realization that applicant has attacked the Commission's decision on another front, namely, that the Commission's decision is unlawful because it did not furnish applicant with reasons for that decision.

This therefore takes me to the second issue namely, the meaning and effect of s68 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("the Constitution". It provides:

"68 Right to Administrative Justice

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, 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 a 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 on where appropriate by an independent and impartial tribunal;
  (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
  (c) promote an efficient administration". (my emphasis)

The ordinary grammatical meaning of subsection (2) of section 68 grants the applicant the right to be given promptly and in writing the reasons for the conduct. There is therefore no doubt about this right. The Oxford Advanced Learners Dictionary defines the word "promptly" as "without delay, (2) exactly at the correct time or at the time mentioned)"

The applicant's case is that he received a letter from the 1st respondent on 6 June 2016 notifying him of the dismissal of his appeal. He further alleges that he was never given reasons why his appeal was turned down. According to him as at the date he filed this application which is the 11th day of July 2016 he had not received the reasons. In his oral submissions during the hearing, applicant's legal practitioner claims that despite requesting for reasons, these were never supplied. He however did not give further particulars of how, when and to whom the request was lodged. I have said elsewhere that s68 of the Constitution does not oblige administrative decision-makers to furnish, without a request, reasons for every single action taken in the country. See *Ex Sgt Maphosa & Ors* v *Chairman of the Police Service Commission & Ors* HB-257-17. See also *South African Police Service & Ors* v *Mamela & Anor* 2003 (S) SA 4801.

That the obligations imposed by this section are binding on every person, natural or juristic, involving the State and all executive, legislature and judicial institutions and agencies of government at every level is trite.

In *Mahachi & Ors* v *Officer Commanding Matabeleland South Province NO & Anor* HB-146-16 it was held that;

> "It is my considered view that section 68 gives a person a right to prompt and written reasons for any administrative action taken and a party is adversely affected by it, he has a right to request for and be promptly supplied with written reasons. I do not take the view that an affected party should sit back and not ask for reasons, only to say the decision is unfair as no reasons were provided. Section 68 of the Constitution of Zimbabwe simply endorsed and incorporated into the Supreme Law of the land, the provisions of the Administrative Justice Act (Chapter 10:28).

In my view, the Administrative Justice Act (supra) is an Act of Parliament that compliments 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 …
>
> Section 3 (1) (b) of the same Act provides thus:
>
> 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 specified 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 specific period, within a reasonable period after being requested to supply reasons by the person concerned". (my emphasis)

In view of these clear provisions of the law, I do not agree with applicant's contention that in terms of the Constitution, applicant is entitled to be furnished with reasons "even without the need to request for same". In the present case, applicant did not request for reasons at all because in his opinion this was unnecessary. For that reason, applicant cannot simply sit back watching the calendar and then spring to action claiming the nullification of the Police Service Commission on the grounds that he was not supplied with reasons for it. The relief sought here

namely reinstatement into the Police Service "forthwith" is incompetent in that applicant jumped the gun by ignoring the peremptory provisions of the law. He should have followed the procedural steps presented in the Administrative Justice Act.

In the circumstances, 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