EX-CONSTABLE TSWATSWA A
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 11 June 2019 and 19 June 2019

Opposed application

N. Mugiya, for the applicant
J Bhudha, for the 1st and 2nd respondents

CHIKOWERO J: In *Mutote Renias* v *The Charging Officer (Mr Mawere N.O) and 4 Ors* HH 233/19 I dismissed a "Court Application for a Declaratur."

I found that it was in substance an application for review disguised as a court application for a declaratory order.

Further, it was the court's finding in that matter that if an application for review were to be filed, both the application for condonation for late filing of the application and extension of time and the substantive application itself, if condonation were granted, would need to be filed with the Labour Court.

Regrettably, despite the same counsel having appeared in that and the present matter, the instant application is also, in substance, an application for review, albeit filed out of time and without obtaining condonation again disguised as an application for a declaratory order.

The brief facts of the matter are these.

Having been found unfit to remain a member of the Police Service, the applicant was discharged therefrom by the first respondent on 4 December 2014.

This was pursuant to disciplinary proceedings instituted against the applicant.

Aggrieved, he appealed to the second respondent.

The second respondent dismissed his appeal.

It was only then that the present application was mounted.

The relief sought was as follows:

"1. The discharge of the applicant from the Police Service by the 1st and 2nd respondents be and is hereby declared unlawful and wrongful
2. The 2nd respondent is ordered to reinstate the applicant into the Police Service within 48 hours of the date of this order.

3. The respondents are ordered to pay costs of suit on a client-attorney scale."

I will now examine the grounds on which the application is founded.

APPLICANT WAS NOT FURNISHED WITH THE RECORD OF PROCEEDINGS WITH REASONS FOR HIS DISCHARGE FROM THE POLICE SERVICE

It was contended that both respondents did not furnish applicant with the record of proceedings conducted before them.

A further complaint was that the applicant was not furnished with written reasons for his discharge from the Police Service

The transgressors in this regard were said to be the respondents.

Reliance was placed on s 68 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 on applicant's right to written reasons.

That provision states:

"68 Right to administrative justice

(1) …..
(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."

That applicant has this right is beyond debate.

But that is no ground to seek an order declaring the discharge from the police service unlawful and wrongful.

Instead, the real complaint is that the failure to provide written reasons for the decisions by respondents renders those proceedings and decisions liable to attack as grossly irregular.

That is ground number (1) (c) under s 27 of the High Court Act [*Chapter 7:06*].

That provision reads:

"27 Grounds for review
(1) Subject to this Act and any other law the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
(a) …
(b) …
(c) Gross irregularity in the proceedings or the decision."

In this regard s 68 (3) (a) provides that:

"(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." (underlining mine)

Mr *Mugiya* was therefore correct in noting that the failure to provide reasons as well as the record of proceeding were gross irregularities. His reference to, among others, *S* v *Makawa* 1991 (1) ZLR 142 (S), although a criminal case, was apposite for the point that he drove home.

His error lay in employing that argument in an application for a declaratur.

WHETHER THE APPLICANT WAS GIVEN AN OPPORTUNITY TO BE HEARD ON APPEAL

It was common cause that no oral hearing was conducted by second respondent.

In other words, the appeal was disposed of by second respondent on the papers.

The only input by applicant was the Notice of Appeal filed by him. That Notice of Appeal set out the grounds of appeal and the relief sought.

I find that such a procedure does not meet the requirements of a public hearing and access to a court, tribunal or other forum established by law as contemplated in s 69 (2) and (3) of the Constitution.

But it is a procedural issue.

Failure to observe the *audi alteram partem* rule, if established, is a gross procedural irregularity.

I need not go further than *Taylor* v *Minister of Education and Another* 1996 (2) ZLR 772 (S) for authority for this settled position.

Resultantly, the point taken has no place in a true application for a declaratory order.

WHETHER THE POLICE SERVICE COMMISSION WAS IMPROPERLY CONSTITUTED

If this ground had been established, applicant would have been entitled to an order voiding the decision of the second respondent.

It would have meant the decision was made by a body with no legal standing. See *Musara* v *Zimbabwe National Traditional Healers Association (ZINATHA*) 1992 (1) ZLR 9 (H). It would not be the Police Service Commission properly constituted and sitting as such.

The problem was that absolutely no evidence was adduced by the applicant in his papers tending to prove the contention taken.

Even when I probed Mr *Mugiya* at the hearing whether I had such evidence, he admitted that the evidence was not there.

I agree with Mr *Bhudha*, for the respondents, that the onus was on the applicant to prove that the second respondent was not properly constituted. See *Book* v *Davidson* 1988 (1) ZLR 365 (SC).

The membership of the second respondent at the time that they dismissed the appeal remains unknown.

Such of their number as ought not to have sat over the appeal remain unknown. This distinguishes this matter from *Geddes Ltd* v *Tawonezvi* 2002 (1) 479 (S).

It cannot be correct for applicant to argue that all he needed to do was to allege that second respondent was improperly constituted so as to shift the onus on second respondent to prove otherwise.

Second respondent had nothing to prove. It was not the mover of the application. It sought no relief from the court.

Accordingly, this ground, which was the only one capable of giving birth to the declaratory order *vis-à-vis* second respondent's decision suffered from want of evidence.

DISPOSITION

The result of all the foregoing is that I make the following order:

1. The application is dismissed.
2. The applicant shall pay the 1st and 2nd respondents' costs of suit.

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