GIFT MAGWADA

Versus

THE POLICE SERVICE COMMISSION

And

THE COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 9 FEBRUARY 2023

Opposed Application

G. Sengweni, for the applicant
G. Mwatsveruka, for the respondents

KABASA J: This matter was heard on 9 February 2023 and after hearing the parties' submissions I dismissed the application, with no order as to costs. I gave my reasons in an *ex tempore* judgment.

I had long forgotten about the matter when on 7 June 2023 the record was brought to me with a request for written reasons. I must say where a litigant requires written reasons such request must be made timeously and not months later, as happened *in casu*.

That said, these are the reasons for my decision:-

The applicant was a member of the Zimbabwe Republic Police holding the rank of a Constable. He was discharged from the Police Service on medical grounds on 30 July 2019. Such discharge was in terms of section 20 of the Police Act, Chapter 11:10.

Section 20 provides that:-

> "(1) Subject to subsection (2), the Commissioner-General may at any time discharge a Regular Force member, other than an officer, on the grounds of continued ill-health or some infirmity of body or mind which prevents the Regular force member from efficiently performing his duties.

(2) The Commissioner-General shall not discharge a member in terms of subsection (1) unless a board appointed in terms of subsection (3) certifies that, in the opinion of that board, the member concerned is suffering from ill-health or infirmity referred to in subsection (1).

(3) A board referred to in subsection (2) shall consist of two or more medical practitioners appointed by the Secretary responsible for health at the request of the Commissioner-General and the opinion of any two of such medical practitioners shall constitute the opinion of the board."

The applicant's discharge came about following an incident which occurred whilst he was performing his duties. The applicant was fixing a police vehicle when brake fluid spilt into his right eye. The damage caused could not be reversed resulting in the applicant losing sight in that eye.

A first Medical Board was convened on 13th March 2015 and the applicant was found to be fit for full duty. Challenges experienced in the discharge of his duties led to a second board which was convened on 14th February 2019. The Medical Board noted that the applicant had right eye blindness with no light perception. He was experiencing pain and discomfort when exposed to sun and wind.

The board considered that no further treatment was required and that the condition had not been aggravated by the member's official duties. Sick leave was not recommended and it was concluded that the member was not fit for either full or light duty. The Medical Board further concluded that the member was permanently unfit to perform full duty in all respects and consideration should be given to his being discharged from the Force on medical grounds. Two members of the Medical Board duly signed as the ones who certified the discharge. The Secretary for Health agreed with the Medical Board's opinion and duly signed on 21st May 2019 culminating in the discharge.

Aggrieved with that discharge the applicant noted an appeal with the 1st respondent. It was not clear on the papers what happened to that appeal but a reading of the applicant's submissions suggests that no appeal lay with the 1st respondent for a discharge on medical grounds and such appeal was therefore not adjudicated on by 1st respondent. The applicant then filed an application for review. The grounds for review were given as:-

1. The respondents erred in acting in concert and agreed to move against the principles of natural justice particularly acting maliciously in contrary to the laid down principles. (*sic*)

2. The 2nd respondent never followed the required procedure by ignoring the legislation and went on to discharge the applicant in a malicious manner.

3. The legislation is clear that the discharge is supposed to come out of a suitability board, however *in casu* the 2nd respondent discharged the applicant without following the relevant legislation.

4. The applicant's right to be heard was violated in the circumstances and hence the discharge cannot stand.

5. There was bias on the part of the 1st respondent when he inclined with the 2nd respondent in this malicious move (*sic*).

The applicant's prayer was that the decision to discharge him be set aside and he be reinstated into the Zimbabwe Republic Police without loss of salary and benefits.

In opposing the application the respondents contended that the applicant was discharged on medical grounds. Such decision was arrived at following the convening of a Medical Board which was done procedurally.

The Medical Board's opinion is expert opinion and where a member is discharged as a result of such opinion no appeal is provided for in terms of the law.

Two or more medical practitioners duly appointed by the Secretary for Health at the request of the Commissioner General constituted the board and in terms of the law the opinion of any two of such medical practitioners constitutes the board's opinion. This procedure was followed, the applicant made representations in writing and so there was nothing irregular or irrational with the procedure and the resultant decision.

At the hearing of the application the applicant had secured the services of a legal practitioner. *Mr G Sengweni*, counsel for the applicant conceded that the procedure followed was as provided for in s20 of the Police Act. Counsel further submitted that the main reason or ground for review was premised on the fact that the applicant could have been considered for other duties.

In response to a question posed by the court counsel accepted that the applicant's discharge followed expert opinion from two medical doctors and the court was not qualified to disregard or question such opinion.

Ms Mwatsveruka for the respondent also abandoned the points *in limine* the respondents had raised and argued on the merits.

I therefore did not consider such points *in limine* in light of counsel's attitude.

I considered Mr Sengweni's concessions as properly made. This is so because the first ground of review attacked the decision on the basis that the respondents had acted against the principles of natural justice and acted maliciously, contrary to laid down procedures.

The record however shows that a Medical Board was convened and in 2015 that board was of the opinion that the applicant was able to resume full duty. However due to the problems he was still experiencing a second board was convened in 2019 and the applicant was allowed to make written representations on the state of his disability, where he had been treated and when and whether his condition had improved or deteriorated from the last Medical Board. He was subsequently examined as is apparent from the Medical Board proceedings and the doctors gave their expert opinion which the respondents subsequently acted on.

Where a person alleges bias the onus is on them to show that bias was clearly or actually displayed and that in the circumstances there was a real possibility of bias. (*City and Suburban Transport (Pvt) Ltd* v *Local Road Transportation Johannesburg* 1932 WLD 100, *Matapo and Ors* v *Bhila N.O and Anor* 2010 (1) ZLR 321).

No malice or bias was shown in the manner the Medical Board was convened. It was not suggested that the medical doctors did not act independently and as expected of them whilst executing their professional duties. The 2nd respondent acted on the expert opinion of the doctors who constituted the Medical Board. There was therefore nothing but a bald assertion that the respondents acted maliciously and contrary to laid down procedures. The laid down procedures were followed.

The first and second ground of review raised the same issue of malice and failure to follow laid down procedure. However as counsel for the applicant correctly conceded the correct procedure was followed. The fact that the 2nd respondent acted on the expert opinion and discharged the applicant shows no malice.

Equally the complaint that a suitability board was not convened stems from a failure to appreciate the correct procedure. Section 20 is clear on the procedure to be followed before a regular member is discharged on medical grounds and that is the procedure which was followed

in casu. A Medical Board sat and 2 medical doctors examined the applicant, considered his written submissions as reflected on the Medical Board proceedings and concluded that consideration be made to retire him on medical grounds.

In reviewing administrative decisions the court must be wary of usurping the powers of that body. In *Mugiya* v *Police Service Commission and Anor* 2010 (2) ZLR 185 GOWORA J (as she then was) put it as follows:-

> "Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to legislative requirements …… The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision."

Without a finding of bias, malice or a failure to adhere to set down procedures, this court cannot extend its powers in a manner that usurps the authority and power of the administrative body. No illegality was shown *in casu* to warrant the setting aside of the respondents' decision.

"The process of review is for the court to examine the circumstances under which the administrative body reached its decision, and it is not open to the court, in a judicial review, to scrutinise the decision lest the court is accused of usurping the powers of the administrative body. See *Chief Constable* v *Evans* (1982) 3 ALL ER 141 at 154, where Lord BRIGHTMAN stated:-

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power." (per GOWORA J in *Mugiya* v *Police Service Commission and Anor* (supra)

In casu the correct procedure was followed. The matter hinged on expert medical opinion which the respondents had no influence or say in. The applicant had an opportunity to engage with the process as his input is evident on the Medical Board proceedings. On what basis therefore can this court interfere with a decision arrived at after adherence to the set procedure? What other procedure except that set out in s20 were the respondents supposed to follow and failed to? I pose these rhetorical questions just to demonstrate that the proper procedure was duly followed.

Can this court hold that the respondents ought to have disregarded the findings of the Medical Board and found some other duties for the applicant to perform within the Force? Where would this court derive such powers?

Mr Sengweni all but conceded that a case for the setting aside of the respondents' decision had not been made.

The applicant had also sought to be reinstated into the Force without loss of salary and benefits. In *Police Service Commission and Anor* v *Manyoni* SC 7-22 GUVAVA JA succinctly put it thus:-

> "Section 28 provides that the High Court can only set aside or correct the proceedings or decision complained of. The High Court has no power to order reinstatement of a person if a matter is brought on review."

The applicant was therefore asking the court to do that which it cannot legally do.

The applicant was a self-actor up to the date of hearing of the application. Whilst costs follow the cause I was of the view that the applicant should not be punished with an order for costs. The circumstances of the matter informed this decision.

It is for the foregoing reasons that I dismissed the application as already set out earlier on in this judgment.

Sengweni Legal Practice, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners