**(1) EX-SERGEANT MAPHOSA T G 981783 E** **HC 1702/16**

**Versus**

**THE CHAIRMAN OF THE POLICE SERVICE COMMISSION**

**And**

**THE COMMISSIONER GENERAL OF POLICE**

**And**

**THE MINISTER OF HOME AFFAIRS**

**(2) EX-CONSTABLE MURESHERWA 073753 Q** **HC 1705/16**

**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 29 MARCH & 24 AUGUST 2017

**Opposed Court Application**

*N. Mugiya* for the applicant
*L. Musika & L. Dube* for the respondents

**TAKUVA J:** At the hearing of these matters, counsel requested that they be consolidated since they raise the same issues. I directed that the matters be argued as one and I will issue one judgment.

The historical background in respect of each is as follows:

**(1) Ex-Constable Muresherwa HC 1705/16**

The applicant was attested into the Police Service on 4 February 2011. He was stationed at Zimbabwe Republic Police Chatsworth. On 17 April 2015, he appeared before a Single Trial Officer facing three counts of contravening paragraph 34 of the Schedule to the Police Act (Chapter 11:10) (the Act). At the end of the trial, he was duly convicted and sentenced to 10, 7 and 8 days imprisonment for counts 1, 2 and 3 respectively. In the 3 counts, the applicant was accused of abusing the loophole in cattle clearing procedure, stealing two stray cattle and disposing them under unclear circumstances.

Applicant unsuccessfully appealed to the 2nd respondent. Aggrieved by this decision, he noted an appeal with this court against the 2nd respondent's decision. It is unclear why applicant opted for this improper procedure. Be that as it may, the second respondent convened a board of suitability against the applicant. The sole purpose was to assess the suitability of the applicant to remain in the Police Service. The Board recommended that applicant be discharged from the Police Service as being "unsuitable for police duties." Convinced that the applicant was unsuitable for police duties, the 2nd respondent discharged the applicant on the 20th day of September 2015.

Dissatisfied, applicant appealed against the discharge to the 1st respondent in terms of section 51 of the Act. He filed a notice of intention to appeal with the "Police Service Commission, NSSA Building, Corner J. Nyerere Way/S. Nujoma Street Harare". Applicant also served his notice of appeal on the 1st respondent on 23 October 2015. Despite noting an appeal, applicant was not reinstated by the 2nd respondent pending the determination of his appeal by the 1st respondent.

At the end of its deliberations, the 1st respondent turned down applicant's appeal against discharge on 2 June 2016. It upheld the decision by the 2nd respondent to discharge applicant from the Police Service. Applicant was advised of this decision on 6 June 2016 through a letter. There were no reasons why the appeal was unsuccessful.

Applicant then filed this application for review in terms of O33 R256 of the High Court Rules 1971 against the decision by the 1st respondent. His grounds for review are that:

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

The applicant seeks the following relief:

"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 the respondents is not in accordance with the law and is therefore set aside.
4. The respondents are ordered to reinstate the applicant into the Police Service forthwith.
5. The respondents are ordered to pay costs of suit on a punitive scale."

**Ex Sergeant Maphosa case number HC 1702/16**

The 2nd applicant was based at Mutare Traffic when she was discharged from the Police Service for contravening paragraph 11 of the Schedule to the Act as read with section 34 of the said Act i.e. "Omitting or neglecting to perform any duty or performance of duty in an improper manner." The specific allegations were that on the 24th day of February 2015 at Mutare Teachers College, the applicant being a member of the force did wrongfully and unlawfully omitted or neglected to carry out a lawful order to declare her money; that is to say the applicant who was at teachers college manning a road block was found with US$90,00 which she could not account for. She was convicted and sentenced to pay a fine of US$10-00.

Subsequently, the 2nd respondent convened a board of suitability against her in terms of section 50 of the Act. Following recommendations of the board, the 2nd respondent discharged the applicant from the Police Service on 12 October 2015. The applicant appealed to the 1st

respondent in terms of section 51 of the Act. Her appeal, which she noted on 15 October 2015 was directed to the 1st respondent and the Chief Clerk Personnel at ZRP General Headquarters. Both the notice of appeal and the notice of intention to appeal were served on the two offices mentioned above. Both were prepared by Messrs Mugiya & Macharaga Law Chambers and the notice of intention to appeal was copied to the Officer In Charge Lupane Police Station (where applicant was then based), the Human Resources Department at Police General Headquarters, the Commissioner General and the Director Legal Services. On the other hand, the notice of appeal was directed to the 1st and 2nd respondents.

Notwithstanding the noting of the appeal, applicant was not reinstated by the 2nd respondent. On 22nd of February 2016, applicant was informed of the decision to dismiss her appeal. No reasons were given for the adverse decision.

Aggrieved by this decision, she filed this application on the following grounds for review:

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

The relief sought is that:-

> "1. The dismissal of the applicant from the Zimbabwe Republic Police be set aside.
> 2. The applicant be reinstated by the respondents into the police force."

The respondents opposed the applications on the following grounds:-

1. Both applicants did not comply with the appeal procedure as set out in section 15 (1) of the Police (Trials and Board of Inquiry) Regulations 1965
2. Both applicants did not request for the record of proceedings and or reasons thereof after being advised of the decision to dismiss their appeals.

From the above, it is crystal clear that there are basically two issues namely;

(a) Whether or not both applicants should have been reinstated pending the determination of the appeal.

(b) Whether or not both applicants were furnished with reasons for the 1st respondent's decision in accordance with section 68 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013? Put differently whether or not 1st respondent complied with section 68 of the Constitution?

**The Law**

In order to answer the 1st issue it is pertinent to examine the relevant legal provisions. Section 51 of the Act states;

> "51 **Appeal**
>
> 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)

This section is clear and unambiguous in that it exposes two *essentialia* namely:

(i) the appeal must be within the time and manner prescribed; and

(ii) the execution of the order appealed against shall be stayed pending the decision of the Police Service Commission.

It is common cause that both applicants were aggrieved by orders made by the 2nd respondent in terms of section 50 of the Act.

The appeal procedure is set out in section 15(1) of the Police (Trials and Boards of Inquiry) Regulations 1965. The section states:

> "15 (1) A member who wishes to appeal in terms of section 51 of the Act shall:
>
> a. within twenty-four hours of being notified of the decision of the Commissioner General of Police, give notice to his officer commanding of his or her intention.

b. Within seven days of being notified of the decision of the Commissioner General of Police, lodge with his or her officer commanding a notice of appeal in writing setting out fully the grounds upon which his or her appeal is based and any argument in support thereof.
c. Upon receipt of notice given in terms of paragraph (a) of subsection (1) the member's superior officer shall notify the Chief Staff Officer (Police) by the most expeditious means." (my emphasis)

The 1st point to note here is that compliance is mandatory. Secondly, the notice of intention to appeal must be given to an appellant's Officer Commanding. Thirdly, the notice of appeal must be lodged with the Officer Commanding and finally the Chief Staff Officer (Police) must be notified expeditiously.

*In casu*, despite *Mr Mugiya's* submissions it is apparent that the above appeal procedure was not followed by both appellants. It is indisputable that both lodged their documents directly with the 1st respondent. They deliberately avoided the procedure stipulated in section 15 (1) *supra*. This is borne out by their notices of intention to appeal and appeal which were stamped by the 1st respondent. The appeal procedure is peremptory and it should have been followed. Failure to comply with a peremptory provision renders the appeal a nullity. In my view, the 2nd respondent was perfectly entitled to treat the appeals as null and void for want of compliance with the provisions of section 15 (1) of the Regulations. It is neither here nor there that the appeal was eventually heard and decided by the 1st respondent. What is crucial is that they disregarded the mandatory provisions which would have facilitated their reinstatement.

The two shot themselves in the foot and cannot place the blame for their misadventure at the Commissioner General's door step. It is the 2nd respondent's responsibility to enforce discipline in the police force. In that regard his power will be severely mutilated if members are permitted to disregard the appeal procedure which is part of the disciplinary process.

In my view, the rationale behind section 15 is to streamline and control the manner in which appeals are noted in order to avoid chaotic situations where notices of appeal are dumped on the Commissioner General's desk from all over the show. More significantly, since it is the Commissioner General's order that should be stayed, it is prudent and imperative that he be

notified through the proper legal channels. This ensures that he maintains the effective command, superintendence and control desperately required for a disciplined police force.

Finally, with respect to this ground, it is only a proper and valid appeal filed in terms of section 51 of the Act that suspends the execution of the Commissioner General's order. A proper and valid appeal is one that complies with section 15 (1) of the Regulations. The applicants' appeals are improper and invalid due to non compliance with mandatory statutory provisions. Consequently, I find that the 1st ground for review has no merit at all.

The synthesis of the second ground is the interpretation of section 68 of the Constitution. The section states:

> "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 the right to be given promptly and in writing the reasons for the conduct.
> (3) …" (my emphasis)

*Mr Mugiya's* argument was that the applicants are entitled to be given reasons promptly and in writing. He submitted that both should have been furnished with reasons simultaneously with the decision to dismiss the appeal. Put differently, the case applicants sought to make out was that in order to comply with section 68 *supra*, the reasons must be "attached" to the decision. Upon receipt of the notice of opposition wherein it was pointed out that the applicants had not requested for reasons, the applicants' argument shifted in that they then claimed that they had made "oral requests" for the reasons.

The issue for determination becomes how does an administrative decision-maker comply with s68 of the Constitution? It should be noted that the section is not explicit as to whether or not an administrative decision-maker is obliged to furnish reasons in the absence of a request.

In Commissioner, *South African Police Service and Others* v *Maimela & Anor* 2003 (5) SA 480 T, Du PLESSIS J while interpreting a similar provisions in the South African Constitution held 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 affected 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 Klaaren (in *Chaskalson and Others Constitutional Law of SA* (Revision Service 5, 1999) at 25-19).

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 interests 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 casu, both applicants did not, prior to this application was launched, request the 1st respondent to furnish reasons for its decision. This is clearly borne out by the absence of such an averment in their founding affidavits. What they later alleged is not only an afterthought but highly improbably and incredible. To claim to have made a "verbal request" to an institution without identifying a specific recipient is disingenuous.

While it is accepted that both applicants were entitled to be furnished with written reasons for the dismissal of their appeals, their failure to request for reasons, mean that they did not assert their rights enshrined in s68 of the Constitution. Therefore, the 1st respondent was not obliged to furnish reasons prior to a request being forwarded to it by the applicants. On this basis, I find that the 1st respondent complied with s68 of the Constitution.

In any event, it is common cause that both applicants were furnished with the 1st respondent's record of proceedings together with written reasons before this application was set down. The proper course would have been to file a court application seeking an order directing the 1st respondent to furnish its reasons.

In the circumstances, the two applications are hereby dismissed with costs.

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