CONSTABLE SIBANDA K 067776 T

Versus

THE TRIAL OFFICER
(CHIEF SUPERINTENDENT MASUKU C)

And

THE COMMISSIONER GENERAL OF POLICE

And

THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 20 OCTOBER 2017 & 7 JUNE 2018

Opposed Application

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

TAKUVA J: This is a court application for a declaratur. The relief sought is that:

"1. The appeal proceedings against the applicant be and are hereby declared to be wrongful and unlawful and accordingly set aside.
2. The further prosecution of the applicant in terms of the Police Act and on the same allegations be and is hereby stayed.
3. The respondents are ordered to pay costs of suit on a punitive scale."

The basis for seeking the above relief is put in applicant's founding affidavit as *inter alia;*

"18. I have no doubt that the manner in which the appeal was dealt with by the 2nd respondent was not in terms of the law and therefore the entire process must be set aside." (my emphasis)

The background facts which are common cause are these:

The applicant was a duly attested member of the Zimbabwe Republic Police then stationed at Musketry Section, Ntabazinduna Training Depot as a trainer. He was therefore

subject to Police Disciplinary Code of Conduct. On 3 May 2013 applicant appeared before a single officer charged with five counts of contravening paragraph 34 of the Schedule to the Police Act Chapter 11:10 as read with section 34 of the Act, that is "performing any duty in an improper manner." The specific allegations were that on five different occasions the applicant did wrongfully and unlawfully sell handouts to recruits of different squads. He cumulatively collected US$618,00 from the recruits. Applicant pleaded guilty to all counts and was duly convicted and sentenced to 70 days imprisonment at Fairbridge Detention Barracks and in addition to a fine of US$50,00 for all counts.

Aggrieved, applicant appealed to the 2nd respondent against both conviction and sentence. His appeal against conviction failed while that against sentence was successful in that it was reduced to 14 days imprisonment and a fine of US$10,00. This was on 10 July 2013. Later that year, applicant filed an application for review under case number HC 5617/13. Three years down the line applicant had not pursued this application resulting in its dismissal for want of prosecution under case number HC 10751/16. A year later, applicant migrated from the Harare High Court to Bulawayo where he filed this application.

The applicant's application for a declaratory order is taken care of by section 14 of the High Court Act [Chapter 7:06] which provides as follows;

> "The High Court may, in its discretion, at the instance of any person interested in an existing, future or contingent right or obligation, notwithstanding that, that person cannot claim any relief consequential upon such determination."

There are 3 requirements for a declaratory order. The 1st is that the person instituting the proceedings must be an interested person. Secondly, the court must inquire and determine an existing future or continent right or obligation. Thirdly, the case must be the proper one for the court to exercise the discretion conferred on it.

The proper approach of the court was laid down by CHIDAYUSIKU J (as he then was) in *Johnson* v *AFC* 1994 (1) ZLR 95 (H) in the following words;

> "Firstly the applicant must satisfy the court that he is a person interested in an existing future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it."

In casu, the 1st two requirements have been met. What calls for determination is the third requirement, namely, whether there is a proper case for the court to exercise the discretion conferred on it. It has been argued for the respondents that this case is not properly before me in that applicant filed an application for review at the Harare High Court under HC 5617/13. That application was dismissed for want of prosecution per MUSAKWA J on 10 November 2016. It was also contended that the applicant filed the current application as a "court application for a declaratur" yet in actual fact "is seeking the review of the decision of the 1st and 2nd respondents. He filed this application as a declaratur to avoid the implication of O33 rule 259 which requires any proceedings by way of review to be instituted within eight (8) weeks of the determination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred. He is therefore trying to hide behind a finger [in order] to file this application without seeking condonation."

In response, applicant suggested that he was not approaching the court in terms of O33 but in terms of s14 of the High Court Act. He however confirmed that the relief he seeks is to "declare the appeal proceedings conducted by the 2nd respondent who determined an incomplete appeal where the 1st respondent failed to respond to the appeal as is required in terms of the Regulations as unlawful and wrongful."

As regards the *res judicata* argument in respect of case number HC 5617/13, applicant argued that the requirements have not been met in that the two applications are based on two different causes of action and different subject matter. The first application which was dismissed for want of prosecution had its cause of action "on the procedural irregularities in the disciplinary trial presided over by the 1st respondent against applicant sometime in 2013. The present application however has its cause of action on the conduct by the 2nd respondent of proceedings to dismiss applicant's appeal where the 1st respondent had not responded to same and where the appeal was not complete." (my emphasis)

In my view, the issue is not whether or not there exists two or more causes of action. It is whether or not from its contents and relief sought, the current application is essentially one for review and not a declaratur. In *Masuku* vs *Delta Beverages* 2012 (2) ZLR 112 (H) it was held that;

> "The determining factor in the position of an application for review is the irregularity of the procedure adopted by a tribunal, board or presiding quasi-judicial board. An application for review is validated or authenticated not by its mere title, but by the facts, which should be a complainant regarding the irregular procedure adopted by the authoritative body whose determination has prejudiced applicant." (my emphasis) See also *Kwete* v *African Commercial Publishing & Development Trust & Ors* HH-216-98 and *Matshumbire* v *Gweru City Council* S-183-95.

The distinction between an application for a declaration order and an application for review can easily be found in the remarks by ADAM J in *Marasha* v *Old Mutual Life Assurance Co.* 2000 (2) ZLR 197 (H) at 198 where the learned judge said;

> "It is clear from the papers filed before me by the applicant that essentially he sought review of proceedings well out of time without first making an application for condonation and establishing that he was entitled to bring an application out of time. What is significant is not heading the proceedings "court application for Declaration" but the draft order which asks the decision to be set aside and his salary to be paid. This clearly is not a declaratory order." (my emphasis).

In casu the applicant's gripe is that the procedure adopted by the 2nd respondent in handling and processing his appeal was irregular. He has not at all attempted to conceal this fact. It is on the basis of these procedural irregularities highlighted in his founding affidavit that he has in the draft order prayed for the "decision" to be set aside and any further prosecution to be permanently stayed. For these reasons I take the view on the facts that the application before me is one for review and not for declaratory order.

In any event even if this were an application for a declaratory order, the applicant would be required to provide an explanation as to why such application for a declaratory order has not been brought within a reasonable period of time. In this case, the applicant filed this application six (6) months after the dismissal of the application under HC 5617/16. Surely, litigants should

not be allowed to file applications for declaratory orders months or years after the offending proceedings had been finalised.

Accordingly, the application is dismissed with costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division, Attorney General's Officer, 1st respondent's legal practitioners