

SERGEANT MUTANDAVARI M 983539N  
**versus**  
THE ACTING OFFICER IN CHARGE  
(INSPECTOR DUBE S)  
and  
THE CHIEF STAFF OFFICER (J.C CHENGETA)  
and  
THE COMMISSIONER GENERAL OF POLICE  
and  
THE POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 16 MAY 2018 AND 7 JUNE 2018

### **Judgment**

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

**MATHONSI J:** The applicant was a sergeant in the Zimbabwe Republic Police stationed at Ntabazinduna Training Depot until the beginning of November 2017 when she was dismissed from the service following the recommendations of a suitability board which had been convened by the third respondent in terms of section 50 of the Police Act [Chapter 11:10]. She has made this review application wherein she seeks an order setting aside her discharge from police service as unlawful and wrongful, directing the respondents to process her resignation and terminal benefits and costs of suit on an attorney and client scale.

The applicant has cited as her ground for review gross procedural irregularity by reason that:

- a. The 3<sup>rd</sup> respondent discharged the applicant from the police service when she had already resigned.
- b. The 3<sup>rd</sup> respondent failed to furnish applicant with reasons for the discharge.”

The facts of the matter are fairly straight forward and generally common cause. During the tenure of her service as a sergeant based at Ntabazinduna Training Depot, having joined the police service in 2004, the applicant was charged with misconduct under the Police Act, tried and convicted. Subsequent to that a suitability board was convened to inquire into her suitability to remain in the force, or to retain her rank, seniority or salary. The applicant was summoned to

appear before that board headed by Chief Superintendent Tembo and did appear on 19 October 2017. Although she complains that her right to legal representation of her choice was violated when the inquiry proceeded in the absence of her legal practitioner who was engaged elsewhere, she did not pursue that complaint as is apparent from her review grounds which do not include that.

What is clear is that the suitability board proceeded with and completed its inquiry. It concluded that she was unsuitable and recommended that the applicant be discharged from police service. According to the second respondent who read the record of those proceedings but did not see it fit to attach it to his opposing affidavit, the applicant was aware of the outcome as she had failed to convince the board that she was suitable. Be that as it may, while the board's recommendations were being transmitted to the third respondent for consideration, the applicant approached her officer in charge, the first respondent, on 30 October 2017 and submitted a notice of resignation together with a waiver of notice of resignation.

It is not clear whether those papers found their way to the third respondent because, although the applicant cited her officer in charge to whom they were submitted as a party to this application, she did not serve it on him. The first respondent did not file opposition and therefore did not explain those issues. What is clear however is that the intended resignation was not processed at all. Instead the third respondent discharged the applicant from police service on 1 November 2017 two days after she had tendered her resignation papers. A radio signal was immediately dispatched to her station which was served upon her at 10:30 hours on 2 November 2017. It reads:

“SUBJECT: DISCHARGE IRO NUMBER 983539N: SERGEANT MUTANDAVARI.

Be advised that the above named member was discharged from the police service as unsuitable for police duties on 01/11/17.

May member be advised accordingly. Member should sign on the acknowledgment of discharge from the police service Proforma. Commence disprop and forward to this headquarters early completed certificate authenticating recovery of all police uniforms and accessories in member's custody CMM ZRP Form 100. A letter to this effect to follow.”

So for being unsuitable to remain in the force, the applicant was discharged. Her entire case, as presented by *Mr Mugiya*, is that it was incompetent for the third respondent to purport to discharge her after she had already resigned. The import of that argument is that resignation,

once communicated, is final and does not require any approval or disapproval from anyone, not even the third respondent. It is a unilateral act by a force member who then ceases to be one, as the applicant did on 30 October 2017, upon submission of her notice of resignation and waiver of notice form. When the third respondent took the decision to discharge her two days later that was an exercise in futility, she having unilaterally stepped down and was therefore no longer subject to the disciplinary authority of the third respondent.

We know from the opposing affidavit of the Chairperson of the Police Service Commission, the fourth respondent herein, that subsequent to receiving the discharge order, the applicant also noted an appeal against it to the Police Service Commission which she did not withdraw. The position of the fourth respondent therefore is that, by approaching this court on review, the applicant is taken to have abandoned domestic remedies available to her without exhausting them in favour of an early approach to this court.

The second and third respondents' case is that the applicant was aware of the recommendations of the suitability board that she was susceptible for discharge as she was unsuitable to remain in the police service. She then attempted to circumvent the due process by purporting to initiate resignation proceedings which were however not completed because the requirement for notice was not waived. As such she remained a force member until the process was completed. The third respondent was therefore within his powers to discharge the applicant as he did on 1 November 2017 in terms of the recommendations of the suitability board.

The issues for determination therefore are whether the applicant resigned from police service and if she did whether the third respondent was entitled to discharge her notwithstanding such resignation. It follows therefore that if there was no valid resignation, the applicant remained a force member who was subject to disciplinary action including discharge. The resolution of these issues requires a determination of when the resignation of a regular force member takes effect. If it takes effect upon the submission of a letter of resignation, as would occur in respect of an ordinary employee, it follows that when the applicant submitted hers to the first respondent she immediately and there and then ceased to being a force member. She could not be disciplined thereafter she not be a force member.

*Mr Mugiya* for the applicant submitted, extraneously in my view, that section 55 of the Constitution of Zimbabwe prohibits forced labour. For that reason the police authorities were

not at liberty to ignore the applicant's letter of resignation submitted to the first respondent on 30 October 2017. In advancing that proposition Mr *Mugiya* relied on the authority of *Muzengi v Standard Chartered Bank Zimbabwe Limited and Another* 2002 (1) ZLR 334 (S) and *Riva v National Social Security Authority* 2002 (1) ZLR 412 (H) where the same principle is pronounced that the giving of notice is a unilateral act which requires no acceptance or rejection by the party receiving it.

In both those cases an employee had given notice of resignation and then later sought to retract it. In both the court held that the notice stood and could not be retracted except with the consent of the employer. In *Muzengi, supra* ZIYAMBI JA upheld the judgment of SMITH J in the court *a quo* (2000 (2) ZLR 137 (H) when the learned Judge of Appeal stated at 339 H, 340A-E:

“By his resignation, again tendered on 26 November, after the inquiry, the appellant terminated his contract of employment with the first respondent. It is of no consequence that the respondent purported to accept the resignation on 11 December. In this regard, the following passage from the judgment of the court *a quo* is apposite and I respectfully endorse it.

‘In *Rustenberg Town Council v Minister of Labour and Others* 1942 TPD 220, MURRY J, dealt with the effect of a notice of termination of a contract of employment. At p244 the learned judge said:

““The giving of notice is an unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given is final, and cannot be withdrawn – except obviously by consent-during the time in excess of the minimum period of notice- ----.””

This statement as to the effect of a letter of resignation has been cited with approval in many cases, including *Potgietersrust Hospital Board v Simons* 1943 TPD 269; *de Vos v Monnick and Visser* 1944 CPD 31, *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1955 SR 114; 1956 (1) SA 34 (SR); and *Kadada v City of Harare* HH -26-94. Therefore even though the Bank purported to accept the resignation on 11 December, it really had no option. The resignation was effective on 26 November. All the Bank could do was to decide whether or not to permit Muzengi to withdraw his resignation”

Mr *Musika* for the respondents submitted that the resignation or retirement of a force member is governed by section 22 of the Police Act which prescribes the procedure for disengagement of a member. It is only when the procedure set out therein has been satisfied that

there can be a valid resignation. As that procedure was not satisfied the applicant remained a member which could be subjected to a discharge order as was issued against her. There was nothing irregular with her discharge on 1 November 2017.

I must state that the position of a force member is one that could be said to be *sui generis*. It cannot be equated to that of an ordinary employee because a member belongs to that special group commonly referred to as “the uniformed forces” who are subject to their own form and set of rules. Indeed the applicant is governed exclusively by the Police Act and cannot rely on civilian law in prosecuting a review of a process conducted in terms of the Police Act. It is for that reason that I stated earlier that *Mr Mugiya* made extraneous submissions because he sought to ignore completely the procedure for retirement of a member set out in the Act. The authorities relied upon by *Mr Mugiya*, to the extent that they provide for a resignation which takes effect immediately upon the delivery of a letter of resignation, have no application to this case as they cannot override the provisions of the Act.

In terms of section 22 (1):

“Subject to section twenty-five, on giving to the Commissioner-General in writing, at least three months notice of his intention to do so or such lesser period of notice as the Commissioner-General may in his case permit, a Regular Force member may retire from the Regular Force—

- (a) on gratuity when his pensionable service amounts to ten years or more; or
- (b) if he does not exercise his right to retire in terms of paragraph (a), on pension, when his pensionable service amounts to twenty years or more.”

The applicant joined the police force in 2004 and had been in it for 13 years when she purported to resign. She indeed qualified to do so in terms of section 22 (1) (a) of the Act. What is important though is that for a member to resign they are required to do so on at least three months’ notice to the third respondent. The latter is entitled, in his discretion, to waive the three months’ notice in favour if a shorter period. It was obviously on account of that discretion that the applicant saw it fit to submit with her resignation letter, a waiver of notice form, seeking to be allowed to resign on shorter notice.

What is irrefutable is that the person entitled to a three months’ notice of resignation is the third respondent. It is him who has the discretion to waive the requirement of a three months’ notice and allow a shorter notice. Until such time that the three months’ notice is

waived, it is the only vehicle through which a regular force member can disengage from the force. The argument that the resignation of the applicant without giving the requisite three months' notice and without applying for and being granted a waiver of that period was dependant on her submission of a letter of resignation only is fundamentally flawed in light of the provisions of section 22 (1). She could not waive the notice herself as the discretion to do so lay elsewhere not with her.

I conclude therefore that the applicant did not resign on 30 October 2017. Whatever resignation she intended to do could only take effect upon the expiry of three months' notice or any shorter period given by the third respondent. Such shorter period was not given and she remained a regular force member. She was such a member when she was discharged from service on 1 November 2017.

The proposition that the applicant could not be subjected to forced labour in breach of section 55 of the Constitution is not only dramatization of straight forward statutory obligations resting upon the applicant but something of no moment at all. It does not command any further attention. I must say though that there is also the very compelling aspect of the applicant's complete lack of *bona fides* arising from a resignation motivated by a desire to circumvent the outcome of disciplinary proceedings which had in fact been completed. To the knowledge of the applicant recommendations for her discharge had already been forwarded. She tried to pull a fast one by purporting to resign. This court cannot allow itself to be used to side-foot the imperatives of misconduct. There is no merit in the application especially as *Mr Mugiya* did not advance any arguments in support of the other review ground that no reasons were given. In my view, the radio communication served on the applicant contained the reasons.

In the result, the application is hereby dismissed with costs.

*Mugiya and Macharaga Law Chambers*, applicant's legal practitioners  
*Civil Division, Attorney General's Office*, respondents' legal practitioners