EX-CONSTABLE MATSITSIRO T. 055873F
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 FEBRUARY 2018 AND 22 MARCH 2018

Opposed Matter

N Mugiya for the applicant
L Musika for the respondents

MOYO J: This is an application for a declaratur. The order sought is as follows:

1. That the decision of the first respondent is hereby declared unlawful and wrongful.
2. That the decision of the first and second respondents be and is hereby set aside.
3. That the respondents are to bear the costs on an attorney and client scale.

The brief facts of the matter are that applicant was discharged from the police force on 23 February 2015. He avers that he was never given reasons for such action even when he demanded them. He then appealed to first respondent, the appeal was unsuccessful, he appealed to second respondent and his appeal was again overturned.

He was never given any reasons on all these instances. He says failure to give him reasons is wrongful and unlawful. He also avers that second respondent was improperly constituted as its composition is not in terms of the constitution.

At the hearing of the matter, applicant submitted that all respondents were out of court as first respondent filed a notice of opposition with no opposing affidavit and that second respondent filed an opposing affidavit with no notice of opposition.

That these papers do not comply with the rules and the respondents are therefore out of court. Counsel for the respondents submitted that the notice of opposition filed on 9 October

2017 with an opposing affidavit attached to it for the second respondent, although its written first respondent on the face of it, that was a typographical error, but that the notice of opposition and the opposing affidavit go together and they are for the second respondent.

I accordingly find that the second respondent is in court for the following reasons:

1. The explanation given by the respondent's counsel is reasonable and both documents are annexed to each other and were filed together as they are both stamped 9 October 2017.
2. That this is a minor technical error which after an explanation, cannot be the basis upon which a party who is keen on defending proceedings should be denied audience.

Denial of audience to a party is a grave measure that should only be taken in those very bad cases where a flagrant breach of the rules or disdain is present. Denial of audience cannot be lightly applied in every case resulting in every miniature omission being used to shut out a litigant. This cannot be in the interests of justice. Save in those very bad cases, a court must be inclined to hear the real dispute between the parties, it must not allow itself to be clouded by small technical battles that do not have any relevance to the real dispute at hand especially where there is no prejudice as in this case. The applicant's behaviour clearly shows that even himself, he was of the view that this matter is opposed causing him to file heads of argument, and supplementary heads of argument. Refer in this regard to the case of; *Trans African Insurance Co Ltd* v *Maluleka* 1956 (2) SA 273 AD at 278 where SCHREINER JA stated thus:

> "Technical objectives to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible inexpensive decision of cases on their real merits."

I hold the same view. The application is thus opposed by the second respondent. The second respondent has opposed the application and says due process was followed, that applicant never made a written request for a record of proceedings and that a minute was indeed addressed to his lawyers. That applicant had appeared before a Suitability Board which found him unsuitable and accordingly recommended his dismissal. The second respondent also denies that it was improperly constituted. Respondent's counsel submitted that applicant is in fact seeking a review disguised as an application for a declaratur.

Whether this is an application for a declaratur

The complaint by the applicant in this matter is as follows: at paragraph 7 of his founding affidavit he complains about respondent's failure to reinstate him.

At paragraph 9, he says subsequent to the dismissal of his appeal, he requested for reasons but was never given any.

At paragraph 10, he says he was never given a right to be heard, a breach of the rules of natural justice.

He further states that he is entitled to be given reasons, and to be heard before an administrative decision is taken. He further states that second respondent was not properly constituted and that refusal or failure to furnish him with written reasons is unlawful and wrongful and that failure to give him an opportunity to be heard before dismissing him was also wrongful and unlawful.

All the above grievances are subject to review. That is, the applicant is bringing grounds for review before this court and decides to call them an application for a declaratur.

- That a party was denied an opportunity to be heard is a ground for review.
- That a party was not given reasons for any administrative decision taken by an administrative body is a ground for review.
- The relief sought in the draft order that the decision be set aside is a remedy on review.

This is therefore an application for review brought as an application for a declaratur for reasons known to the applicant.

Our courts have held that a party should not be able to get around the requirements for review proceedings by instituting proceedings for a declaratory order. Refer to the case of *Kwete* v *Africa Community Publishing and Development Trust* HH 216/98 and *Marashu* v *Old Mutual Life Insurance Co Ltd* 2000 (2) ZLR 197 (H).

I also agree with the views of this court in the case of *Ex-Constable Stanley* v *The Commission General of Police and Others* HB 288/17 that it is inappropriate to bring an application for review disguised as an application for a declaratur. The applicant certainly is at qualms with the irregularity of the proceedings being complained of and therefore should properly have brought an application for review wherein the record of proceedings would have

been attached for this Honourable court to assess for itself the presence and extent of any irregularities therein.

Whether the Police Service Commission was improperly constituted

The applicant makes a bold assertion in its papers that the police service commission was not properly constituted. He does not, take us through the factual foundation for this averment. For the court to make a finding as to whether second respondent was properly constituted the court requires the following facts;

1. What is the constitutional requirement for the composition of second respondent?
2. What was composition of second respondent at the material time? How was second respondent factually composed at the time applicant's case was dealt with?
3. What were the specific inadequacies in so far as its composition was concerned?

Applicant does not give us a factual basis for the attack on the composition of second respondent. Although the legal representative of applicant then tried to make these factual averments on their heads of argument, it is too late because second respondent has already answered to the bare allegation that it is not properly constituted fullstop. Even on the heads of argument still applicant does not tell us how he knows as a matter of fact that second respondent was not properly constituted and that no commissioners were sworn to it. Allegations should have a factual basis, they cannot just be plucked from the air. Applicant makes an assumption on this aspect and does not lay a factual foundation at all for such a claim, which certainly cannot be held to be common cause.

It is for these reasons that this application should fail.

I accordingly dismiss the application with costs.

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