EX-ASSISTANT INSPECTOR HODZA L 052493G
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE CHAIRMAN OF THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 14 & 30 May 2019

Court Application

N Mugiya, for the applicant
D Jaricha , for 1st respondent

MANZUNZU J: This application is premised on fairly simple facts. The applicant was a member of the Police Service. He appeared before a single officer facing certain charges under the Police Act, (*Chapter 11:10*). He was convicted on 30 June 2014. The applicant appealed to the Commissioner General against both conviction and sentence. His appeal was dismissed by the Commissioner General on 3 December 2014 who then set up and convened a Board of Inquiry to determine his suitability in terms of s 50 of the Police Act on 16 November 2015. As a result the applicant was discharged from service on 11 January 2016.

The applicant filed an appeal on 13 January 2016 to the Police Service Commission against the decision to discharge him. The Police Service Commission dismissed applicant's appeal on 2 June 2016. On 27 June 2016 the applicant filed this application and prayed for an order that,

> "1. The discharge of the Applicant from the Police Service by the 1st and 2nd Respondents is declared unlawful and wrongful.
> 2. The Respondents are ordered to reinstate the applicant into the Police Service forthwith.
> 3. The respondents are ordered to pay costs of suit on a client/attorney scale."

Despite due service, the second and third respondents did not respond. The first respondent opposed the application and raised a point in *limine* alleging a misjoinder. At the hearing the point in *limine* was abandoned and properly so as it had no merit.

I will now turn to the grounds relied upon by the applicant in support of his application.

Effect of an appeal vis-à-vis Reinstatement of Applicant

Section 51 of the Police Act reads;

> "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."

The provisions of this section are clear. When the applicant filed his appeal with the Police Service Commission on 13 January 2016 the Commissioner General ought to have reinstated the applicant to his position until the outcome of his appeal. See also the case of *Constable Mutimusakwa & Ors* v *The Commissioner General of Police & Anor* HB 225-16 where TAKUVA J had this to say:

> "It is clearly the Commissioner General who is directed not to execute his order until the Commission has given its decision. In the circumstances, the Commissioner General cannot claim to have power to discharge and not to reinstate. In my view, to argue that it is the Police Service Commission that should reinstate amounts to requiring applicants to apply for stay of execution in circumstance where that relief has already been granted by the law."

The appeal was dismissed on 14 June 2016. The Commissioner General should have reinstated the applicant for the period 11 January 2016 to 14 June 2016. He did not do so. His omission was unlawful.

The last minute attempt by Mr *Jaricha* that there was no proper appeal before Police Service Commission because of the manner it was served has no merit and I do not intend to comment beyond this.

Failure to Give Reasons

The applicant alleged that the second respondent failed to give reasons why the appeal was dismissed. He relied on s 68 (2) of the Constitution of Zimbabwe which provides that:

> "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) An Act of Parliament must give effect to these rights, and must –
> (a) Provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
> (b) Impose a duty on the State to give effect to the rights in subsections (1) (2); and
> (c) Promote an efficient administration."

The applicant said he requested the reasons from the second respondent through a

letter dated 16 June 2016. No reasons were furnished. However, through a document headed notice of filing respondents filed the reasons with the court record on 9 October 2018 copied to the applicant's legal practitioners. I did not hear applicant say such document was not received. Instead, Mr *Mugiya*'s argument was that the document was not properly before the court as it did not follow the due process of the rules. Mr *Jaricha* who appeared for the first respondent conceded to that.

However, despite its disregard, counsels kept referring to it in their argument when it was convenient to do so though in each case either counsel will object to its use. Rules of procedure are relevant in every case and must strictly be adhered to. But courts are not blind folded. They have a duty to do justice to the parties. Technicalities must not be allowed to drive away fairness. I did not hear the applicant say he did not receive the reasons for dismissal of his appeal from the Police Service Commission though it might have been belated. Applicant complains that he did not receive the reasons for the decision and if indeed he has now received them what is the cause of complaint. The rationale for providing reasons for decision is to remove the presumption of arbitrariness by the administrative authorities. I was not persuaded that the ground for the absence for reasons for the decision be allowed to stand when as a matter of fact it was fulfilled. This ground must fail. The applicant's founding affidavit does not raise this issue in respect to the first respondent.

Audi alteram partem rule

The applicant's founding affidavit does not elaborate on this ground. He merely says in paragraph 6 that he was informed of his discharge through a radio signal on 11 January 2016. Earlier in paragraph 5 he says a board of suitability was convened on 16 November 2015 and attached a notice to that effect. The notice of the board of inquiry is fairly detailed and was received and signed by the applicant on 10 November 2015.

Despite this proof of service there is no evidence as to why applicant says he was not given the chance to be heard. The only time this features is in the heads of argument. The question is what are the factual issues before the heads. The onus was on the applicant to reveal in full detail the background to this ground. He chose not to. The court does not know how he claims was denied the opportunity to be heard when in actual fact the first respondent invited him to the board of suitability in the first place. I find no merit in this ground.

Composition of the Police Service Commission.

A challenge was made that the Police Service Commission which heard his appeal was not properly constituted. It has been alleged its composition is not in terms of the Constitution. Mr *Mugiya* in argument relied on s 222 (2) of the Constitution which provides that;

> "**222 Establishment and composition of Police Service Commission**
> (1) There is a Police Service Commission consisting of a chairperson, who must be the chairperson of the Civil Service Commission, and a minimum of two and a maximum of six other members appointed by the President.
> (2) Members of the Police Service Commission must be chosen for their knowledge of or experience in the maintenance of law and order, administration, or their professional qualifications or their general suitability for appointment, and—
> (a) at least half of them must be persons who are not and have not been members of the Police Service;
> (b) at least one of them must have held a senior rank in the Police Service for one or more periods amounting to at least five years."

I agree with Mr *Jaricha* for first respondent when he said there were no averments as to why applicant was saying the Commission was not properly constituted. I drew the attention of Mr *Mugiya* when he was on the floor as to why there were no averments sufficient enough to inform the respondents on the alleged improper constitution. His position was that it was sufficient to merely allege the impropriety of the composition with the onus shifting to the respondents to show the proprietness.

I disagree. This is not a witch hunting exercise. Applicant is the one alleging the inappropriateness and has the onus to lay out sufficiently the basis for such allegation. That will guide the respondents on the line of relevancy of the response. It is not sufficient for the applicant to throw a blanket allegation with the hope that respondent will go through a mammoth task of dealing with each and every aspect of the constitutional requirements of its membership.

The factual allegation that second respondent was not appointed by the President appears in the heads not in evidence. This ground has no merit.

<u>Whether or not there is double jeopardy if the same facts as alleged in criminal courts are used in disciplinary hearing</u>

This ground though raised in both counsels' heads, was never pursued by either Counsel at the hearing. I take it that it was abandoned and I do not intent to deal with it in any detail.

Conclusion:

Of all the grounds raised by the applicant the only ground with merit is that the first respondent ought to have reinstated the applicant when he filed his plea. But the applicant seeks a declaratory order under s 14 of the High Court Act, [*Chapter 7:06*] The section reads:

> **"14 High Court may determine future or contingent rights**
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

It is within the court's discretion to grant or refuse an application for a declaratory order. The discretion must be judicially exercised. The legal position that an appeal against the decision of the Commissioner General suspends the operation of that decision is well set out in s 51 of the Police Act cited supra. The position has not been contested by the first respondent.

Ordinarily the court will not grant a declaratory order where the legal position is clearly set out by the statute. However, for the avoidance of doubt, this application partially succeeds as against the first respondent to the following extent.

IT IS ORDERED THAT

1. The discharge of the applicant from the Police Service for the period 11 January 2016 to 14 June 2016 by the first respondent be and is hereby declared wrongful and unlawful.
2. The first respondent is ordered to pay costs of suit to the applicant on the ordinary scale.
3. There is no order of costs as against the second and third respondents.

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