EX-CONSTABLE MACHERERA B 072314 B
versus
THE COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 15 May 2019 & 10 October 2019

Court Application

N Mugiya, for the applicant
G Chihuta, for the respondent

MANZUNZU J: This is a court application in which the applicant seeks an order in the following terms:

"IT IS ORDERED THAT

1. The refusal of failure by the respondents to furnish applicant with reasons for his discharge be and is hereby declared unlawful and wrongful.
2. The discharge of the applicant from the Police service by the respondents be and is hereby declared wrongful and unlawful and accordingly set aside.
3. The respondents are ordered to pay costs of suit on attorney – client scale."

The background to this matter is that the applicant who was a constable in the Police Service was discharged from his employment by the first respondent on 1 June 2016. This was after he was convicted by a single officer in terms of the Police Act [*Chapter 11:10*]. Applicant appealed against both conviction and sentence to the first respondent who after considering the appeal dismissed it. A Board of Inquiry (Suitability) was thereafter convened in terms of s 50 (1) of the Police Act. The Board thereafter recommended for the discharge of the applicant from the Police Service. The first respondent then discharged the applicant.

The applicant filed this application on 21 March 2018 attacking the process leading to his discharge.

He accused first respondent of hearing his appeal without affording him a hearing. He attacked the Board of Inquiry into his suitability of being improperly convened by an unauthorised officer in terms of the law. Applicant said the convening order for the Board was signed by an unauthorised officer who was not the first respondent. He accused the first respondent of not furnishing him with the findings and recommendations of the Board of Inquiry.

Finally, applicant alleged the radio signal notifying him of the discharge did not contain reasons justifying his discharge.

The first respondent in opposition has controverted these alleged procedural irregularities. But first and foremost, raised two preliminary points.

The first one is that the application is bad at law in that while it purports to be a declaratur it is in essence a review. What then is the distinction between a declaratur and a review?

This court derives its power from s 14 of the High Court Act [*Chapter 7:06*] in respect to a declaratur. Section 14 reads:

> "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."

On the other hand, s 27 of the High Court Act which deals with the grounds for review state that;

> "27 Grounds for review
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c)gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall effect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

An application for a declaratur must meet the requirements of an application for such a relief.

In Johnson v AFC 1995 (1) ZLR 65 (S) at p 72E GUBBAY CJ said,

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto…

> At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter."

The cardinal principle in deciding whether a matter is for a declaratory order or review is not so much of the relief sought but rather the grounds upon which the application is based.

In *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) at 484 G, MALABA JA said,

> "In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not in itself proof that that application is not for review."

The applicant's founding affidavit is clear that it is a challenge of the procedure used by the first respondent leading to his discharge. The applicant is simply saying the procedure used by the first respondent was wrong.

It is apparent from the content of the application that what the applicant seeks is not a declaration of rights but rather to set aside decision of the first respondent in respect to the appeal and discharge.

It was stated in the *Geddes* case (*supra*) that, "setting aside of a decision or proceedings is a relief normally sought in an application for review."

I agree with the argument by counsel for the respondents that this is an application for review clothed as a declaratur so as to avoid the time lines required for the filing of an application for review. This is not a proper case for the court to exercise its discretion under s 14 of the Act. The application is bad at law and the point *in limine* succeeds.

The second point *in limine* is that the applicant did not exhaust the domestic remedies available to him. When his appeal was dismissed leading to his discharge he ought to have appealed to the Police Service Commission. He did not. The applicant ought to have used internal remedies. The point *in limine* is upheld.

I find no need to go to the merits because these points *in limine* do dispose of the matter.

The application is therefore dismissed with costs.

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