HB 146-16
HC 750-16
XREF HC 765-16

ADMIRE MAHACHI
and
NYARAI MPOFU
and
EMMANUEL MUGUTO
and
KNOWLEDGE SHAMHU
versus
OFFICER COMMANDING MATABELELAND
SOUTH PROVINCE, N.O
and
COMMISSIONER GENERAL OF POLICE N.O

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 9 JUNE 2016

Urgent Chamber Application

MOYO J: This is an urgent application wherein the four applicants seek an interdict stopping the Commissioner General of the Police from transferring them from Beitbridge Police station prior to their constitutional application which they filed with this court having been determined. I declined the order and, gave reasons in query form, but the applicants then requested for written reasons in the form of a judgment to enable them to take the matter further. Here are my reasons:-

I noted at the time I attended to the application that whilst it was filed as an urgent application by a firm of lawyers representing the applicants, it was not certified as urgent. A blank certificate of urgency was attached to the application. It was therefore not certified as urgent. I noted though, that at the time they requested for reasons, a signed certificate of urgency had been substituted for the blank one that had been in the record. My reason therefore that the matter was not certified as urgent still stands as that is what I observed and putting the papers in order after I had dealt with the matter does not save the situation in my view. The application thus did not comply with Rule 244 in that regard.

Again, the facts of the matters are that the applicants, who were stationed at Beitbridge Police Station, were now being transferred to other districts and they alleged that they had launched a constitutional application to challenge their transfer on the basis that they had a legitimate expectation to continue working at the same police station as three of the applicants had been moved there before in order to join their families. The fourth applicant has also worked at Beitbridge Police station and was not given any reasons for the transfer. They alleged that section 68 of the Constitution of Zimbabwe mandated first respondent to give them reasons for the transfer decision as it affected their interests.

They also alleged that in terms of the Police standing orders Vol. 2, all officers were entitled to remain at one police station without being transferred for a minimum period of five years. No clause in the police standing orders was cited with precision neither were same annexed to the application. On perusal of the application, I noted that the transfer being complained of involved not only the four police officers but thirty-six police officers were being moved to different police stations. The requirements for a temporary interdict are as follows:

1) a *prima facie* right

2) a well-grounded fear of irreparable harm

3) the absence of any other remedy

4) the balance of convenience favours applicant. Refer to the case of *Zesa Staff Pension Fund* v *Mushambadzi* SC 57/02.

On the first requirement, whether the applicants' papers established a right which although open to some doubt, was present. I noted the following:

That section in terms of 219-221 of the Constitution of Zimbabwe the Police Service Commission and the Commissioner General of the Zimbabwe Republic Police are mandated with the administration of the Police Service. The Police Service is an organization that has resources, including human resources that are administered by the Commissioner General of Police under the auspices of the Police Service Commission. In administering such resources, they have a duty to distribute resources within the Police Service this includes human resources

such that they benefit the whole nation at large. It therefore follows that in exercising their constitutional mandate, they will move human resources around the country.

In the case *Gurava* v *Traffic Safety Council of Zimbabwe* SC 5/2009, it was held that:

> "It must be accepted that the right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employers' discretion in determining which employee should be transferred and to which point of the employers operations is not to be readily interfered with except for good cause shown."

Good cause in that case was given as *inter alia,* unfounded allegations, victimization of the employee and any action taken to disadvantage the employee.

Of course in the *Gurava* case, *(supra*) reasons had been given for the transfer, but the applicant had made representations against the transfer, nonetheless the employer still insisted on the transfer after considering the employee's representations.

The Supreme Court in that case however, went on to hold that:

> "even if the reasons had not been given in the first correspondence to him, the reasons would still be valid as long as they were genuine."

In the *Gurava* case, the Supreme Court went on to state that:

> "The employee who undertakes to work for an employer whose business is carried out at different places takes the risk of being sent to perform services of the employer where ever such services are required unless the employment contract stipulated that he is to be employed and remain at a specific place only."

In the *Gurava* case, *(supra*) the court also quoted the case of *Taylor* v *Ministry of Higher Education and Another* 1996 (2) ZLR 772 (SC) where in the appeal court had held that in some cases an employer can still transfer an employee without giving him or her a hearing, depending on the circumstances of the case and that it would be unworkable if every employee were to be consulted before a transfer decision is made. By its very nature, the police service has a national duty to maintain law and public order and public safety and is an essential service in my view wherein the administrative actions of the Commissioner General in distributing human resources should not be interfered with except for good cause having been shown. It cannot be good cause that applicant's just want to remain at one station with their families and that they have not been given reasons and yet they also have not sought to assert their rights by demanding them.

This takes us to section 68 (2) of the Constitution which stipulates thus,

> "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 reason for the conduct."

The four applicants allege that no reasons were given for their transfer hence the unlawfulness of the administrative action in contravention of section 68 of the Constitution.

It is my considered view that section 68 gives a person a right to prompt and written reasons for any administrative action taken. It therefore follows in my view that where administrative action is taken, and a party is adversely affected by it, he has a right to request for and be promptly supplied with written reasons. I do not hold the view that an affected party should sit back, and not ask for reasons only to say the decision is unfair as no reasons were provided. Section 68 of the Constitution of Zimbabwe simply endorsed and incorporated into the Supreme Law of the land, the provisions of the Administrative Justice Act [Chapter 10:28].

In my view, the Administrative Justice Act *(supra)* is an act of Parliament that compliments the provisions of section 68 of the Constitution. It actually provides in its preamble as follows:

> "To provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair, to provide for the entitlement to written reasons for administrative action or decisions----."

Section 3(1)(b) of the same Act provides thus:

> "An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall ---
> (c) where it has taken the action, supply written reasons therefore within the relevant period specified by law, or if there is no such specified period after being requested to supply reasons by the person concerned."

I accordingly formulated the opinion that firstly, the applicants had not shown a *prima facie* right against being transferred and secondly that they had not shown that their constitutional challenge to the transfer had prospects of success as they had not requested for written reasons.

We then look at whether the applicants would suffer irreparable harm if the interdict is not granted. Irreparable harm is a legal concept which refers to that type of harm which cannot be corrected through compensation or whose conditions cannot be put back where they were. I hold the view that the applicants have not shown that they will suffer irreparable harm if the interdict they seek has not been granted for the simple reason that the applicants are employed in the Police Service, they can request for written reasons for their transfer, challenge them if they so wish but from their respective areas of posting as per the transfer memorandum. If they successfully challenge their transfers in accordance with the law, they will then revert back to their original stations. Where is the irreparable harm? The harm that they fear can be reversed if they are successful so it cannot be held to be irreparable. Refer to the case of *Sekwele* v *Ministry of Communications and another* ZALC JHB 165/13 a judgment of the labour court of South Africa wherein the applicant sought an interdict to stop a transfer pending challenges to same. The court therein held the view that no irreparable harm can be suffered in a transfer as the applicant therein could challenge it and that it could not be held that the applicant challenging a transfer in another fora can be held not to have an alternative remedy. I hold the same view. It is therefore for these reasons that I declined to exercise my discretion in terms of Rule 246 (2) as I formulated the opinion that the applicants had not made any case for the relief sought.

I accordingly declined the provisional order for the aforestated reasons.

Phulu and Ncube, applicants' legal practitioners