HB 02/19
HC 1887/17

EX-CONSTABLE NZONZO P.T.

And

EX-CONSTABLE SOKOLE D.

Versus

THE COMMISSIONER GENERAL OF POLICE

And

THE CHAIRPERSON OF THE POLICE SERVICE COMMISSION

And

THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 9 JANUARY 2018 & 10 JANUARY 2019

Opposed Application

N. Mugiya for the applicants
L. Musika for the respondents

TAKUVA J: This is a court application for a dclaratur wherein applicants seek the following relief:

> "1. The discharge of the applicants from the Police Service by the respondents be and is hereby declared unlawful and wrongful.
> 2. The respondents are ordered to reinstate the applicants into the Police Service forthwith.
> 3. The respondents are ordered to pay costs of suit on a client attorney scale".

The applicants' case is based on the following facts:

On the 26th day of July 2016 they were discharged from the Police Service by the 1st respondent. Both appealed against the dismissal to the 2nd respondent in terms of section 51 of

the Police Act (Chapter 11:10) (the Act). Despite the appeal the 1st respondent refused, failed and /or neglected to reinstate the applicants into the Police Service.

On 7 November 2016, 1st applicant received a notice from the 2nd respondent that his appeal has been dismissed and that the decision of the 1st respondent was upheld. The 2nd applicant received a similar notification on 6 April 2017. Both alleged that they verbally requested for reasons why their appeals were dismissed "by the 1st and 2nd respondents but we were never furnished with the said reasons". Further, the two contended that the 2nd respondent's Commission is not "properly constituted in terms of the Constitution. Finally, they claimed that the 1st respondent's refusal to reinstate them is unlawful and wrongful, while the 2nd respondent's refusal or failure to furnish them with written reasons for dismissing their appeals is also unlawful and wrongful.

The respondents opposed the application on the following grounds;

1. The applicants failed to comply with the procedure provided in section 15 (1) of the Board of Inquiries (Regulations) 1965 in that they did not file their appeals with their Officer Commanding but filed them directly to the 2nd respondent.
2. Both applicants did not request for reasons from the 2nd respondent, making the 2nd respondent's failure to supply those reasons lawful.

Both parties filed detailed heads of argument which they adhered to. Applicants abandoned all their points *in limine* and the matter was argued on the merits. The parties agreed that the following are the issues to be determined:

(a) Whether or not the failure by the 1st respondent to reinstate applicants pending the determination of their appeal against discharge is wrongful and unlawful.
(b) Whether or not the dismissal of applicants from the Police Service without giving reasons is unlawful and wrongful.
(c) Whether or not the Police Service Commission is properly constituted.

The Law

In seeking a Declaratur the applicants relied on section 14 of the High Court Act (Chapter 7:06) which provides;

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

This court per NDOU J laid down the guiding principles on the exercise of its discretion in *Mpukuta* v *Motor Insurance Pool & Ors* 2012 (1) ZLR 192 (H) at p192E-G as:

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person in the sense of having 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 relate to an existing future or contingent right. The court will not decide abstract academic or hypothetical questions unrelated to such interest. That is the 1st stage in the determination of the court. At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s14 of the High Court Act (Chapter 7:06). In this regard, some tangible and justifiable advantage in relation to the applicant's position, with reference to an existing future or contingent legal right or obligation, must appear to flow from the grant of the declaratory order". See also *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 387 (S). and *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 (SC).

In the present matter, it is not in dispute that prior to their dismissal the relationship between applicants and the 2nd respondent was one of employer – employee. Therefore the applicants have a direct and substantial interest in the lawfulness or otherwise of their dismissal. For this reason, both applicants have established the requirements of the 1st test.

As regards the second stage. I turn to the merits of the case and specifically to the 1st issue. The material legal provisions are the following:

" Section 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 Commissioner has been given". (my emphasis)

The section has two critical components namely;

(i) the appeal must be within the time and manner prescribed; and

(ii) the execution of the order appealed against shall be stayed pending the decision of the Police Service Commission.

The appeal procedure isset out in section 15 (1) of the Police (Trials and Boards of Inquiry) Regulations 1965. It states;

"15(1) A member who wishes to appeal in terms of s51 of the Act shall:

(a) Within twenty-four hours of being notified of the decision of the Commissioner General of Police, give notice to his Officer Commanding of his or her intention.

(b) Within seven (7) days of being notified of the decision of the Commissioner General of Police, lodge with him or her officer commanding a notice of appeal in writing setting out fully the grounds upon which his or her appeal is based and any argument in support thereof.

(c) Upon receipt of a notice given in terms of paragraph (a) of subsection (1) the member's superior officer shall notify the Chief Staff Officer (Police) by the most expeditious means." (my emphasis)

The import of this provision is firstly, that compliance is mandatory. Secondly, the applicants were required to give notice of their intention to appeal to their Officer Commanding.

Thirdly, both applicants were required to lodge with their Officer Commanding a notice of appeal and grounds thereof. Finally, their superior officer was required to then notify the Chief Staff Officer of the applicants' appeals. The applicants contended that they filed their appeals properly in accordance with the law because the 2nd respondent determined the appeals. Secondly, they argued that they submitted their appeals through their Officer Commanding who has not rebutted that assertion through an affidavit. The 1st argument has no merit in that, in my view, it is neither here nor there that the 2nd respondent decided to consider and determine an appeal without looking at its procedural aspects. This point was not raised or argued before the 2nd respondent. Also since the reinstatement was supposed to be effected by the 1st respondent it was crucial that he be made aware of the appeal. This in my view is the spirit of section 51 of the Act and s15 (1) of the Regulations. The second argument has no merit in that it seeks to shift the onus to the respondents to prove that the appeals were improperly filed in circumstances where applicants positively asserted that they appealed through their Officer Commanding. This is a fact known to them and they would have easily discharged the onus by producing copies of their notices stamped by their Officer Commanding.

In terms of the regulations, the 1st respondent's decision is only stayed by an appeal that complies with the regulations. *In casu,* I take the view that both applicants failed to comply with the regulations. Therefore the 1st respondent could not be obliged to reinstate applicants in circumstances where the 1st respondent was in the dark about the appeals. Consequently, the 1st respondent's failure to reinstate the applicants was not wrongful and unlawful.

As regards the second issue the applicants' argument is that they "verbally" requested for the 2nd respondent's reasons but none were forthcoming. The 2nd respondent denied receiving any such request. The crisp issue is whether or not the applicants made verbal requests. The court has to resolve this dispute on the papers as no *viva voce* evidence was led. It must be noted that 2nd respondent is the chairperson of an institution. Therefore, to allege that a verbal request was made without supplying further particulars of the identity of the person to whom it was made is not helpful. Further, both applicants have not stated when and where the request was

allegedly made. If the request was made to the 2nd respondent 1st they should have specifically stated so in their founding affidavits. The probabilities in my view, do not favour a conclusion that verbal requests were made to the 2nd respondent.

This brings me to section 68 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which provides;

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 where appropriate, by an independent and impartial tribunal;
    (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
    (c) promote an efficient administration." (my emphasis)

The Act that gives effect to these rights is the Administrative Justice Act (Chapter 10:28). Sections 3 thereof provides that:

"3. Duty of Administrative Authority

(1) 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 –
    (a) act lawfully, reasonably and in a fair manner; and
    (b) act within the relevant period specified by law, or if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned, and

(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, within a reasonable period after being requested to supply reasons by the person concerned." (my emphasis)

Now, in terms of this Act, a person who requires written reasons for any administrative decision which adversely affects him/her must request to be supplied with those reasons. The question then becomes whether or not this interpretation should be extended to s68 of the Constitution? The South African Supreme Court ascribed the same meaning to a provision that is similar to s68 of our Constitution, in *South African Police Service & Ors* v *Maimela & Anor* 2003 (S) SA 4801. In this case, DU PLESSES J held that:

> "When interpreting section 33 (c) of the Constitution, it must be borne in mind that the right to be furnished with reasons is very wide, it applies to every person whose right or interests are affected by any administrative action. In many instances the persons affected may not be interested in the reasons. The practical interpretation of section 33(c) is that reasons must be furnished to affected persons who assert the right to be furnished with reasons. The purpose of section 33(c) is not to oblige administrative decision-makers to furnish without a request, reasons for every single administrative action taken in this country". (See Klaaren (in Chaskalson & Others Constitutional Law of SA (Revision Services, 1999) at 25-19). (my emphasis)

In the present matter I have found that both applicants did not prior to filing this application request to be supplied with the 2nd respondent's reasons for dismissing their appeals. It is incredible and improbable to allege or assert that they made verbal requests to an institution without identifying a specific recipient. As I pointed out above, if they made the request to the second respondent's chairperson then they should have said so in their founding affidavits. They should have also mentioned when and where the request was made.

Therefore, I find that the 2nd respondent's failure to supply his reasons for dismissing the applicants' appeals does not contravene s68 of the Constitution. It cannot on the authorities above be termed "wrongful and unlawful".

The 3rd issue relating to the constitutionality of the Police Service Commission was included as a parting shot in my view. I say so because the point was not sufficiently argued by both parties. As I pointed out elsewhere, the applicants are free to file any application with the Constitutional Court. On the status of the 2nd respondent this court is unable to make a determination on the basis of the unsubstantiated allegations in the founding affidavits by the applicants. The applicants have failed to discharge the onus to prove their claims.

In the circumstances the application is hereby dismissed with costs.

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