

EX-CONSTABLE CHITEMERE
versus
THE COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 15 May 2018

Opposed Application For A Declaration

N. Mugiya, for the applicant
D. Jaricha, for the 1st and 2nd respondents
No appearance for the 3rd respondent

MUZENDA J: The applicant, a former constable in the Zimbabwe Republic Police is seeking the following order:

“IT IS ORDERED THAT

1. The discharge of the applicant from the Police Service by the first respondent be and is hereby declared unlawful and set aside.
2. The 1st respondent be and is hereby 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.”

The applicant was discharged from the Police Service on 15 September 2017 by the Commissioner General of Police, the first respondent for being unsuitable for police duties. This discharge followed a trial of the applicant, before a single officer where applicant was convicted. The applicant appealed against that conviction and penalty to the Police Service Commission, the second respondent and according to the applicant in his papers, he is awaiting outcome of the appeal. Meanwhile the applicant argues that the noting of the appeal to the Police Service Commission automatically entitles him a reinstatement. On the other hand the respondents in their opposing papers argue that the procedure adopted by the

applicant in noting an appeal does not comply with the Police regulations and as such there is no, appeal to talk about and to justify reinstatement of the applicant to his position of constable whilst awaiting the outcome of the appeal. When the respondents refused to reinstate the applicant, the applicant then filed an application for a declaratur

WHETHER THE APPLICANT PROPERLY APPEALED

The parties are in agreement on the meaning of s 51 of the Police Act [*Chapter 11:10*] which principally provides that where a convicted member of the police service notes an appeal, that appeal suspends automatically the execution of the decision appealed against, in effect therefore a convicted member is automatically expected to go back to work pending the prosecution of that appeal. What is however in dispute is the procedure of noting that appeal. The applicant contends that he properly filed his appeal and the second respondent acknowledged receipt of that appeal. The respondents on the other hand aver that the applicant did not comply with the procedure succinctly outlined in the Police regulations. To the respondents, once the procedure adopted by the applicant failed to comply with the Police regulations the respondents argued, there is no appeal.

Section 15 (1) of the Police (Trials and Boards of Inquiry) Regulations, 1965 provides as follows:

“Section 15 (1)

- (a) Within 24 hours of being notified of the decision of the Commissioner, give notice to his Officer Commanding of his intention to appeal;
 - b) within seven days of being notified of the decision of the Commissioner, lodge with his Officer Commanding a notice of appeal in writing setting out fully the grounds on which his appeal is based and any argument in support thereof.
- (2) Upon receipt of 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.
 - (3) Upon receipt of the written notice of appeal described in paragraph (b) of subsection (1) such officer shall forward it forthwith to the Commissioner (General).
 - (4) the Commissioner (General) shall within fourteen days of receipt thereof forward to the Secretary of the Police Service Commission written notice of appeal together with the record of proceedings in terms of section 51 of the Act, or, where applicable, a certified copy of the indictment on which the member was convicted, and other relevant documents.”

Mr *Mugiya* submitted that the notice of appeal was served on the second respondent directly and the second respondent acknowledged receipt. In this court's view that procedure was flawed, if the applicant would have followed the procedure clearly provided in the Police regulations even this application would not have been necessary at all. Once the intention to appeal was given to the Officer Commanding, then the process is put into motion and the applicant goes back to work. I do not agree with Mr *Mugiya* that the police details were not cooperative. It is not clear as to who approached who about the intention to appeal, if it was Mr *Mugiya* who was acting on behalf of his client then he should have filed an affidavit to that effect. Mr Mariyawanda Nzuwa on behalf of the second respondent stated that the applicant did not comply with the requisite procedure of noting appeals as provided for in terms of s 51 of the Police Act. Hence in principle there is no valid appeal pending before the second respondent.

Mr *Mugiya* for the applicant further argued that a petition for a declaratur necessarily entails superimposed grounds for review. He was asked to provide authorities for such an argument and could not provide any. Mr *Jaricha* for first and second respondents contended that the applicant mounted an application seeking a declaratur relying on s 4 of the High Court Act. The applicant did not use Order 33 of the High Court Rules. The applicant *inter-alia* prayed for an order for his reinstatement into the Police Service Commission forthwith when he was put to task to explain whether he wanted the court to reinstate the applicant, he urged the court to expunge from the order para 2 and remain with para 1 which reads:

“The discharge of the applicant from the police service by the first respondent be and is hereby declared unlawful and set aside.”

When he was put to further task whether such a relief is not peculiar to review proceedings, he could not explain. The affidavit of the applicant is clear that the applicant wants this court to review the proceedings of the respondents for their administrative process. The question for applying for a declaratur in terms of s 14 does not apply in my view. The applicant did not comply with the provisions of the police regulations and as a result there is no appeal to justify then application of s 51 of the Police Act.

DISPOSITION

The application is dismissed with costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Attorney General (Civil Division)'s Office, 1st & 2nd respondents' legal practitioners