GODWIN SIMBARASHE MOYO
versus
SECTION COMMANDER (CHAYARUKA B N.O)
and
COMMANDER OF THE AIRFORCE OF ZIMBABWE N.O
and
COMMANDER OF THE ZIMBABWE DEFENCE FORCES N.O
and
DEFENCE SERVICE COMMISSION
and
THE MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 29 October 2019 and 15 January 2020

Court application for a declaratur

M. Mugiya, for the applicant
C Chitekuteku, for the respondents

PHIRI J: This was a court application for a declaratur in which the applicant was seeking the following order:

"1. The failure by the respondents to afford the applicant the right to be heard be and is hereby declared to be unlawful and wrongful.
2. The refusal and or failure by the respondents to furnish the applicant with reasons for the decision not to renew his contract be and is hereby declared unlawful.
3. The discharge of the applicant by the respondents is declared unlawful and wrongful and is accordingly set aside.
4. The respondents are ordered to reinstate the applicant forthwith without loss of salary or benefits.
5. The respondents are ordered to pay costs of suit on a client / attorney scale."

The facts

Applicants averred that he was employed by the Airforce of Zimbabwe on a contractual basis which was to be renewed after three years. He was charged and convicted thrice on certain allegations.

His contract was set to expire on 20th July, 2014. He received a radio signal on the 7th July, 2014 and was advised this his contract was terminated. He submitted that he was not given reasons why his contract was terminated.

He averred that he wrote several letters to the respondents in an attempt to appeal against the decision to no avail. The letters were annexed as annexure A1 to A7 to this application.

He averred that his appeal has not been determined to this day.

Respondents opposing affidavit

The second respondent the commander of the Airforce of Zimbabwe deposed an affidavit being authorised to also depose an affidavit for and on behalf of all respondents.

Points *in limine*

He raised points *in limine* that

1) Applicant's contract had expired in July, 2017 and was seeking a declaratur 3 years after his contract had expired.
2) The applicant had adopted a wrong procedure. He was seeking a declaratur instead of a review since the conduct complained of was administrative in nature.
3) The applicant should have sought condonation to file the present application.

The merits

On the merits the respondent submitted that the applicant had been employed on a contract basis in line with the Defence Act [*Chapter 11:02*].

He cited section 5 (1) of the Defence Forces (offices) regulations which stipulates that the Commander should approve the applicant's election to renew his contract.

He explained that the applicant was unsuitable to remain in the organisation to a series of "indiscipline" since the Military's thrust is discipline.

He confirmed that indeed the applicant was charged thrice and convicted and failed to challenge these convictions in terms of the Defence Forces (Discipline) Regulations, 2003 (S.I 205 of 2003).

Applicant was called for interview and was informed that his service that was lingered with unacceptable behaviour and accordingly his contract would not be renewed. He also submitted that the applicant had admitted in para 7, of his founding affidavit; that he was called for an interview and was accordingly given an opportunity to be heard.

Respondent also submitted that there is no procedure for an appeal against the decision of the Airforce Commander of Zimbabwe.

Respondent maintained that a radio signal informed applicant that his application for alteration of class engagement was not successful. This was coupled with his exit interview. Accordingly the respondent maintained that reasons for applicant's dismissal were proffered.

COURT'S FINDINGS

This court is of the view that the applicant was employed on a contract basis and in view of the fact that he was found to be an unsuitable candidate, at the expiration of his contract, his submission that he had a legitimate expectation for the contract to be renewed is unfounded.

Secondly this court is of the view that the series of letters annexed as annexure A1 to A7 do not in fact constitute any appeal.

In fact it was an appeal for clemency. At p 7 of the record the applicant stated:

> "..... I am not in dispute of the above disciplinary action taken by my superior. I am applying for a second chance to be allowed to continue serving in the A.F.Z allowed to review my contract. I promise to measure up to standard." (see page 7 letter dated 7 July 2014)

Similarly in his letter of 21 July, 2014 he wrote

> "(1) I have the honour to apply for clemency to review my contract with the A.F.Z. My general application to renew my contract from initial to permanent term was not approved. I was also given a short notice.
> (2) I was appraised of my shortcomings and I have learned from them. If allowed to review my contract to continue serving in the AFZ, I will perform to the best of my ability and measure up to standard ....." (see page 8 of the record)

All subsequent letters addressed to the Defence Service Commission are couched in similar terms. See pages 9 to 16.

At the hearing of this matter it was raised whether these letters constituted an appeal in the strict sense and the answer was in the negative.

This court accordingly finds that in these circumstances the application for a declaratur is unfounded and that the applicant is not entitled to the relief sought.

The application is accordingly dismissed with costs.

Mugiya and Macharaga, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners