

JOSEPH MATARUTSE
versus
OFFICER COMMANDING POLICE, MIDLANDS
and
CHIEF STAFF OFFICER – HUMAN RESOURCES ADMINISTRATION
and
COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION
and
MINISTRY OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 1 & 4 November 2016; and 20 December 2016

Urgent chamber application

Mr R. Chidawanyika, for the applicant
Adv. O. Takaindisa, with him Mr H. Magadure, for the respondents

MAFUSIRE J: The remedy sought by the applicant, on an urgent basis, was rather unusual. For a final order, he wanted the court to declare, in the main, as being unlawful and a breach of his constitutional rights, the respondents' conduct in barring him from retiring from the police force after having reached the pensionable service. Ancillary to that, was a request to set aside the respondent's letter communicating that decision.

As interim relief, the applicant sought an order to allow him to retire from the police force by the date he would have clocked the pensionable service. Corollary orders would bar the respondents from stopping him from retiring and would direct them to process the paperwork to facilitate his retirement.

As I understood it, and in my own words, the applicant's cause of action was this. By 31 October 2016 he would have clocked twenty years' service in the police force. He would then be eligible to retire on pension in terms of the Police Act, *Chapter 11:10*. He did want to retire. So, on 20 September 2016 he submitted his written notice. Section 22 [1] requires that the notice be at least three months. The applicant asked for a waiver.

Unfortunately, the police would not let him retire before he had completed his bonding period. He had undertaken university education in terms of a written contract with

the police. In terms thereof, he would have to complete seventy two months of service, post his graduation. The police said he had only done twenty six. They said the bonding contract had no buy-out clause.

The applicant sued. He said the police had no right to force him to continue associating with them. He said s 22 of the Police Act, as read with s 25, permitted him to retire on pension, except in the specified circumstances [e.g. during war, riot, disturbances, or other emergencies]. Bonding was not one of those circumstances.

The applicant also said the police' conduct infringed on his constitutional rights as enshrined in s 54 [freedom from slavery]; s 58 [freedom of assembly]; s 64 [freedom of profession, trade or occupation] and s 65 [labour rights].

On why he was proceeding on an urgent basis, the applicant said his constitutional rights were being infringed and that the infringement was continuing. He said the police wanted to force him to work when he had reached pensionable service.

The certificate of urgency firstly summarised the above facts. It then went on to condemn the police for disregarding ss 22 and 25 of their own Act. It condemned them for infringing the applicant's constitutional rights. Finally, it said the matter required urgent intervention by the court so as to "... *apprehend* ..." the harm being suffered by the applicant. It was said the need for the applicant to act had arisen on 23 October 2016 when the police had communicated their decision to turn down his application to retire on pension.

In spite of the fact that the application was patently defective, among other things, for want of compliance with Order 32 r 241[1] of the Rules of this Court, I caused it to be set down in case the applicant would be able to explain himself convincingly. Furthermore, this being the very first urgent chamber application to be dealt with by the new High Court station at Masvingo¹, I also wanted to take the opportunity to sensitize the parties and the legal practitioners in that part of the country of certain practices and procedures. Some in the legal fraternity had in courtesy meetings candidly confessed their lack of High Court experience.

The police opposed the application. They took the view that the bonding contract was binding on the applicant; that it did not infringe his rights, either in terms of the Police Act, or the Constitution, and that the matter was not urgent anyway.

At the end of the hearing I removed the matter from the roll for being defective for want of compliance with r 241[1] [relating to the use of the appropriate form]; defective for

¹ With effect from 1 September 2016

want of compliance with r 242[2][b] [relating to the certificate of urgency] and defective for lack of urgency.

I drew attention to my judgments in *Marick Trading [Private] Limited v Old Mutual Properties Life Assurance Company of Zimbabwe [Private] Limited & Anor*² and *Odar Housing Development Consortium v Sensene Investments [Private] Limited & Ors*³ in which I dealt extensively with the need for correct forms in urgent and ordinary applications and with the contents of a certificate of urgency. I was not re-inventing the wheel, but merely summarising the requirements of the law.

In the present case, the form of the application used was exactly the same as that condemned in those cases. So what I said therein equally applied herein.

Regarding the certificate of urgency, it said absolutely nothing about why the matter had to be treated with such haste ahead of any others that might have been awaiting determination on the ordinary motion court roll. The document was hardly a certificate of urgency. It was some kind of heads of argument.

During argument, Mr *Chidawanyika*, for the applicant, tried to salvage the situation by arguing that if the applicant just left employment on the day he clocked the pensionable service without the formal blessings of the police, he could be branded a deserter and liable to be arrested. That, he said, made the matter urgent because the applicant did not want to be arrested as that would have drastic consequences on his person, his family and his character.

However, the point lost to the applicant was that all this did not create a situation of dire emergency at all.

Firstly, the substantive relief that he really wanted was a declaration of invalidity of the so-called bonding contract. There was nothing urgent in that.

Secondly, when he entered into that contract in July 2011, thus more than five years ago, the Police Act had been there. His course of study would complete in July 2014, i.e. more than two years ago. After completion, he had continued to serve under that contract.

The point is: he had had more than ample time to challenge the validity of that contract without haste and using ordinary court processes. That would have allowed factual issues and points of law to be canvassed and ventilated extensively and exhaustively. In contrast, in urgent proceedings, issues and points of law are dealt with just hurriedly and perfunctorily because the time does not permit. That is why urgent chamber applications are

² HH 667-15

³ HH 709-15

reserved for situations of dire emergency where the court, in an effort to alleviate a desperate situation, may bend over backwards by suspending all its other business; relaxing some general safeguards like the need to file proper and extensive pleadings; shortening all the time frames, and even drastically lowering the normal standards of proof. It will grant relief if, for example, the applicant shows an infringement, or potential infringement, of a mere *prima right* which might even be open to some doubt.

I pointed out to the applicant that in labour disputes, for example, employees are sometimes suspended without pay and benefits. Invariably, the resultant financial hardships are enormous. Yet because these are the obvious and natural vicissitudes of employment relationships arising out of the operation of the law, it is not always given that the employment dispute will be determined by the court on an urgent basis. *In casu*, the applicant's situation was 360° in the opposite direction. He was someone literally running away from his employment; from his wages; from his benefits; from his perquisites and from whatever else the trappings of his employment were. He was then engaging the court to give him some salutary assurance, on an urgent basis, that he could breach his contract – for *prima facie* that is what it was – and that he should fear no repercussions. There was nothing urgent in that. There was no discernible harm that would be suffered irreparably if the matter was to be determined in the ordinary course

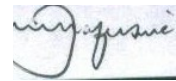
That was the reason why the case was removed from the roll.

Regarding costs, Mr *Takaindisa*, for the respondents, was initially magnanimous in pointing out that in the notice of opposition, only the third respondent, the Commissioner General, had asked for the dismissal of the application with costs. However, Mr *Takaindisa* subsequently tried to backtrack. He now sought costs of suit for the rest of the respondents. His argument was that with the removal of the matter from the roll, there remained nothing else pending between the parties, for example, a main application in which the rights of the parties would subsequently be determined effectually, with the costs probably following the event. The removal of the applicant's matter from roll meant that the respondents had to have their costs or else they would lose out completely when it was the applicant who had dragged them to court unnecessarily and on a defective process.

However, I was not persuaded. Costs of suit are not an absolute right for a successful litigant. They are awarded in the discretion of the court. In this matter the respondents had been perfunctory in the manner they dealt with the aspect of urgency. Furthermore, they had completely ignored or overlooked the other serious defects in the application. Most

importantly, the second respondent who, in his opposing affidavit, spoke on behalf of virtually all the respondents, had sought no costs. So the matter was removed from the roll with no order as to costs.

20 December 2016

A handwritten signature in black ink, appearing to read 'M. J. J. J.', written over a horizontal line.

Chitere, Chidawanyika & Partners, legal practitioners for the applicant
Civil Division of the Attorney-General's Office, legal practitioners for the respondents