

EX CONSTABLE MUSARIRI 067089X
and
EX CONSTABLE VULILE 065676L
versus
THE COMMISSIONER GENERAL OF POLICE
AND THE CHAIRMAN OF THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 29 June, 7, 27 July & 4 August 2017

Opposed Application

N. Mugiya, for applicants
M. Gezera, for respondents

MUSAKWA J: The applicants filed an application for a declaratory order whose draft reads as follows-

“Whereupon after reading documents filed of record and hearing counsel;

It Is Ordered That

1. The 1st and 2nd Respondents’ failure to furnish the Applicants with reasons for their decisions is unlawful and wrongful.
2. The Applicants’ discharge from the Police service is accordingly set aside.
3. The Respondents are ordered to reinstate the Applicants into the Police service forthwith.
4. The Respondents are ordered to pay costs of suit on a punitive scale.”

The background to the matter is that in April 2014 the applicants were charged with contravening para 35 of the schedule to the Police Act [*Chapter 11:10*]. They were tried by a single officer who found them guilty. Appeal was lodged with the first respondent who dismissed it and ordered the applicant’s dismissal from the Police Force on 19 August 2014. Appeal was then noted to the second respondent who turned it down on 23 August 2015.

The applicants claim that they were not furnished with written reasons for dismissal of their appeal in violation of s 68 (2) of the Constitution. They verbally requested to be furnished with reasons but the request was not acceded to. They also claim that the second respondent is not properly constituted and thus its decision is unconstitutional.

As regards when the applicants were discharged, the first respondent contends that the first applicant was served with a notice of discharge on 25 March 2015 and not 23 August 2016. The acknowledgment attached to the first respondent's opposing affidavit shows that the applicant signed the discharge notice on 25 March 2015 although the person who signed as witness endorsed 25 May 2015.

At the commencement of the hearing, counsel for the respondents raised a preliminary point concerning the substance of the relief that is being sought. The preliminary point was first raised in the first respondent's opposing affidavit. The contention is that this is a disguised application for review that has been cast as an application for a declarator. Thus Ms *Gezera* contended that the applicants failed to prosecute the review in time and sought refuge under an application for a declaratory order. In this respect the court's attention was drawn to the draft order.

On his part Mr *Mugiya* drew attention to s 14 of the High Court Act [*Chapter 7:06*] which gives the court discretion to inquire into and determine any existing, future or contingent right or obligation notwithstanding that an applicant cannot claim any consequential relief following such determination. Of course, it is evident that the applicants are seeking consequential relief despite the submission to the contrary.

The relief that the applicants seek is the setting aside of their discharge and reinstatement to their former positions. Substantially this is a review under the guise of a declarator riding on being denied reasons for the dismissal of their appeal. If the applicants were so desirous of being given reasons for dismissal of the appeal, they could have applied for an order to compel the respondents to furnish the reasons. They refrained from doing so for reasons not explained in their papers.

Having been discharged in 2015 the applicants had eight weeks within which to institute review proceedings in terms of the High Court rules, if they so wished. Many months later, they now sought a declaratory order accompanied with consequential relief. This was clearly done to circumvent the need for seeking condonation of late application for review. This was the same scenario in *Marasha v Old Mutual Life Assurance Co Ltd* 2000 (2) ZLR 197. In dismissing the application, ADAM J made the following remarks at 198-199:

“It is clear from the papers filed before me by the applicant that essentially he sought review of proceedings well out of time without first making an application for condonation and establishing that he was entitled to bring an application out of time. What is significant is not heading the proceeding "Court Application for Declaration", but the draft order filed which asks the decision to be set aside and his salary to be paid. This clearly is not a declaratory order. He belatedly sought in the answering affidavit to convert these review proceedings into proceedings for a declaration. In the heads of argument filed on behalf of the applicant, reference was made to the judgment of this court in the case of *Musara v Zimbabwe National Traditional Healers Association (ZINATHA)* 1992 (1) ZLR 9 (H). But since that judgment a number of judgments have been given by this court as well as by the Supreme Court. This court has held that a declaratory order is merely one of a species of relief available and that a party should not be able to get around the time limits for review proceedings by instituting proceedings for a declaratory order - *Kwete v Africa Community Publishing & Development Trust* HH-216-98. This was approved by the *Supreme Court in Mutare City Council v Mudzime* 1999 (2) ZLR 140 (S). In my view, even if this were an application for a declaratory order the applicant would be required to provide an explanation as to why such an application for a declaratory order has not been brought within a reasonable period of time i.e. two months or eight weeks, otherwise applications for declaratory orders can be made many months or years after the offending proceedings had been finalised.

I am satisfied on the papers before me that the application filed by the applicant is in fact for review proceedings and as such an Application for Condonation has to be made as to why the application was not brought within the time period set out in the Rules of Court: see *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) at 260.”

I am satisfied that the present matter is a belated application for review framed under the guise of a declarator. The draft order tells it all.

In equal measure, Mr *Mugiya* also raised his own preliminary points. When a legal practitioner has had ample time to reflect on a matter, as has been the case in these proceedings the raising of a preliminary point should be done on notice to the other side. There is no need to ambush the other side even if a point of law can be raised at any stage. The respondents may have been lulled into believing that the imperfections in their papers had been overlooked by the applicants.

An issue has been raised on the manner of attestation of the respondents' affidavits. The bone of contention is that the affidavits are defective as they were not properly attested. The first point is that the affidavits are not dated by the deponents. The second point is that Augustine Chihuri's affidavit was attested before a nameless Provincial Magistrate. Against the space for the commissioner of oaths is a signature and a date stamp of the Provincial

Magistrate in the Chief Magistrate's office. As regards Margaret Muchada's affidavit, the contention is that it was attested before a member of the same office where she works. There is a stamp of the Public Service Commission, Salary Service Bureau and another stamp depicting the commissioner of oaths as Brighton Chiuzingo and his signature.

It was also contended that Margaret Muchada had not tendered proof that she had authority to depose to the affidavit on behalf of the second respondent. This is because she is only a deputy chairperson.

Coming to the omission to indicate the dates on which the two deponents had attested the affidavits, I do not think this is a serious flaw that can invalidate the affidavits. This is because there are dates on the stamps of the respective commissioners of oaths' stamps. In my view that can be regarded as adequate authentication. In future, blank spaces must be filled in order to avoid such issues.

In terms of the Ex Officio Commissioners of Oaths Designation Notice, Statutory Instrument 648/83, a Magistrate is an *ex officio* commissioner of oaths. I do not think that the omission by the Magistrate to specifically endorse his name is fatal to the attestation. I would hold that there was substantial compliance.

As regards the second respondent's affidavit, the fact that the commissioner of oaths is from the same office as the deponent is not fatal. In terms of s 2 (1) of the Justices of the Peace and Commissioners of Oaths (General) Regulations, Statutory Instrument 183/98, no justice of the peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has an interest. However, s 2 of the same regulations provides some exemptions. According to s 2 (a) a member of the Public Service whose only interest in the affidavit arises out of the performance of his duties in the Public Service is exempt from the prohibition. Therefore, the attestation by Brighton Chiuzingo was not irregular.

I am not persuaded by the submission that Margaret Muchada was not competent to depose to an affidavit on behalf of the second respondent. As was correctly submitted by Ms *Gezera*, Margaret Muchada was competent to depose to the affidavit if she could positively swear to the facts. This is accordance with r 227 (4) (a) of the Rules of the High Court. I did not hear it being argued that what she swore to was hearsay or that she does not have personal knowledge of the matter.

The procedure of attesting affidavits in Zimbabwe is not provided in any regulations. This is unlike in South Africa. For example, there is the Administration of an Oath Governing

Regulations which applies to members of the Institute of Tax Practitioners who are *ex officio* commissioners of oaths. Section 4 of the regulations provides that-

“4.1 An oath is administered by causing the deponent to utter the following words: “I swear that the contents of this declaration are true, so help me God whether he knows and understands the contents of the declaration;

4.2 Before a Commissioner of Oaths administers to any person the oath, he shall ask the

4.2. 1 whether he has any objection to taking the prescribed oath; and

4.2. 2 whether he considers the prescribed oath to be binding on his conscience.

4.3 If the deponent acknowledges that he knows and understands the contents of the declaration and informs the Commissioner of Oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience, the Commissioner of Oaths shall administer the oath prescribed by regulation.

4.4 If the deponent acknowledges that he knows and understands the contents of the declaration and informs the Commissioner of Oaths that he does not consider the oath to be binding on his conscience the Commissioner of Oaths shall administer the affirmation.

4.5 The deponent shall sign the declaration in the presence of the Commissioner of Oaths.

foot of the declaration: Provided that if the Commissioner of Oaths has any doubt as to the deponent’s inability trustworthy person.

4.7 Below the deponent’s signature or mark the Commissioner of Oaths shall certify that the de -ponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

4.8 The Commissioner of Oaths shall

4.8. 1 sign the declaration and print his full name and business address below the signature; and attesting any declaration.

4.8.2 state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.”

It is therefore apparent that within this jurisdiction the attestation that Mr *Mugiya* hankers for arises from practice. It would be desirable if the Justices of the Peace and Commissioners of Oaths (General) Regulations made provision on how an oath should be administered. It is possible that some commissioners of oaths may not know how to properly administer an oath.

Accordingly, having found merit in the respondents’ point in *limine* and having found no merit in the applicants’ points in *limine*, the application is hereby dismissed with costs.

Mugiya and Macharaga Law Chambers, applicants’ legal practitioners
Civil Division of The Attorney-General’s Office, respondents’ legal practitioners