

EX-CONSTABLE SIBANDA I. 065316V
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE CHAIRMAN OF THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 14 and 13 December 2017

Opposed Matter

N Mugiya, for the applicant
LT Muradzikwa, for the respondents

TAGU J: The applicant seeks a declaratur that the first and second respondents' failure to furnish the applicant with reasons for their decisions is unlawful and wrongful, that the applicant's discharge from the police service is accordingly set aside, that the respondents are ordered to reinstate the applicant into the police service forthwith and that the respondents are ordered to pay costs of suit on a punitive scale.

The facts giving rise to this application are that the applicant is an ex-constable in the Zimbabwe Republic Police. On 10 July 2015 the applicant was charged and convicted for contravening para 34 of the Schedule to the Police Act [*Chapter 11.10*]. He was sentenced to pay a fine of USD 10.00. He appealed against both conviction and sentence to the first respondent in terms of s 34 (7) of the Police Act. The first respondent dismissed his appeal. A board of suitability was convened against the applicant in terms of s 50 of the Police Act. He was discharged from the Police service on 23 February 2016. He filed a notice of intention to appeal in terms of s 11 of the Trials and Boards Regulation 1965 to the second respondent on 25 February 2016. On 29 February 2016 he filed his grounds of appeal to the second respondent in terms of s 51 of the Police Act. On 23 August 2016 he received a notice from the second

respondent that his appeal in terms of s 51 of the Police Act had been turned down and that the decision of the Commissioner General of Police had been upheld.

In his founding affidavit which the respondents alleged was defective in the sense that the person who commissioned it used a certifying stamp instead of a proper stamp, of which the court condoned in terms of r 4C in the interest of justice the applicant submitted that the second respondent did not tell him why and how he upheld the decision of the first respondent contrary to the provisions of s 68 (2) of the Constitution of Zimbabwe. He further submitted that he verbally requested to be furnished with the reasons why his appeal was dismissed by the second respondent but he was never furnished with the same. He argued that in any case in terms of s 51 of the Police Act the moment he noted his appeal to the second respondent the decision of the first respondent was automatically suspended and that the first respondent was obligated to reinstate him. Further he said the second respondent's commission is not properly constituted in terms of the Constitution of Zimbabwe hence he is heading an unconstitutional body. He therefore prayed that the failure and refusal to reinstate him as well as the second respondent's failure and refusal to furnish him with written reasons for dismissing his appeal be declared unlawful and wrongful and that his dismissal be set aside.

The second respondent opposed the application on the basis that the applicant did not appeal in time. The applicant was discharged on 23 February 2016 and only submitted his appeal to the Police Service Commission on 29 February 2016 contrary to the provisions of Part V of the Police (Trials and Boards of Inquiry) Regulations 1965, s 15(1) as amended by s 8 of the Police (Trials and Boards of Inquiry) (Amendment Regulations 1998 (No. 4) which provides that:

“A member who wishes to appeal in terms of s 51 of the Act shall-

- (a) within twenty-four 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 the grounds upon which his appeal is based and any argument in support thereof.”

Further, he opposed the application on the basis that the applicant never requested in writing for the record of proceedings which if he had done so could have been furnished. Lastly he denied that the Police Service Commission is unconstitutional since its role and functions are governed by s 219 of the Constitution of Zimbabwe.

The third respondent also opposed the application on the basis that the prerogative to reinstate a dismissed member lies with the second respondent. He said after a member has lodged an appeal with the second respondent it is the duty of Public Service Commission (PSC) to order reinstatement of the member hence the applicant should have taken the matter up with the second respondent.

The main issues which I perceive to be issues for determination in this matter are:

- a) Whether or not section 51 of the Police Act automatically suspends the decision of the first respondent and he is obligated to reinstate applicant upon noting of an appeal to the Police Service Commission.
- b) Whether or not applicant noted his appeal within the prescribed time period.
- c) Whether or not applicant was properly furnished with reasons for the dismissal of his appeal by the second respondent.
- d) Whether or not the Police Service Commission is properly constituted in terms of the Constitution.

In their heads of argument the respondents submitted that this application is confusing whether the applicant is approaching this court for an order for review or a declaratory order since the papers filed by the applicant's counsel addresses both and seems to be in a fishing expedition not knowing exactly what they want.

I will deal with what I perceive to be the issues.

A. WHETHER SECTION 51 OBLIGATED FIRST RESPONDENT TO REINSTATE APPLICANT

Section 51 of the Police Act provides as follows:

“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 Commission has been given.”

In my view, upon noting of an appeal to the Police Service Commission, which appeal must be made in time, the decision to discharge the applicant is automatically suspended. In *casu* it is not clear from the papers whether the applicant assumed his duties and was stopped from doing so or not. It has not been stated what happened from the date the applicant noted his appeal to the date when he was advised that the Police Service Commission had dismissed his appeal. If indeed he had attempted to resume his duties and was told not to do so, then that decision would have been unlawful since the decision to discharge him had been suspended. It is not clear whether the applicant just waited at home without doing anything or not. It is not

clear whether he was just waiting for an instruction to assume duty or not. The applicant has been economic with the facts. It is not stated what the first respondent did to frustrate the applicant's reinstatement. It can only be assumed that the applicant did nothing to enforce his rights. At the moment he was told that his appeal had been dismissed this unfortunately had been overtaken by events. In any case even if he had been allowed to continue with his duties he was to be discharged anywhere at the time he was advised that his appeal had been dismissed. Counsel for the applicant argued that the decision to dismiss applicant's appeal was a nullity because the first respondent had failed to reinstate him hence was in contempt of court or statute. He referred the court to the case of JSC V Romeo Zibani SC 68/17. In my view I do not believe that even if the applicant had been reinstated by the first respondent pending determination of his appeal that would have caused the second respondent to uphold his appeal. He was going to be discharged anywhere making the relief he is now seeking untenable.

B. WHETHER APPLICANT NOTED APPEAL IN TIME

The respondents submitted that in any case the applicant did not file his appeal timeously. The applicant on the other hand said he was served with the radio for discharge on the 25th day of February 2016 and he noted his notice of intention to appeal the same day. What is indeed true is that the applicant noted his appeal on the 29th February 2016 as shown by the date stamps on the face of the notice of appeal. If he indeed received the radio on the 25th February 2016 one wonders why the copy of that radio is not filed of record. It is common cause that a Police radio is usually in the form of a written document. It can only be assumed that he indeed filed his notice of appeal out of time as stated by the respondents.

C. WHETHER APPLICANT WAS FURNISHED WITH REASONS

A reading of the papers filed of record showed that the applicant was served with a letter notifying him of the dismissal of his appeal by the second respondent. The applicant did not attach the said letter and the contents thereof are not known. In any case the respondents agreed that they did not furnish the applicant with reasons and argued that the applicant never requested for the reasons. They said if he had done so the second respondent would have furnished him with the reasons. In his heads of argument and founding affidavit the applicant said he made a verbal request. This averment was denied by the respondents.

Section 68 (2) of the Constitution of Zimbabwe which was quoted by the applicant provides that:

“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.”

In the case of *Makombe and others* HH-120-86 it was held that:

“Unless reasons are given for a judgment, it is impossible to determine how the ultimate conclusion was reached and whether it was reached on a proper reasoned basis. Merely to state a conclusion without giving reasons, creates an impression that the decision was an arbitrary one, it could have been reached on the basis of caprice or whim. By giving reasons the magistrate shows that his decision is a good one. He gives proof that he has taken into account evidence and arguments of both sides.”

In *casu* the second respondent furnished the applicant with a written letter advising him that his appeal had been dismissed and that the decision of the Board to discharge him had been upheld. Like I said it is not clear what else was in that letter. Be that as it may the questions to be decided are whether the applicant indeed made a verbal request for reasons or not since the respondents dispute it. The other issue is whether the failure to give reasons is a reviewable irregularity warranting the reinstatement of the applicant. On the first issue other than the applicant’s mere say so without proof it is difficult to believe that a verbal request for reasons was made. If it was made and turned down the applicant was at liberty to resort to s 6 of the Administrative Justice Act which provides for the procedure that the applicant may take in order to compel an administrative authority to supply reasons in the event of a delay or failure to provide reasons and the relief that the applicant may get from the High Court in respect of an application in terms of s 6 (1) as outlined in ss 6 (2) and (3). This was not done. Further, as regards the issue of failure to give reasons, this honourable court had the occasion to hold in *Ncube v Hamadziripi* 1996 (2) ZLR 404 “H” at paragraph “A” that –

“...it is not a reviewable irregularity for the presiding officer to fail to give reasons for his decision when he hands down his decision; it suffices for him to provide reasons when an interested party asks for reasons.”

In *casu* the applicant is not asking this court to compel the respondents to give reasons but is asking the court to set aside the respondents’ decision on the basis that they did not furnish him with reasons. I am not convinced to do so.

A. WHETHER OR NOT THE POLICE SERVICE COMMISSION IS PROPERLY CONSTITUTED

At the hearing of this matter no oral submissions were made by both counsels on whether the Police Service Commission is properly constituted or not. Suffice to say that both counsels submitted that they abide by their heads of argument. In his heads of argument the applicant merely submitted that the Police Service Commission is not properly constituted as required by s 222 of the Constitution and the decision by the second respondent is not only unlawful but also unconstitutional in that his organisation is not recognised by the law and therefore ought to be set aside. The section in question states that:

“222 Establishment and composition of Police Service Commission

1. There is a Police Service Commission consisting of a chairperson, who must be the chairperson of the Civil Service Commission, and a minimum of two and a maximum of six other members appointed by the President.
2. Members of the Police Service Commission must be chosen for their knowledge of or experience in the maintenance of law and order, administration, or their professional qualifications or their general suitability for appointment, and –
 - (a) at least half of them must be persons who are not and have not been members of the Police Service;
 - (b) at least one of them must have held a senior rank in the Police Service for one or more periods amounting to at least five years.”

On the other hand the respondents also submitted in their heads of argument that the applicant failed to substantiate their contention and argued that the Police Service Commission is properly constituted as provided for in s 219 of the Constitution of Zimbabwe. They submitted that he who alleges must prove his or her allegation which the applicant failed to do.

Section 219 Of the Constitution referred to by the respondents says:

“219 Police Services and its functions

- (1) there is a Police Service which is responsible for-
 - (a) detecting, investigating and preventing crime;
 - (b) preserving the internal security of Zimbabwe;
 - (c) protecting and securing the lives and property of the people;
 - (d) maintaining law and order, and
 - (e) upholding this Constitution and enforcing the law without fear or favour.
- (2) The Police Service must exercise its functions in co-operation with-
 - (a) any intelligence service that may be established by law;
 - (b) anybody that may be established by law for the purpose of detecting, investigating or preventing particular classes of offences; and
 - (c) regional and international bodies formed to combat crime.

3.....

4.....”

In *casu* the deponent to an opposing affidavit on behalf of the second respondent is none other than Mr Mariyo Mariyawanda Nzuwa who said is the chairperson of the Police Service Commission. No submissions have been made as to how he is disqualified to hold that post. As to the other members no submission were made as to who they are and how they are disqualified. In my view the Police Service Commission is a creature of the Constitution of Zimbabwe hence the second respondent is very constitutional. For these reasons the decision by the second respondent cannot be set aside on the basis of unconstitutionality.

In the result I found no merit in the application and it is dismissed with costs on the legal practitioner and client scale.

Mugiya And Macharaga Law Chambers, applicant’s legal practitioners
Civil Division of the Attorney General’s Office, respondents’ legal practitioners