

YAKUBU MUSA
and
IMRAAN MUSA
and
ZUNAD MUSA
versus
THE COMMISSIONER GENERAL POLICE
and
THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 November 2017 & 21 December 2017

Opposed Application

Adv. R Mabwe with A Borerwe, for the applicants
K T Mkanganwi. for the respondents

CHITAKUNYE J. On the 29th November 2017 I granted the applicants' application and my reasons thereof were as follows: This is a ruling in an application for review in terms of section 27 (1) (c) of the High Court Act, [*Chapter7:06*]

The applicants were employed by the second respondent as members of the Police Constabulary for periods ranging between seven to twenty nine years; i.e. since 2009, 2001 and 1987.

On the 3rd of October 2016 they were alerted to a Notice titled SPECON which conveyed their discharge from the Police Constabulary. The said notice was affixed to a Notice Board.

The notice was not signed. It nevertheless amounted to a summary dismissal of the applicants from Police Constabulary.

The applicants were naturally perturbed by the dismissal as they had no prior knowledge of the impending dismissal. The notice of dismissal showed that complaints had been made against the applicants after which the first respondent authored the Notice of

dismissal without affording them a hearing. On the 21st of October 2016 applicants wrote a letter to the respondents on the issue but received no response. As a consequence they filed this application.

The grounds for review advanced included that:

1. The applicants were summarily dismissed from their duties in the Police Force in contravention of s 68 and s 69 of the constitution.
2. The applicants' summary dismissal is in violation of the provisions of section 27(4) of the Police Act, chapter 11:10
3. Respondents, actions of summarily dismissing applicants from their duties contravene principles of natural justice which required that:
 - i) Applicants be afforded a right to be heard before a decision is made against them;
 - ii) Respondents be not judges in a matter they had created.

The applicant thus sought that:

1. The Respondents' decision communicated by the letter of 23 September 2016 received by applicants on 3 October 2016 be set aside.
2. Applicants' personal items confiscated pursuant to the dismissal be restored.

The first respondent opposed the application. In its opposing affidavit the first respondent confirmed the summary nature of the dismissal. The deponent to the opposing affidavit however averred that first respondent acted in terms of section 10 (a) of the Police Reserves (Amendment) Regulations 1998. He contended that in terms of that section, the services of a member of the Police Constabulary may be terminated by the Commissioner General of Police with or without notice, thus the decision to dismiss the applicants was within the limits of the law.

The deponent proceeded to state that the decision to dismiss applicants, as members with allegations of serious offences against them was correct and does not defy logic and justice and that if the applicants felt that his decision was improper they had an option to appeal to the second respondent in terms of the Police Act.

As regards restoring applicants' personal items, the deponent to the opposing affidavit stated that the discharge of the applicants from the Police service was lawful and so they cannot continue to use or possess items that are restricted for use only in the police business.

I am of the view that the first respondent misunderstood the issues raised by the applicants. Firstly he did not seem to appreciate the constitutional issues raised and the failure to comply with the basic principles of nature justice.

On the items to be restored the applicants were not seeking that police items be restored to them but their personal items which were taken together with police apparel they had.

The section 10 (a) of the Police Reserves (Amendment) Regulations 1998 that the first respondent sought to rely on must be read together with the parent statute and the constitution of the land. Where the provision is inconsistent or contravenes the provisions of the parent statute or the constitution surely what it provides for cannot supersede the constitution.

Section 2 of the Police Act, [*Chapter 11:10*] defines a Police Constabulary as ‘the Police Constabulary established in terms of section twenty-seven.’

Section 27 defines the employment terms, discipline and dismissal of members of the Police Constabulary. In this regard the section provides as follows:

- “(1) Subject to subsection(3), there is hereby established a Police Constabulary to which the Commissioner –General may appoint, on such terms and conditions as may be prescribed, so many fit and proper persons as he considers expedient.
(2) The Minister may, on the advice of the Commissioner –General, at any time when, in his opinion, circumstances so require-
(a) disband the Constabulary established in terms of subsection(1);
(b) re-establish the Police Constabulary and, if he considers circumstances so require, disband any Police Constabulary so established.
(3) Constabulary members may be employed to assist the Regular Force on any occasion.”

The discharge of a Constabulary member where there are allegations of misconduct is not left to whim or arbitrary decisions of those in authority. Section 27(4) provides that:

“A Constabulary member shall while he is on duty, have the same powers, functions and authority, and be subject to the same responsibilities, discipline and penalties as a Regular Force member and shall be liable in respect of acts done or omitted to be done to the same extent as he would have been liable in the same circumstances if he were a Regular Force member, and shall have the benefit of any indemnity to which Regular Force members would in the same circumstances be entitled.”

In so far as the subsection states that a constabulary member shall be subject to the same discipline and penalties as a Regular Force member, it would only be proper that where allegations of misconduct are levelled against the Constabulary member the proper course to take is not to summarily dismiss without hearing the member but to proceed in terms of the disciplinary proceedings in the police Act.

The fact of failing to comply with the Police Act in instances where allegations of misconduct were made against the applicants makes the act void *ab origine*.

The summary dismissal is further contrary to s 3 of the Administrative Justice Act [Chapter 10:28]. Section 3 is to the effect that an administrative authority which has power to take actions that may affect the rights, interests or legitimate expectations of any person must act lawfully, reasonably and in a fair manner. Certain basic steps are outlined that are expected of the administrative authority.

Section 3 basically advises against arbitrary decisions. In *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009(2) ZLR 259(H) at 267F-268A, MAKARAU JP (as she then was) in commenting on the effects of the Administrative Justice Act stated, inter alia, that:

“It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3(3) of the Act, apply.”

In casu, the SPECON document dated 23 September 2016 neither gave the applicants warning of proposed action nor provided the nature thereof. It is simply a document that communicated the dismissal of the applicants from the blues, as some would say. Such conduct was clearly contrary to the provisions of s 3 of the Administrative Justice Act.

It is common cause that no opportunity was given to the applicants to answer to the allegations upon which the decision was made. Such conduct must be frowned upon. In *Taylor v Minister of Higher Education & Others* 1996 (2) ZLR 772(S) the Supreme Court spoke against such conduct in these words:

“The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through ages. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before a decision is taken.”

The constitutional issues raised serve to confirm the fatality of the summary dismissal without following the proper disciplinary procedures. In terms of s 68(1) of the constitution every person has a right to administrative conduct that is both substantially and procedurally fair. Such fairness cannot be from denying applicants the right to be informed of the intended adverse administrative action and to be heard over the allegations.

Counsel for the first respondent submitted that applicants as police constabulary suffer no prejudice whatsoever if they are dismissed without notice. This submission is oblivious of the fact that there were damaging allegations against the applicants which principles of natural

justice would require them to answer. They were summarily dismissed for misconduct and to say such is not prejudicial to the applicants is wrong.

I am of the view that the applicants are entitled to the relief they seek, that is the setting aside of the summary dismissal and the restoration of their personal items taken by the police pursuant to the dismissal.

Accordingly it is hereby ordered that:

1. The summary dismissal of the applicants by the respondents communicated by the letter of 23 September 2016 and received by the applicants on 3rd October 2016 , be and is hereby set aside.
2. Applicants' personal items confiscated pursuant to the dismissal in (1) be and are hereby restored.
3. The respondents to bear the costs of suit on the ordinary scale jointly and severally one paying the other to be absolved.

Chatsanga & Partners, applicants' legal practitioners
Civil division of the Attorney General's Office, respondents' legal practitioners.