LIBERTY MUCHENA

Versus

THE POLICE SERVICE COMMISSION

And

COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 5 AND 12 OCTOBER 2023

Opposed Application

Applicant in person
S. Jukwa, for the 1st and 2nd respondents

KABASA J: - This is an application for a declaratory order. The applicant seeks the following order:-

> "The dismissal of applicant from the Zimbabwe Republic Police on 9 December 2013 be and is hereby declared unlawful."

The background facts are these: The applicant was employed by the Ministry of Home Affairs holding the rank of Constable in the Zimbabwe Republic Police. He was charged with rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He also faced charges under the Police Act [Chapter 11:10]. He was convicted of contravening paragraph 35 of the Schedule to the Police Act, that is "acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police force." As a result of that conviction a suitability board was convened in terms of section 50 of the Act and he was discharged from the Police force on 16 April 2013. The applicant appealed against the second respondent's decision with no success. The discharge was confirmed on 9 December 2013.

The applicant was aggrieved with the appeal decision and under HC 972/14 sought to bring the matter on review. The application which sought to set aside his dismissal suffered a still birth as it had been filed outside the 8 week period provided for by the rules of court. He decided to seek condonation but the application was dismissed by KAMOCHA J under HB 20-17.

Meanwhile the criminal trial proceeded and ended in his acquittal on 25 February 2016. The current application for a declaratur was subsequently filed on 2 June 2017.

The applicant's argument is that he ought not to have faced disciplinary proceedings in a matter which arose from a criminal offence. He was acquitted of the criminal charges yet his dismissal was before the conclusion of the criminal trial. With his acquittal the charge under the Police Act also fell off. He therefore decided to bring an application for a declaratur as his acquittal brought new facts which were not there when he initially sought to have the decision to discharge him reviewed. In any event his condonation application was dismissed due to a failure by his erstwhile representative to put the correct facts before the court.

At the hearing of the application the applicant contended that the thrust of his argument is that the criminal trial resulted in his acquittal. That process has a higher standard of proof, the acquittal therefore meant that his rights had to be restored. He ought not to have faced a more severe penalty in light of his acquittal on criminal charges. He suffered double jeopardy as a result, warranting a declaration to the effect that the dismissal was unlawful. This narrowing of the issue the court was being asked to adjudicate on is what I intend to focus on in this judgment.

In opposing the application the respondents contended that the applicant has brought a review disguised as a declaratur. He failed to successfully prosecute the review application as he failed to observe the stipulated time limits. The declaratur is therefore designed to circumvent the time limit hurdle that saw his earlier review application suffering a still birth.

The criminal charge and the resultant acquittal was a process with a life of its own. The disciplinary proceedings were in terms of the Police Act and he was duly convicted and deemed unfit for police duties. His dismissal was justified and the process followed was not flawed, so counsel for the respondents argued.

With these submissions counsel moved for the dismissal of the application.

The issue here is whether the applicant has made a case for a declaratur. Section 14 of the High Court Act [Chapter 7:06] provides that:-

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The applicant's interest lies in the fact that he has lost employment and the matter therefore is one in which he has a substantial interest.

In bringing an application for a declaratur is the applicant seeking to circumvent the time limits for a review? His contention is that the declaratur is premised on the fact that he was acquitted of the criminal charges. The disciplinary proceedings exposed him to double jeopardy and the subsequent dismissal was a heavier penalty which failed to consider the acquittal on the criminal charges.

A review is concerned with the regularity and validity of the proceedings. (*Liberty Life Association of Africa* v *Kachelhoffer* 2001 (3) SA 1094). The decision-making process is what a review looks at (*Krumm* v *The Master* 1989 (3) SA 944). In *Samaya v Commissioner General of Police & 2 Ors* HH272-21 MANZUNZU J had this to say:

"The cardinal principle in deciding whether an application is for a declaratory order or review is not so much of the relief sought but rather the grounds upon which the application is based. In *Geddes Ltd v Taonezvi* 2002(1) ZLR 479(S) MALABA JA said: 'In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not in itself proof that that application is not for review'

In *Zvomatsayi & Ors v Chitekwe NO &Anor* 2019(3) ZLR 990 (H) DUBE-BANDA J articulated it thus:

"A review is not concerned with the merits of the decision but whether it was arrived at in an acceptable fashion. The focus is on the process, and on the way in which the decision-maker came to the challenged decision. Instead of asking whether the decision was right or wrong, a court on review concerns itself with the procedural irregularities. A declaratur and review cover different jurisprudential terrains. The two cannot be deployed interchangeably. It

is one or the other, but never both. A declaratory order should not be used to get around the requirements for review proceedings."

I am of the considered view that the applicant's argument on double jeopardy and his contention that the penalty of dismissal was not commensurate with the criminal charge verdict is what this application is anchored on. He is not harping on procedural irregularities or the process which led to the making of the decision. S27 of the High Court Act [Chapter 7:06] provides for the grounds upon which a review can be anchored. The applicant in his oral submissions did not attack the proceedings or the process which led to the decision. His contention is that he suffered double jeopardy in facing both criminal and disciplinary proceedings and the penalty of dismissal did not consider his acquittal on the more serious criminal charge. I am therefore persuaded to hold that the application is not a review disguised as a declaratur. Has the applicant made a case for a declaratur?

In *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) GUBBAY CJ had this to say:-

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court…. The interest must relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest." See also *Johnson* v *AFC* 1995 (1) ZLR 65, *Mugangavari* v *Provincial Mining Director – Midlands & Anor* HB 254-20).

I have already stated that the applicant's interest lies in his quest to save his job. He therefore passed the first hurdle.

The second hurdle relates to whether this is a case where this court can exercise its jurisdiction in granting a declaratur. The applicant has argued that he has suffered double jeopardy due to the criminal prosecution and the disciplinary proceedings.

Section 278 (2) of the Criminal Law Code provides that:-

> "(2) A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be."

Subsection 3 thereof provides that:-

> "Civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings."

It is therefore a failure to comprehend the law when the applicant contends that the criminal prosecution and the disciplinary proceedings exposed him to double jeopardy.

In *Gore* v *Commissioner General of Police* HB 149-17 MATHONSI J (as he then was) had this to say:-

> "Regrettably the argument that is sought to be relied upon in that application that of double jeopardy, cannot succeed. In essence, the applicant is saying that he was tried in the criminal court and as such it is unlawful to then subject him to disciplinary proceedings in terms of the Police Act because it amounts to double punishment. The argument is lacking in merit.
>
> It is trite that the same conduct can give rise to both criminal and civil sanction."

These remarks apply with equal force *in casu.* It matters not that the applicant faced criminal charges over the same incident that gave rise to disciplinary action. His acquittal on the criminal charges has no bearing on the disciplinary proceedings.

It is interesting that the applicant says the standard of proof in the criminal matter is higher and so his conviction on the disciplinary matter ought to have attracted a lesser penalty following his acquittal of the criminal charges. Disciplinary proceedings are civil proceedings and the standard of proof is on a balance of probabilities. It does not follow that because of the less onerous standard of proof a conviction on disciplinary charges should attract a lesser penalty than that which would be justified on a conviction of the criminal charges linked to the offence wherein the disciplinary proceedings are anchored.

The applicant was a member of the police force. The manner in which members of the disciplined forces conduct themselves is of paramount importance. Conduct that does not speak to such discipline ought to be visited with censure commensurate with the level of indiscipline and the effect thereof to the reputation of the police force.

The thrust of the applicant's argument that because he was acquitted of the criminal charges the penalty of dismissal was not warranted stems from a failure to appreciate that the imposition of a suitable penalty is the employer's prerogative and should not be interfered with unless cogent reasons for such interference have been proffered. Equally this court cannot

declare as unlawful a penalty which was within the employer's power and discretion to impose. There is nothing unlawful about the penalty. The position would have been different had it been shown that the penalty is expressly excluded in the relevant statute under which the applicant was charged.

With that said what remains is an answer to the question I posed earlier. Is this a matter which calls for the exercise of this court's discretion in terms of s14 of the High Court Act, [Chapter 7:06]. The answer is in the negative. This case is not a proper one for the exercise of such discretion.

The applicant has not made a case for the relief he seeks. I accordingly decline to exercise my discretion and grant a declaratory order.

In the result I make the following order:-

The application be and is hereby dismissed with costs

Civil Divison of The Attorney-General's Office, respondents' legal practitioners