INSPECTOR MUZA CLARKSON 040571Y

Versus

THE BOARD PRESIDENT
(CHIEF SUPERINTENDENT ANTONIO)

And

COMMISSIONER GENERAL OF POLICE

And

THE POLICE SERVICE COMMISSION

And

THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 23 SEPTEMBER & 7 OCTOBER 2021

Opposed Application

T. Mabika for the applicant
B. Moyo, for the respondents

KABASA J: This is an application for review wherein the applicant seeks the decision of the respondents to be reviewed on the grounds of gross procedural irregularities. The applicant was dismissed from the police service without following proper procedures.

The cause of the complaint appears in the applicant's grounds for review and these are:

(a) The 2nd respondent declared that the applicant's whereabouts were not known when it was apparent that I was ordered to appear before the medical board by the same 2nd respondent.
(b) The 2nd respondent used falsified information to achieve his agenda by endorsing my ex-wife as the person interviewed when I and my wife were available for interview at police accommodation.

(c) The 2nd respondent failed to take the health status of the applicant when he transferred him to Nyamapanda where there were no proper health facilities for the applicant's liver ailment.
(d) The 2nd respondent failed to appreciate the law that the deserter must have an intention to desert and *in casu* the applicant's health forced him not to be far away from the proper health facilities a condition the 2nd respondent was aware of.
(e) The 2nd respondent failed to follow the procedure that when a deserter is found, causality returns must be done and member be reinstated pending disciplinary procedure.
(f) 2nd respondent failed to appreciate that the applicant was supposed to be presumed innocent until proven guilty. It is clear that he was discharged before the disciplinary proceedings were completed thereby denying him an opportunity to be heard.
(g) The 2nd respondent failed to appreciate that the desertion process must be initiated by the officer in charge but *in casu* the officer in charge refused to initiate since he knew that the applicant never deserted.

In the event that these grounds find favour with the court, the applicant seeks the following relief:

1. The discharge of the applicant from the police service be and is hereby declared to be unlawful and wrongful.
2. The findings of the board of desertion which was convened to recommend the dismissal of the applicant from the police service be and are hereby set aside.
3. The discharge of the applicant from the police service be and is hereby set aside.
4. The respondents are ordered to reinstate the applicant into the police service forthwith without loss of salary and benefits.
5. The respondents are ordered to pay costs of suit jointly and severally, one paying the other to be absolved.

The background facts to the matter are these:

The applicant was employed in the Zimbabwe Republic Police and held the rank of an Inspector. In 2010 he was involved in an accident and sustained some injuries. In April 2013 he successfully had a transfer from ZRP Njube to ZRP Lusulu reversed due to his medical condition. He was transferred to ZRP Western Commonage instead, until 21st July 2016 when he was transferred to ZRP Nyamapanda. He tried to get the transfer reversed with no success. He did

not assume duty at Nyamapanda as per the July 2016 transfer. On 10th October 2016 a radio signal was dispatched, the purpose of which was to establish his whereabouts. His salary was subsequently ceased and he learnt that this was because he had been declared a deserter.

The applicant contends that the proper procedure was not followed. The police officer who deposed to an affidavit to the effect that he could not be located falsified that information as he never visited his place of abode. The person he allegedly saw and identified as his wife is not his wife but an ex-wife. To that end the applicant attached a judgment from the Magistrates' Court to prove that he was divorced and a copy of the marriage certificate between him and his current wife. The finding that he was a deserter was therefore grossly irregular and this is compounded by the fact that he was subsequently called to appear before a medical board post the discharge on grounds of desertion.

The whole process was orchestrated through the machinations of a "hidden hand". The grave irregularities warrant this court's intervention, contended the applicant.

The application is opposed. In his opposing affidavit the 2nd respondent averred that the applicant is now an ex-member and his July 2016 transfer was not related to the earlier 2013 transfer which was reversed on humanitarian grounds.

After his July 2016 transfer to Nyamapanda the applicant did not assume duty due to medical reasons but on 30th August 2016 he was cleared to resume duty but on light duties. He however did not report for duty until 21 days lapsed. On 20th September 2016 a board of inquiry was convened in terms of section 50 (1) of the Police Act, Chapter 11:10 as read with section 13 (1) (b) of the Police (Trials and Boards of Inquiry) Regulations 1965. The purpose was to inquire into the applicant's absence from duty. Efforts were made to locate him and an affidavit by one Dennis Tapiwa Pfumbirai, an Inspector and officer in charge at ZRP Mzilikazi established that the applicant could not be located. The board of inquiry subsequently made a finding that the applicant had deserted the service and recommended his discharge. The 2nd respondent acted on that recommendation which was then communicated to the President of Zimbabwe in terms of the Police Act, resulting in the applicant's discharge from the police service.

The decision was therefore not grossly unreasonable as it was based on facts.

At the hearing of the application counsel for the applicant sought to amend the draft order so that it would include a paragraph ordering the 2nd respondent to convene a medical board in terms of section 20 of the Police Act. The amendment was opposed and since it did not speak to the issue of desertion and the dismissal on the ground of such desertion, it was not granted.

Mr. Mabika, for the applicant, in his oral submissions made it clear that the basis for attacking the decision to discharge the applicant on grounds of desertion was that an affidavit which stated a falsehood was used to arrive at such decision. In essence therefore the argument was that but for the falsehood in the affidavit the process had been followed in terms of the law.

In response *Mr. Moyo* for the respondents contended that the issue of the falsification of the affidavit was not for the court to deal with in an application for review.

The applicant was discharged in 2016 and the review application was filed in 2020. As at the time of the 2016 decision the applicant was not located and so his desertion was a live issue. It can therefore not be argued that he ought to have been arrested as he was not there for such arrest to be effected.

From the foregoing, has the applicant made a case for the relief he seeks?

This application was brought in terms of section 27 (1) (c) of the High Court Act, Chapter 7:06. Section 27 (1) (c) provides that:

> "27 (1) subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
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> (a) …
> (b) …
> (c) gross irregularity in the proceedings or the decision."

In *Mugiya* v *Police Service Commission and Another* 2010 (2) ZLR 185 (H) GOWORA J (as she then was) had this to say regarding the function of the court in review matters:

> "Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to the legislative requirements … The power to review is inherent in courts of superior

jurisdiction, but such power is limited to the legality of the administrative action or decision."

In casu documents filed of record show that the applicant was transferred to ZRP Nyamapanda in July 2016. A Chief Inspector Peter Sibanda who was the officer in charge of Nyamapanda deposed to an affidavit chronicling his interaction with the applicant. On 2nd August 2016 the applicant reported at Nyamapanda and advised the officer in charge that he was unhappy with the transfer. The officer in charge advised him to see the officer Commanding District. The applicant did not report for duty on 5th August 2016, a date the officer in charge was made to understand applicant had been asked to report for duty and pursue the transfer issue whilst at Nyamapanda. On 11th August 2016 the officer in charge received a radio signal indicating that the applicant had been granted sick leave for 2 weeks up to 25th August 2016. He however did not report for duty from 26th August to 29th August 2016. On 29th August 2016 the officer in charge then originated a radio signal enquiring about the applicant's whereabouts. A radio signal dated 30 August 2016 revealed that the applicant was cleared to resume duty on light duties for a month. He however never reported for duty and a radio signal of 8th September 2016 revealed that the applicant had not reported for duty even at the old station from which he had been transferred to Nyamapanda. On 12th September the same officer in charge radioed a signal so the applicant could be sought for. Communication eventually revealed that the applicant was not at home.

It is therefore not disputed that he was away from work without leave for 21 days. It is equally not disputed that the standing orders empowers the 2nd respondent to appoint a board to inquire into the officer's absence. No issue has been raised as regards the legality of the board which was appointed. It was therefore above board.

That board was convened in terms of section 72 (1) of the Police Act as read with section 13 (1) (b) of the Police (Trials and Boards of Inquiry) Regulations, 1965 and based on the affidavits from the officer in charge Nyamapanda and the affidavit from Inspector Pfumbirai who had tried to locate the applicant but failed, the board recommended that the applicant be charged for deserting from the service upon his arrest.

There was no such arrest. The applicant was thereafter, in terms of section 14 (1) (b) as read with section 49 (b) and section 50 of the Police Act discharged from the police service.

Section 49 (b) of the Police Act, provides that:

> "An officer who is found to be unfit to remain in the police service as a result of an inquiry conducted in terms of section fifty or in terms of the Commissions of Inquiry Act (Chapter 10:07) may be discharged from the police service by the President, acting on the advice of the Minister tendered after consultation with the Commissioner General of Police".

This process was followed, the Commissioner General of Police signed the recommendation on 5th December 2016, the Minister also recommended the discharge to the President who approved it on 8th February 2017.

This process was in terms of the law and speaks of no irregularity in so far as the procedure was concerned. *Mr. Mabika* confirmed that the procedure was in terms of the law. The applicant's gripe is that Inspector Pfumbirai lied in his affidavit.

Is this court to hold that the decision of the respondents is grossly unreasonable because a lie was told in an affidavit? Is it being suggested that there was collusion and such lie was communicated to the respondents who nonetheless acted on it, knowing it was a lie?

> "The process of review is for the court to examine the circumstances under which the administrative body reached its decision, and it is not open to the court, in a judicial review, to scrutinize the decision lest the court is accused of usurping the powers of the administrative body. See *Chief Constable* v *Evans* [1982] 3 ALL ER 141 at 154, where LORD BRIGHTMAN stated:
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> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power". (per GOWORA J in *Mugiya* v *Police Service Commission and Another (supra)*).

I have deliberately decided against dealing with each ground of review as enumerated at the beginning of this judgment, for the simple reason that the issue revolved around the discharge of the applicant from the service and his prayer for reinstatement speaks to that discharge, which discharge was on the grounds of desertion. The grounds of review are numerous but all speak to the discharge on grounds of desertion.

That being the case there can be no issue of the denial of a hearing when the issue was desertion. The *audi alteram partem* rule speaks to the principle that "each party must have reasonable notice of the case he has to meet and he must be given an opportunity of stating his case and answering (if he can) any arguments put forward against it" (O. Hood Phillips' Constitutional and Administrative Law, Sixth Edition at p 604). *In casu* a reading of the board's findings and the subsequent desertion Board's findings show that the applicant had not been accounted for. The applicant's reference to the events of 2013 and 2018 relate to post February 2016 when he was discharged upon the grounds of desertion which decision was for the period of 21 days he failed to report for duty and did not avail himself either at his old station or the new station.

The officer in charge Nyamapanda is the one who initiated the process and so the ground that the process was flawed because it was not the officer in charge who initiated it is not borne out by what is on record. The applicant had been transferred to Nyamapanda and so the Officer-in-Charge of that station was now his Officer-in-Charge. That is the very person who originated the radio which initiated the process leading to the desertion hearing. The issue of the applicant's health is not what the desertion charge was about. He was cleared to resume duty on light duties for a month and there was therefore no medical issue which the 2nd respondent can be accused of having failed to appreciate.

This review is not about the applicant's transfer to Nyamapanda and so there is no basis to argue that the 2nd respondent failed to consider the applicant's health status and raise such as a ground of review.

> "The essential question in review proceedings is not the correctness of the decision under review but its validity". (Herbstein and Van Winsen, *The Civil Practice of the High Court of South Africa*, fifth edition, Volume 2 at p1271)

Can it therefore be said the decision *in casu* is not valid because it is grossly unreasonable? I find nothing grossly unreasonable with the process itself and the decision that was arrived at.

In *Dombodzvuku and Anor* v *Sithole N.O. and Anor* 2004 (2) ZLR 242 (H) at p246B-C MAKARAU J (as she then was) had this to say:

> "As observed in *Oskil Properties* v *Chairman, Rent Control Board* 1985 (2) SA 234 (SEC) the onus resting upon a litigant to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view, the task is Herculean if it is an interpretation of the law by a judicial

> officer that is sought to be impugned as being unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law clearly showing how it was arrived at cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable."

Granted the decision *in casu* is of a quasi-judicial body and not a judicial officer but the issue of whether the law was correctly applied arises. In the heads of argument, the applicant argued that the decision was based on irregular proceedings that were not in line with the law. This is at variance with *Mr. Mabika's* oral submissions that the complaint relates to the fact that an affidavit which told a lie was used to arrive at the decision.

The applicant's assertion that he is divorced from the woman who was identified as his wife is no basis to hold that the respondent's decision was grossly unreasonable. These were the facts before the board and the decision was not at a tangent to these facts.

What law therefore was grossly misinterpreted to justify interference with the tribunal's decision on review? I would say these was no such misinterpretation of the law.

This court cannot interfere with the tribunal's decision on the basis that the evidence upon which the tribunal based its decision was in reality false. There was nothing before the tribunal to controvert those facts and so its decision was consistent with what was placed before it.

I therefore come to the conclusion that the applicant has not made a case for the relief he seeks.

In the result, I make the following order:

The application for review be and is hereby dismissed, with costs.

Mugiya & Muvhami Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners