CONSTABLE MUTIMUSAKWA M.K 076467D
and
CONSTABLE MAKAMBA 071326C
and
CONSTABLE MUGOMBA 073102H
and
SERGEANT TAPERA 062785T
and
CONSTABLE SIBANDA
and
SERGEANT TAWUNGWENA 059243T
and
CONSTABLE MUSIIWA G.B 048893T
and
CONSTABLE MAKWARIMBA N. 059254F
and
CONSTABLE RUSERE T.M 085536Y
and
CONSTABLE MHAKA O. 081215B
and
CONSTABLE MUROMBO 058688Q
and
CONSTABLE MUKOCHIWA 063269V
and
CONSTABLE MATAMBO A. 062944R
and
CONSTABLE MURESHERWA 073753Q
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 29 APRIL 2016 AND 4 AUGUST 2016 AND 25 AUGUST 2016

Urgent Chamber Application

N Mugiya for the applicants
L Musika for the respondents

TAKUVA J: The fourteen applicants are members in the Zimbabwe Republic Police. They were discharged from the force for various acts of misconduct on different dates. Aggrieved by that discharge, they appealed to the Police Service Commission in terms of section 51 of the Police Act [Chapter 11:10] [the Act]. All the applicants except Constable Muresherwa noted their appeals between 24 February and 1 April 2016. Constable Muresherwa filed his notice of appeal on 23 October 2015.

The basis of the application is that despite noting their appeals against discharge, the first respondent refused to reinstate them in accordance with the provisions of section 51 of the Police Act.

The section states;

> "51 Appeal
> 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." (my emphasis).

It was further contended that the cause of action arose from the first respondent's failure to comply with clear provisions of the law. Applicants' prayed as follows:

> "Pending the confirmation of the provisional order an interim relief is granted on the following terms;
>
> 1. The 1st respondent is ordered to reinstate the applicants into the police service forthwith pending the finalization of this matter."

The respondents opposed the application on grounds I have synthesized as;

1. the application is not urgent
2. it is improper to bunch all the applicants in one application because they have different scenarios. Consequently the common question of law principle is inapplicable.
3. the first to sixth applicants once approached this court under HC582/16 on urgent basis asking for the same remedy but had their case dismissed for want of prosecution on 16 March 2016.
4. failure to cite the Police Service Commission is fatal to the applicants' case since it is the employer in terms of s223 of the Constitution of Zimbabwe Amendment (No 20) Act

2013. The Commissioner General of Police is not the employer and he has no power to compel the Police Service Commission to reinstate the applicants into the Police Service.

What constitutes urgency was succinctly put by CHATIKOBO J in the case of *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188 (H) when he observed that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the ….arrival of the day of reckoning; a matter is also urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action."

In *Dodhill (Pvt) Ltd and Another* v *Minister of Lands and Rural Resettlement and another* 2009 (1) ZLR 182 (H) it was held per BERE J that in urgent application there is no standard formular which determines the issue of urgency. Every case must be looked at within its own context. I must hasten to add however that time is of the essence in such a determination.

In *casu*, Constable Muresherwa noted his appeal on 23 October 2015 while this application was filed on 21 April 2016. It cannot therefore be argued that there is urgency in his case. I find therefore that his application is not urgent. As regards the rest of the applicants, their appeals were noted between 4 February 2016 and 1 April 2016. They were supposed to be reinstated as soon as their appeals were received. It should be noted that administratively this may take quite some time. Therefore it cannot be said that the apparent delay was not explained. I find therefore that the application in respect of the first to the thirteen applicants is urgent.

Secondly, it was contended that the "bunching of applicants" in one application is improper and irregular in the circumstances. Rule 85 of the High Court Rules 1971 permit such joinder of parties. The rule states;

> "Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where—
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and;
> (b) all rights to relief claimed in the action whether they are joint, severally or alternative, are in respect of or arise out of the same transaction or series of transactions." (my emphasis).

In this case, the common question of law which arises is the interpretation of section 51 of the Act. Therefore it is not improper to join all the applicants together in one action.

Thirdly, respondents argued that since the first to sixth respondents' case under HC 582/16 was dismissed for want of prosecution they are not properly before the court. While it is correct that these respondents approached the court on an urgent basis, the matter was not dismissed on the merits. Therefore, in my view, the issues are not *res judicata* in that the reason for the urgency remained unresolved. Applicants can revive their application see *WLSA* v *Mandaza* 2004 (1) ZLR 182 (H).

The fourth and final ground was that the failure to cite the Police Service Commission is fatal to the applicants' case since it is the employer in terms of s223 of the Constitution of Zimbabwe. There are two distinct issues here. Firstly, whether or not nonjoinder of the Police Service Commission is fatal to the applicants' case. Secondly whether first respondent can abdicate his duties in terms of the Act by virtue of s223 of the Constitution.

The first issue is relatively simpler in that the answer lies in r87 of this court's rules which states;

> "87 Misjoinder or non joinder of parties
>
> (1) No cause or matter shall be defeated by reason of the misjoinder or non joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

For this reason, this ground has no merit.

The second ground also has no merit in that section 223 of the Constitution is irrelevant to the issue at hand in *casu*. The section simply provides as follows:

> "223 Functions of Police Service Commission
>
> (i) The Police Service Commission has the following functions –
>
> (a) to appoint qualified and competent persons to hold posts or ranks in the Police Service;
> (b) ----
> (c) ----
> (d) ----
> (e) ----

(f) ----
(g) ----."

The argument by respondent's counsel as I understood it, is that paragraph (a) means that the Police Service Commission is now the employer and by implication it alone has power to dismiss or reinstate a dismissed employee. The Commissioner General of Police, so the argument went no longer has power to appoint, dismiss or reinstate a member of the Police Service. It was further argued that the failure to realign the constitution and the Act has produced this result.

I am not persuaded by this argument for the simple reason that the same constitution in s221(1) states that;

> "The Police Service is under the command of a Commissioner General of Police appointed by the President after consultation with the Minister responsible for the Police Service."

While section 219 (4) of the constitution states:

> "An Act of Parliament must provide for the organization, structures, management, regulation, discipline and subject to section 223, the conditions of service of members of the Police Service", this in my view does not mean that the Commissioner General of Police has been stripped of his powers to discipline members of the force until an Act of Parliament has been promulgated. I come to this conclusion for the simple reason that the constitution in paragraph 10 of the Sixth Schedule states that, "all existing laws continue in force but must be construed in conformity with this constitution." The Act has provisions for the establishment of the Police Service Commission and the appointment and responsibilities of the Commissioner General of Police.

In terms of both the Constitution and the Act, the Commissioner General is responsible for discipline in the Police Service as the "Commander." Section 50(3) of the Act states:

> "(3) if a Regular Force member other than an officer, is found after inquiry by a board to be—
>
> (a) unsuitable or inefficient in the discharge of his duties, or
> (b) otherwise unfit to remain in the Regular Force or to retain his rank, seniority or salary, the Commissioner General may—
> (i) <u>discharge the Regular Force member</u>, or
> (ii) ----
> (iii) ----″ (my emphasis)

In *casu*, the Commissioner General exercised his powers in terms of the above section and discharged the applicants who then appealed against this order in terms of section 51 whose effect is that an appeal automatically by operation of the law suspends the decision appealed against. It is clearly the Commissioner-General who is directed not to execute his order until the Commission has given its decision. In the circumstance, the Commissioner General cannot claim to have power to discharge and not to reinstate. In my view, to argue that it is the Police Service Commission that should reinstate, amounts to requiring the applicants to apply for stay of execution in circumstances where that relief has already been granted by the law. A reading of the Constitution and the Act does not in my view reveal any disharmony.

In the circumstances, it is ordered that; pending the confirmation of the provisional order, an interim relief is granted on the following terms;

1. The first respondent is ordered to reinstate the first to the thirteenth applicants into the Police Service forthwith.

Mugiya and Macharaga Law Chambers, C/o Muzvuzvu and Mguni Law Chambers applicants' legal practitioners
Civil Division, Attorney General's Office, respondent's legal practitioners