HB 10-18
HC1956/17

EX-ASSISTANT INSPECTOR MUZARI
versus
COMMISSIONER GENERAL OF POLICE
and
CHAIRPERSON OF THE POLICE SERVICE COMMISSION
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 JANUARY 2018 AND 1 FEBRUARY 2018

Opposed Application

N Mugiya for the applicant
L Musika for the respondents

MATHONSI J: This is one of those applications in which the draft order which the applicant seeks is at variance with the main body of the application and the applicant's case as argued in the heads of argument does not accord with the case that is sought to be made in the founding affidavit. As a result whatever it is that the applicant seeks has become blurred, a situation that has not been helped by the endless sets of heads of argument filed on behalf of the applicant, all of which are steeped on the extraneous.

The draft order which the applicant seeks reads;

"IT IS ORDERED THAT

1. The discharge of the applicant from the Police Service by the 1st and 2nd respondents be and is hereby declared wrongfully and unlawful and accordingly set aside.
2. The 1st respondent is ordered to reinstate the applicant into the Police Service and the 2nd respondent is ordered to regularize the applicant's reinstatement by the 1st respondent forthwith.
3. The respondents are ordered to pay costs of suit."

In his founding affidavit the applicant, a former assistant inspector in the Zimbabwe Republic Police, stated that upon being notified by a discharge radio of 15 December 2014 he, on the same day gave notice of intention to appeal. On 24 December 2014 he filed his grounds of

appeal with the second respondent, the Police Service Commission. Indeed the notice of appeal, which the applicant attached to his founding affidavit is duly stamped by the second respondent on 2 March 2015. The applicant went on to say that the effect of the noting of the appeal was to automatically suspend the decision of the first respondent to discharge him from police service. He should have been reinstated then and there but he was not reinstated in gross violation of the law.

The applicant stated that he received a radio communication dated 24 August 2015 advising him that his appeal had been unsuccessful and that the decision of the first respondent to discharge him had been upheld. The radio reads in relevant part:

> "SUBJECT: DISCHARGE IRO NUMBER 047764R MUZARI
> Be advised that member's appeal against discharge was dismissed by the Police Service Commission on 05/08/15. Consequently member was discharged from the service as being unsuitable for police duties with effect from 11/12/14. You are therefore kindly requested to ensure the following:
>
> 1. That member is advised of the discharge. He should append his signature in acknowledgment.
> 2. All articles of uniform, police identity document and government property on charge to member are withdrawn.
> 3. Member vacate government accommodation.
> 4. ZRP forms 100, member's DRS and medical envelope are forwarded to this headquarters early.
>
> A termination letter to this effect is to follow."

The applicant complained bitterly that the second respondent did not disclose to him why the first respondent's decision to dismiss him had been upheld as a result of which he "verbally" requested the reasons which have not been given. The failure to give those reasons violates s68 (2) of the constitution. The applicant did not disclose the name of the person to whom the request was made. It is significant that the decision to discharge the applicant from police service was taken by the first respondent and upheld by the second respondent after a suitability board had been constituted which inquired into the applicant's suitability to remain in the force. It made recommendations to the first respondent which recommendations were obviously made available to the applicant who did not find it necessary to state that fact in his founding affidavit. In fact one can only glean that fact from his grounds of appeal to the second respondent attached to the founding affidavit.

The failure to disclose such a material fact in pursuit of the narrow and opportunistic scoring of undeserved points betrays a lack of probity. I am also mindful of the fact that the radio communication I have cited above does, to an extent, give the reason for the dismissal of the appeal as being that the applicant was "unsuitable for police duties." As I have said this is the person who was privy to the findings and recommendations of the suitability board.

For now however the point I am making by referring to the contents of the applicant's founding affidavit is that it does not relate to how and indeed why he seeks in the draft order a declaration that his discharge from police service was wrongful and unlawful and why it should be set as aside.

Surely such declaration cannot be founded on the fact that his appeal was dismissed or that he was not reinstated upon purportedly noting an appeal without regard to the findings of the suitability board whose report the applicant has withheld from the gaze of this court.

The applicant then makes the point that the second respondent is not properly constituted and is therefore an unconstitutional body. That point is not developed as he does not state why that is so. Even in his answering affidavit there is only a cursory reference to the Police Service Commission not being "properly constituted as required in terms of the constitution," something not helpful at all. He then says that the second respondent is "not even appointed by the President." As to why he says so he does not state.

In any event, it is trite that in motion proceedings it is to the founding affidavit that the court must look as an application stands or fails on its founding affidavit. See *Mobil Oil Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70. The applicant cannot purport to build a case which is not made in the founding affidavit by camio reference to the constitution and the President only in the answering affidavit.

More importantly it would be a sad day indeed were a party which has submitted itself to the jurisdiction of a tribunal like the second respondent and participated in its processes to be allowed to turn round and challenge the jurisdiction of the same tribunal. Such a party is estopped from questioning the tribunal's jurisdiction. It is the applicant who took his appeal to the second respondent for recourse. He submitted a very detailed and extensive notice of appeal containing all his arguments wherein he said nothing about the Commission being unconstitutional. He therefore submitted to its jurisdiction. It is only after his appeal was thrown

out that he purported to question the constitutionality of that tribunal. He must forever hold his peace.

In his heads of argument the applicant argues a case not contained in the application, that of dirty hands. Mr *Mugiya* submitted that by failing to reinstate the applicant following the noting of the appeal the respondents were acting in flagrant defiance of the law regard being had that s51 of the Police Act [Chapter 11:10] provides that an appeal suspends the decision appealed against. He then gets it all twisted by submitting that the subsequent discharge of the applicant following failure to reinstate him pending appeal was a nullity, as if the discharge arises from the appeal decision. The appellate only upheld the discharge made by the first respondent on the advice of the suitability board. Nothing more needs to be said about that argument.

The respondent's position is that there was no valid appeal given that the applicant flouted the procedure for noting an appeal in his attempt to contest the first respondent's determination. There was therefore no legal basis for reinstatement. In respect of the grounds for the dismissal of his appeal the respondents stated that the communication radio contained the reasons for dismissal and that if the applicant required more details he should have submitted a written request. As he did not, there was no entitlement to what had not been requested. The respondents denied that the Commission is not properly constituted maintaining that the provisions of the constitution were complied with.

The procedure for the noting of an appeal is provided for in Part V of the Police (Trials and Boards of Inquiry) Regulations RGN 97k/65 as read with s51 of the Act. To begin with s51 provides:

> "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."

The first respondent discharged the applicant from police service following a suitability inquiry by a board constituted in terms of s50 (1) of the Act, the discharge itself being made in terms of s50 (3) of the Act. Therefore s51 applied to the case in which event if the applicant desired to note an appeal against the discharge order he should have done so "within the time and

in the manner prescribed" by the Regulations. The appeal procedure is set out in s15 (1) of the Police (Trials and Boards of Inquiry) Regulations, 1965 which reads:

> "(1) A member who wishes to appeal in terms of section 51 of the Act shall:
>
> (a) within twenty four hours of being notified of the decision of the Commissioner General of Police, give notice to his officer commanding of his or her intention.
> (b) within seven days of being notified of the decision of the Commissioner General of Police, lodge with his or her officer commanding a notice of appeal in writing setting out fully the grounds upon which his or her appeal is based and argument in support thereof.
> (c) upon receipt of notice given in terms of paragraph (a) of subsection (1) the member's superior shall notify the Chief Staff Officer (Police) by the most expeditious means."

Clearly the procedure which I have set out is peremptory. The intention to appeal and the appeal itself are given to the member's officer commanding who then forwards it to the Chief Staff Officer of Police.

In this matter it is common cause that the applicant filed his notice of appeal with the Chief Clerk Human Resources Administration at Police General Headquarters in Harare which he says he filed on 24 December 2014, a date which has not been contested by the respondents even though the copy attached to the founding affidavit bears the date stamp of 2 March 2015 by the second respondent. What is however contested is that such filing was competent as to constitute a valid appeal. The peremptory provisions of the regulations require the notice of appeal to be filed with his officer commanding who in this case would be in Manicaland Province and not at Police General Headquarters in Harare.

Upon realizing that anomaly Mr *Mugiya* who appeared for the applicant made reference to the last page of the notice of appeal wherein it is endorsed that the notice was to be copied to, among others, the Officer Commanding Police Manicaland Province. He submitted that this then complied with the procedure for filing the appeal with the applicant's officer commanding. I do not agree. For a start the Officer Commanding Manicaland Province was not the applicant's officer commanding. The meaning of that provision is that a member should file the appeal with his own boss to whom he reports. Any other interpretation would not accord with the legislative intendment because there is a reason why such a requirement is in place.

It is unfortunate that counsel for the applicant tried desperately to refer to the relevant provisions piece meal and a close reading of the heads of argument shows that they are

misleading. What is even more disappointing is that as an officer of the court he owes it to the court to disclose all the relevant case law on the subject but he has seen it fit to withhold an authority that is on all fours with this matter. He was counsel for the applicants in another matter where he advanced the same arguments he has made in this case before TAKUVA J. Therefore the subject matter of this case has been the subject of earlier judicial pronouncements which rejected Mr *Mugiya*'s submissions which have been repeated herein. I am here referring to *Ex-Sergeant Maphosa TG 981783E* v *The Chairman of the Police Service Commission and Others*; *Ex-Constable Muresherwa 073753Q* v *The Chairman of the Police Service Commission and Others* HB 257/17.

The learned judge determined all the issues that the applicant herein, through the same legal practitioner who argued the earlier matter, has placed before me for further determination when at pp 6-7 he stated;

> "The point to note here is that compliance is mandatory. Secondly, the notice of intention to appeal must be given to an appellant's Officer Commanding. Thirdly, the notice of appeal must be lodged with the Officer Commanding and finally the Chief Staff Officer (Police) must be notified expeditiously. In *casu,* despite Mr *Mugiya*'s submissions it is apparent that the above appeal procedure was not followed by both appellants. It is indisputable that both lodged their documents directly with the 1st respondent. They deliberately avoided the procedure stipulated in section 15 (1) *supra*. This is borne out by their notices of intention to appeal and appeal which were stamped by the 1st respondent. The appeal procedure is peremptory and it should have been followed. Failure to comply with a peremptory provision renders the appeal a nullity. In my view, the 2nd respondent was perfectly entitled to treat the appeals as null and void for want of compliance with the provisions of section 15(1) of the Regulations. It is neither here nor there that the appeal was eventually heard and decided by the 1st respondent. What is crucial is that they disregarded the mandatory provisions which would have facilitated their reinstatement. The two shot themselves in the foot and cannot place the blame for their misadventure at the Commissioner General's door step. It is the 2nd respondent's responsibility to enforce discipline in the police force. In that regard his power will be severely mutilated if members are permitted to disregard the appeal procedure which is part of the disciplinary process. In my view, the rationale behind section 15 is to streamline and control the manner in which appeals are noted in order to avoid chaotic situations where notices of appeal are dumped on the Commissioner General's desk from all over the show. More importantly, since it is the Commissioner General's order that should be stayed, it is prudent and imperative that he be notified through the proper legal channels. This ensures that he maintains the effective command, superintendence and control desperately required for a disciplined police force. Finally, with respect to this ground, it is only a proper and valid appeal filed in terms of section

> 51 of the Act that suspends the execution of the Commissioner General's order. A proper and valid appeal is one that complies with section 15 (1) of the Regulations. The applicants' appeals are improper and invalid due to non compliance with the mandatory statutory provisions. Consequently, I find that the 1st ground for review has no merit at all."

The judgment of TAKUVA J was handed down on 24 August 2017. Although the present application was filed a month earlier on 21 July 2017, the applicant's first set of heads of argument prepared by none other than Mr *Mugiya* was filed on 18 September 2017 at a time when he was well aware of the pronouncement I have related to above. Still he did not see the wisdom of bringing it to the attention of the court.

The doctrine of *stare decisis* is still part of our law. As a superior court this court is governed by that time honoured doctrine. It abides by and upholds decisions of superior courts made on a particular subject in the past. It has to achieve consistency in its decisions unless they are over turned by a more superior court. Where a litigant desires to have this court depart from a previous decision on a particular subject the litigant must show that the decision is wrong and as such must be departed from or that since that decision was made the law or even society have evolved to such an extent that the decision can no longer be adhered to. In the absence of that, this court will abide by previous decisions it has made on the subject as it is not in the habit of contradicting itself. Apart from that this court is bound by the decisions of the Supreme Court which it applies without question.

On their part legal practitioners, as officers of the court occupying that privileged position in the administration of justice are required to assist the court administer justice. They have a duty to protect the integrity of the court as well. It is highly unethical and unacceptable for a legal practitioner to conceal from the court the fact that it has already determined a legal issue and attempt to argue the same point over and over again before different judges in the hope that judges will contradict each other and in the process overturn each other when they enjoy the same level of jurisdiction. To say the least it is despicable.

I am aware that the judgment of TAKUVA J was taken on appeal and that the appeal is yet to be determined by the Supreme Court. That however is not a licence for legal practitioners to pretend that it does not exist. Quite often in these police disciplinary cases this court is subjected to the same arguments which it has determined before and different judges are having to

determine the same issues which have been settled by others. It is an unacceptable abuse of the court. What is really unfortunate is that almost all the police officers who come to this court challenging disciplinary proceedings are represented by one legal practitioner who sees nothing wrong with what is happening.

If Mr *Mugiya* feels strongly that these issues have been wrongly decided, it is within his right to bring them up again but to disclose the earlier decision and seek to persuade the court to depart from the earlier decisions on concrete grounds. As it is all the issues that I have been requested to determine, including the giving of reasons, were settled in the authority I have referred to, an authority which was not disclosed. More importantly nothing whatsoever was advanced as to why I should depart from that judgment. I am therefore unable to do so. I must warn therefore that this is going to be the last time that costs *de bonis propriis* will not be awarded as a seal of the court's disapproval of this abuse.

I must however add my voice to what has already been said about the issue of giving reasons in police disciplinary cases. In *Ex-Sergeant Maphosa supra*, the court took the view, relying on the authority of *South African Police Service and Others* v *Maimela and Another* 2003 (5) SA 480 (T) that the purpose of the Constitutional requirement for the provision of reasons was to demand reasons for every administrative decision but that reasons must be requested and that where they have been requested and not given, the remedy is not to seek to overturn the administrative decision but to approach the court for an order compelling the supply of those reasons. In my view that reasoning is sound.

What I wish to do though is to draw attention to the provisions of s 3 (1) (c), s6 and s 11 of the Administrative Justice Act [Chapter 10:28]. Section 3 (1) (c) requires an administrative authority taking administrative action affecting the rights of a person to supply written reasons within a reasonable period. Section 6 (1) of that Act allows a person deprived of reasons to apply to the High Court for an order compelling the supply of the reasons. So the remedy is not to nullify the decision made without reasons but to compel the provision of the reasons.

What is more important though is that s 11 of the same Act as read with Part II of the Schedule to the Act exempts the application of s 3 (1) (c) and s 6 of the Act to disciplinary action taken in respect of uniformed forces. It provides:

"The following provisions—

(a) paragraph (c) of subsection (1) of section three; and
(b) section six;
shall not apply to any of the administrative actions specified in Part II of the Schedule."

Part II of the Schedule lists any disciplinary action taken in terms of the Defence Act [Chapter 11:02], the Police Act [Chapter 11:10] and the Prisons Act [Chapter 7:11].

It becomes apparent therefore that the applicant had no automatic right to be given reasons for the dismissal of his appeal. He has not denied that he did not make a written request for the reasons and even the feeble claim that a verbal request was made without specifying to whom it was made will simply not wash. To that should be tied my earlier observation that the communication radio did inform the applicant that his appeal was being dismissed because he was unsuitable for police duties. Mind you, this is a person who had been subjected to a suitability board inquiry who was aware of the reasons and is taken to have been in possession of the full record of the inquiry. I conclude therefore that there is no merit in the application.

In the result the application is hereby dismissed with costs.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners