HB 148/18
HC 1829/17
X REF HC 458/16

ASSISTANT INSEPCTOR MAZURA LLYOD

And

SERGEANT MAGAMA EDMONT

And

SERGEANT GWEMURI M

And

SERGEANT MUKWASHI PASI

And

CONSTABLE MAVESERE JUSTIN

Versus

THE OFFICER COMMANDING DISTRICT

And

THE OFFICER COMMANDING PROVINCE

And

THE COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 6 NOVEMBER 2017 & 14 JUNE 2018

Opposed Application

N. Mugiya for the applicants
L. Musika for the respondents

TAKUVA J: Prior to November 2017, there was a mushrooming of police road blocks. The purpose of these roadblocks was not always legitimate resulting in an outcry by motorists and other road users. This case is an off-shoot of what was perceived to be roadblocks mounted

by rogue officers in that all three counts of extortion preferred against applicants arose from "roadblock duties".

Applicants were alleged to have solicited for bribes from 3 motorists carrying imported goods from South Africa. According to the allegations, the three drivers were on different occasions compelled to drive from one place to the other until they succumbed to the pressure and paid the consideration that was demanded.

A complaint was raised to the authorities resulting in the arrest of all five applicants. They were immediately suspended from duty in terms of section 47 of the Police Act Chapter 11:16 [the Act]. All five opted to be tried by a magistrate in terms of section 32 of the Act. Although applicants claim to have signed suspension letters these were not filed of record. Be that as it may, the five were acquitted in respect of one count of contravening section 134 (1) (a) (b) of the Criminal Law Codification and Reform Act Chapter 9:23. In respect of the other two counts, prosecution was declined in February 2016.

It appears 1st respondent then summoned all applicants to appear before him to answer charges of "contravening paragraph 27 of the Schedule to the Police Act, as read with section 29 and 34 of the said Act i.e. soliciting or accepting any bribe or soliciting any present, reward or consideration whatsoever in connection with his position or duties as a member or accepting such present, reward or consideration without authority of the Commissioner General of Police."

On 24 February 2016, all applicants filed an urgent chamber application in this court under HC 458/16 challenging the legality of proceedings before the 1st respondent. Respondents opposed the application which was then set down for hearing before BERE J on the 26th of February 2016. After hearing both parties, he granted a provisional order in the following terms;

> "Pending the confirmation of the provisional order, an interim order is granted on the following terms;
>
> 1. The trial proceedings presided over by the 1st respondent be and are hereby stayed pending the finalisation of this matter."

The provisional order was served on the respondents who failed to file a notice of opposition to the confirmation of the provisional order within 10 days and in the prescribed form. The applicants invoked O32 r233 (3) and 236 (1) of this court's rules and set the matter down on the unopposed roll praying for a final order in the following terms;

> "1. The prosecution of the applicants in terms of the Police Act on the same charge for which the applicants were charged in terms of ordinary law is declared unlawful and wrongful;
> 2. The trial proceedings conducted by the 1st respondent against the applicants are therefore set aside;
> 3. The respondents are ordered to pay costs of suit on a client-attorney scale."

This matter i.e. HC 458/16 was placed before me in motion court on the unopposed roll for confirmation on the 4th day of May 2017 and I granted it in terms of the draft. Buoyed by this order, applicants filed this application on the 10th day of July 2017 seeking the following order.

> "1. The suspensions against the applicants be and are hereby declared unlawful and wrongful.
> 2. The respondents are ordered to release and serve the applicants with a radio signal for the cancellation of the purported suspension within 72 hours from the date of this order.
> 3. The respondents are ordered to pay costs of suit on a client-attorney scale."

The basis of this application is set out in the 1st applicant's founding affidavit whose relevant paragraphs state:

> "6. Pursuant to the allegations, in particular the criminal allegations, the applicants were suspended in terms of the Police Act from active police duties pending the finalisation of the criminal charges.
> 7. The suspensions were not signed or authenticated within 24 hours as required in terms of the Standing Orders Volume 1 by the Commissioner General of Police. What it clearly means [is] that the suspensions <u>were unlawful from the onset</u>.
> 8. All the applicants were kept on the illegal suspensions and we were prosecuted at Tredgold Magistrates' Court and on the 15th of January 2016, we were all acquitted and I attach hereto the copy of the court extract to that effect as Annexure 'A'.

9. We approached the respondents in order to uplift our suspensions but the respondents refused claiming that the suspension extends to the allegations in terms of the Police Act. We did not sign new suspension letters to that effect and it was by word of mouth. Clearly, again the suspensions were extended unlawfully again.
10. We challenged our prosecution in terms of the Police Act before this court on the very allegations for the suspensions were said to be dependent on under case number 458/16 and on 4th of May 2017, the court granted our application, the coy of which I attach hereto as annexure 'B'.
11. …
12. …
13. We have no choice except to approach this court so that the respondents' suspensions could be declared unlawful and wrongful." (my emphasis)

Respondents opposed the application on the ground that the applicants' suspensions are lawful and that the applicants' acquittal at the Magistrates' Court does not limit the Commissioner General's powers to suspend the applicants. It was further contended that respondents are challenging the order under HC 458/16.

In seeking a declaratur applicants relied on section 14 of the High Court Act which provides;

"14. High Court may determine future or contingent rights

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 guiding principles on the exercise by the High Court of its powers to grant declaratory orders were set out in *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 (SC). In *Mpukuta* v *Motor Insurance Pool & Ors* 2012 (1) ZLR 192 (H) at p 192E-G this court per NDOU J held that;

> "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. That is the 1st stage in the determination of the court. At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s14 of the High Court Act [Chapter 7:06]. In this regard some tangible and justifiable advantage in relation to the applicant's position, with reference to an existing, future or contingent legal right or obligation, must appear to flow from the grant of the declaratory order. See also *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 ZLR 337 (S)
>
> In casu, I find that the applicants as employees have a direct and substantial interest in the lawfulness or otherwise of their suspension. This interest is not an abstract question, but one that constitutes a real dispute between the parties. For this reason, the applicants' case passes the first stage of the inquiry.
>
> As regards the second stage, the critical question is whether there exists some "tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation that appear to flow from the grant of the declaratory order sought." (my emphasis)

Bearing this in mind, I have to decide whether or not the case before me is a proper one for the exercise of my discretion under s14. In other words, I must turn to the merits of this application. As pointed out above applicants contend that their suspension is unlawful because firstly the correct procedure was not followed. Secondly they argue that the reason for suspending them has fallen away. The relief they seek is that the suspension be set aside and for the respondents to cancel them.

It is common cause that applicants were suspended in terms of section 47 of the Act. The section provides:

> "47. Suspension of members
>
> The Commissioner General may suspend a member –
> (a) Pending his trial or after his conviction for any offence whether under this Act or otherwise; or
> (b) Pending the holding of a board of inquiry in terms of section fifty; or

(c) Where the Commissioner General is considering acting in terms of subsection (4) of section fifty."

While applicants argued that they were suspended in terms of paragraph (a) *supra*, they did not provide proof by way of the suspension letters. This narrow interpretation was challenged by the respondents who contended that they were suspended under the breath and width of s47. Respondents further submitted that the Commissioner General has every right to convene a board of inquiry into the suitability of applicants to remain in the Regular Force or to retain their rank, seniority or salary in terms of s47 (b).

Section 50 of the Act states:

"Board of Inquiry Procedure where Member unsuitable or unfit to remain in the Regular Force or to retain his rank, seniority or salary

(1) A board of inquiry consisting of not less than three officers of such rank not being below that of superintendent as may be considered necessary by the Commissioner General, may be convened by the Commissioner General to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary:

Provided that no officer who is a material witness or has a personal interest in the matter shall be appointed to such a board.

(2) The senior officer appointed to a board in terms of subsection (1) shall preside over the board and record or cause to be recorded in writing or by mechanical means all evidence which may be given before the board.

(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) discharge the Regular Force member

(ii) impose any one or more of the following penalties –

A. reduction in rank or salary;

B. loss of seniority;

C. withholding of an increment or salary;

(iii) reprimand the Regular Force member." (my emphasis)

Quite clearly, the procedure set out in s50 is distinct from those procedures set out in sections 29A, 30, 32 and 34 of the Act. More significantly in my view, it has got nothing to do with an acquittal or conviction on a criminal charge. The Commissioner General's powers in section 50 are of a disciplinary nature bestowed on a "disciplinary authority" commanding a "disciplined force" called the "Police Force". This legal position is consistent with the provisions of section 278 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] which states;

> "278 Relation of criminal to civil or disciplinary proceedings
>
> (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.
>
> (3) Civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution or any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings."

Disciplinary proceedings held in terms of this section are of a civil rather than criminal nature. They are therefore permissible pursuant to a criminal prosecution. This court cannot bar the Commissioner General from exercising powers granted to him by the law. The decision by the Commissioner General to suspend applicants is a decision which may be taken on review in the event that he has taken an inordinate delay in finalizing the envisaged investigations. It can also be challenged on the basis of procedural irregularities. Consequently, to grant a Declaratur under these circumstances would unjustifiably place the applicants at an advantage *vis-à-vis* the Commissioner General's powers in terms of the Act.

As regards the alleged contempt of court by the respondents my view is that the order under HC 458/16 is unrelated and irrelevant to the suspension orders. What is barred in that order is another "criminal" prosecution and not disciplinary proceedings of a civil nature for

example the convening of a Board of Inquiry to the suitability of the applicants or any other investigation into applicants' conduct.

From these reasons, I take the view that this is not a proper case for the exercise of my discretion under section 14 of the High Court Act [Chapter 7:07].

In the circumstances, it is ordered that the application for a declaratur be and is hereby dismissed wit costs.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners