EX CONSTABLE GANI A 987343Y
versus
COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 15 & 31 January & 24 March 2025

Application for a *declaratur*

N Mugiya, for the applicants
C Chitekuteku, for the respondent

DUBE-BANDA J:

[1] This is an application for, *inter alia*, declaratory orders and consequential relief in the following terms:

i. It is hereby ordered and declared that the letter written by Assistant Commissioner R.M Basera on the 14th of February 2019 and date stamped on the 18th of February 2019 do not constitute reasons for the decision of the first respondent in his capacity as the appellant authority in terms of the Police Act.
ii. It is accordingly held that the first respondent is in contempt of the order of this court under HC 42/18 granted on the 28th of November 2018.
iii. It is hereby held that the first respondent failed to give reasons in terms of Section 68(2) of the the Constitution in the decision he gave against the applicant.
iv. The decision of the first respondent discharging the applicant from the police service be accordingly set aside.
v. The Respondents be ordered to reinstate the applicant in the police service within 14 days from the date of this order without loss of salary and benefits.
vi. The Respondents are ordered to pay costs of suit on a client attorney scale.

[2] The application is opposed by the respondents.

[3] The applicant took a point *in limine* that there is no notice of opposition in that the respondents' opposing affidavits were commissioned by lawyers who work at the offices of the respondents. It was contended that these commissioners of oaths prepared the affidavits and commissioned them. It was submitted that the commissioners had an interest in the matter, and therefore the opposing affidavits are irregular and fatally defective. In support of this proposition, Mr *Muguya* relied on the case of *Chafanza* v *Edgars Stores* 2005 (1) ZLR 299 (H) where the court held thus:

> "To my mind, it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter at hand."

[4] Counsel argued that without opposing affidavits the application is unopposed and the relief sought by the applicants must granted on an unopposed basis.

[5] *Per contra*, Mr *Chitekuteku* counsel for the first respondent argued that first respondent's affidavit was commissioned in terms of the requirements of the law. It was disputed that the commissioner of oaths drafted the opposing affidavits. Counsel relied on the provisions of the Justices of the Peace and Commissioners of Oaths (General) Regulations, 1998 ("Regulations"). Counsel submitted that the officers who commissioned the affidavits had no interest in the matter since they did so in terms of para (2) of the Regulations as are mere civil servants who were appointed to commission documents. It was submitted that the point *in limine* had no merit and must be refused.

[6] The departure point is para 2(1) of the Regulations which say "No justice of the peace or commissioner of oaths shall attest any affidavit relating to matter in which he has any interest." Granted that para 2(1) prohibits a commissioner of oaths from attesting any affidavit relating to a matter in which he has interest, however para 2 to the Schedule to the Regulations provides for "Affidavits exempted from s 2(1)." These include affidavits commissioned by a member of the Public Service where his only interest in the affidavit arises out of the performance of his duties; and the primary interest in the affidavit is that of the State. I agree with Mr *Chitekuteku* that the affidavits deposed to by the respondents are valid as they were commissioned by members of the Public Service whose primary interest in the affidavit is that of the State. See *Marega v The Commissioner of Prisons & Anor* HH140/17. By operation of the exemption, the case of *Chafanza* v *Edgars Stores* 2005 (1) ZLR 299 (H) is distinguishable from this matter. In addition, there is no evidence that the commissioner of oaths drafted the affidavits in issue. In the circumstances, the point *in limine* has no merit and is refused.

[7] In the opposing papers, the respondents had taken a preliminary point that this matter is *res judicata.* At the commencement of the hearing, this preliminary point was abandoned and as such no further reference shall be made to it.

[8] On the merits the applicant contends she was charged in terms of para 35 of the Schedule to the Police Act [*Chapter 11:10*] ("the Act") and was convicted. The first respondent convened a board of suitability in terms of s 50 of the Act whose recommendations led to her discharge from the Police Service. It was further contended that she was not furnished with the reasons for the board recommendations and the reasons for the discharge. The applicant avers that she challenged the legality of the decision of the first respondent, and it was declared unlawful and wrongful.

[9] The applicant argued that the reasons given by one R.M. Basera an Assistant Commissioner in the Zimbabwe Republic Police do not constitute reasons as contemplated in the order in HC 42/18, in that he cannot usurp or take over the judicial function of the Commissioner of Police. The applicant further avers that she was discharged without reasons as required by s 68(2) of the Constitution.

[10] *Per contra* the respondents contend that the applicant was charged and convicted in terms of the Act and was discharged on the recommendations of the suitability board. It was contended further that the order in HC 42/18 was complied with in that the applicant was furnished with reasons. The first respondent averred that he delegated Assistant Commissioner Basera to provide the applicant with reasons for her discharge.

[11] It is clear that this application is predicated on the order in HC 42/18 (Per MAWADZE J as he then was), which reads as follows:

i. The refusal and or failure by the respondents to furnish applicant with reasons for her discharge be and is hereby declared unlawful and wrongful.
ii. The first and second respondents are ordered to furnish the applicant with reasons for her discharge from the Police Service within fourteen (14) days from the date of this order.
iii. The respondents are ordered to pay cost of suit on client-attorney scale.

[12] It does not require closer scrutiny to observe that the court did not declare the decision of the first respondent unlawful, what was declared unlawful and wrongful was the failure to furnish the applicant with reasons for her discharge. The court then ordered that the applicant be furnished with reasons for her discharge. Mr *Chitekuteku* argued that the first respondent delegated Assistant Commissioner Basera to furnish the applicant with reasons. Indeed, the

applicant does not dispute that Basera provided her with reasons for her discharge, what is being challenged is the legality of the delegation.

[13] The law permits the first respondent to delegate his functions to senior officers of the police. The empowering provision is s 10 of the Police Act, which provides thus:

> "10 Delegation of Commissioner-General's functions
> Subject to this Act, the Commissioner-General may from time to time delegate to any officer of or above the rank of superintendent any right, function, power or duty conferred upon him by this Act or any other enactment, other than the power of further delegating the right, function, power or duty so delegated." (My emphasis).

[14] The first respondent delegated his function to Basera an Assistant Commissioner in the Zimbabwe Republic Police. I take the view that such delegation is in accordance with the requirements of the law. Assistant Commissioner Basera is above the rank of superintendent as required by the empowering provision. I take the view that the order in HC 42/18 was complied with, in that the applicant was given reasons for her discharge from the police service.

[15] In addition, the argument that the respondents are in contempt of the order in HC 42/18 has no merit because reasons were provided to the applicant. In any event, this court cannot, in *casu* grant an order of contempt of court because the is no application for contempt before court. An application for contempt of court is made in terms of r 79 of the High Court Rules, 2021 and there is no such application before court. The contention that the court must hold the respondents in contempt of court is disingenuous.

[16] Furthermore, there is no basis in this application for this court to set aside the decision of the first respondent, and order the reinstatement of the applicant without loss of salary and benefits. In fact, even if the reasons had not been provided, the remedy would not be reinstatement, but an application for contempt of court. The applicant has not challenged the merits of her discharge based on the reasons provided by the first respondent through Assistant Commissioner Basera. It is incomprehensible how she can seek to be reinstatement without loss of salary and benefits without first making a case for such relief. This is merely one of those confused applications which crowd the corridors of this court for no good measure. It is for the above reasons that this application has no merit and stands to be dismissed.

[17] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the event. The respondents are clearly entitled to their costs.

In the circumstances, this application is dismissed with costs.

Dube-Banda J:……..

Mugiya Law Chambers, applicants' legal practitioners
Civil Division of the A-G Office, first respondent's legal practitioners