CONSTABLE HOFISI ANGELINE
and
CONSTABLE CHIRIPANYANGA DELIGHT
and
CONSTABLE HOFISI OBVIOUS
and
CONSTABLE SIRIVA CANAAN
and
CONSTABLE MOYO CONCILIA
and
CONTABLE MPUNZI NQOBILE
and
CONSTABLE SIBANDA LIBERTY M
and
CONSTABLE GUMINDOGA DONALD
and
CONSTABLE NDLOVU KHOLISANI
and
CONSTABLE SIHWA MKHOKHELI NTOKOZO
versus
COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 15 January & 24 January 2025

Application for a declaratur

N Mugiya, for the applicants
Ms *N L Mabasa*, for the respondent

DUBE-BANDA J:

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

i. The respondents' decision to discharge the applicants from the police service be and is hereby held to be unlawful and wrongful.

ii. The respondents' decisions to stand down the applicants from the police diploma program without giving the reasons and any form of justification is held to be unlawful and wrongful.

iii. The respondents are ordered to reinstate the applicants into the police service forthwith or at least not later than 14 days from the date of this order.

iv. The respondents are ordered to disclose to the applicants, the failed subjects or courses in the first semester of the program and to allow them to carry over the failed courses into second semester and thereafter proceed in terms of the regulations of the owner of the program.

v. The respondents are ordered to pay for costs of suit on a punitive scale.

[2] The application is opposed by the first respondent. At the commencement of the hearing, Mr *Mugiya* counsel for the applicants informed the court that the second respondent has not opposed the application, and default judgment must be granted against it without further ado. I declined such a request, to me the order sought in this application can only be granted on the merits, subject to the requirements of the law. The terms of the order sought in the draft shows that, once a default judgment is granted against the second respondent, it will operate and be enforceable as against the two respondents. Such would be incompetent because the first respondent has opposed the application. In words, a default judgment cannot be structured to be enforceable against the second respondent to the exclusion of the first respondent. In fact, the draft order refers to the "respondents" showing the order sought is intended to be enforceable against the two respondents jointly and severally. It is for these reasons that granting a default judgment against the second respondent is not competent and is refused.

[3] The applicants took a point *in limine* that the first respondent's affidavit is fatally defective in that it was commissioned by a legal practitioner stationed his office. It was contended that the officer prepared the affidavit and commissioned it. It was further submitted that the commissioner of oaths had an interest in the matter, and therefore the affidavit is irregular and fatally defective. In support of this proposition, Mr *Mugiya* 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 an opposing affidavit the application is unopposed and the relief sought by the applicants must granted as unopposed.

[5] *Per contra*, Ms *Mabasa* counsel for the first respondent argued that the affidavit was commissioned in terms of the requirements of the law. It was disputed that the commissioner of oaths drafted the affidavit. Counsel relied on the provisions of the Justices of the Peace and Commissioners of Oaths (General) Regulations, 1998 ("Regulations"). Counsel submitted that the officer who commissioned the affidavit had no interest in the matter since he did so in terms of para (2) of the Regulations as a mere civil servant who was appointed to commission documents. It was submitted that the point *in limine* has no merit and must be refused.

[6] The departure point is para 2(1) of the Regulations say "*No justice of the peace or commissioner of oaths shall attest any affidavit relating to matter in which he has any interest.*" 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 in the Public Service; and the primary interest in the affidavit is that of the State. I agree with the counsel that the affidavit deposed to by the first respondent is valid as it was commissioned by a member 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] I now turn to the points *in limine* taken by the first respondent. The first respondent took three points *in limine*, i.e., failure to exhaust internal remedies; that the court application is fatally defective; and that there is no cause of action. The point *in limine* that there was no cause of action was abandoned, and no further reference shall be made to it in this judgment.

[8] Ms *Mabasa* persisted with the point *in limine* attacking the applicants for the alleged failure to exhaust internal remedies. It is trite that the general rule is that an internal remedy must be exhausted prior to approaching the court, unless the litigant can show exceptional circumstances to exempt him or her from this requirement. See *Matukutire* v *Medicines Control Authority of Zimbabwe* HH 59/2008; *Musanhu* v *Chairperson of Cresta Lodge Disciplinary and Grievance Committee* HH 115/94; *Tuso* v *City of Harare* HH 1/2004. What constitutes exceptional circumstances depends on the facts and circumstances of the case and is decided on a case by case basis. In terms of s 7 of the Administrative Justice Act [*Chapter 10:28*] the court has a discretion, to be exercised judicially upon a consideration of all the facts to exercise its jurisdiction over a matter where the litigant has not exhausted internal remedies. In *casu*, I

take the view that s 51 of the Police Act [*Chapter 11:10*] envisages an appeal arising from a discharge predicated on a disciplinary case. The applicants were not discharged on the back of a disciplinary case arising from cases of misconduct. In other words, they were discharged for failing more than half of the modules in the first semester of the Diploma Programme. In my view a pursuit of an appeal in terms of s 51 of the Police Act would therefore be futile. This factor, in my view, constitute exceptional circumstances to exempt the applicants from the obligation to exhaust the remedy under s 51 of the Police Act. In the circumstances, the point *in lime* has no merit and is refused.

[9] The second point *in limine* is that the respondent this application is bad at law in that it is a review disguised as a *declaratur*. It was argued that the content of the application shows that the applicants do not seek a declaration of rights, but to set aside the decision of the first respondent. It was argued further that the averments turning on the alleged failure to give reasons for the discharge and the contention that the applicants were not given a right to be heard, are grounds of review. It was further argued that the applicants brought this application as a declaratur because they found themselves out of the time line to file an application for review.

[10] In *Zvomatsayi & Ors* v *Chitekwe No & Anor* 2019 (3) ZLR 990 (H) the court held that a declaratory order should not be used to get around the requirements for review proceedings. In *casu,* this application betrays a confusion as to the difference between a *declaratur* and a review. I say so because the allegation turning on the alleged failure to give reasons for the decision and the alleged violation of the right to be heard are grounds for review. The application also has features of a *declaratur*. In the final analysis it is just a hotchpotch of the grounds for a *declaratur* and grounds for review lumped together. It is for these reasons that to some extent the point *in lime* taken by the first respondent has substance. However, I am not persuaded to non-suit the applicants because of the confusion attendant to drawing up this application. In the result, the point *in limine* is refused.

[11] I now turn to the merits of the matter. The applicants' case is briefly that they were attested into the Zimbabwe Republic Police ("ZRP") on 9 November 2021 and commenced training at Morris Depot. They allege that the training as a police officer was for a period of six months upon which they would qualify to be awarded certificates and be confirmed as members of the police service in terms of the Police Act [*Chapter 11:10*]. They further aver that the first respondent advised them that starting that year, there would be an extended course programme in which those who would have passed will be awarded diplomas after two years. The recruits

would undergo two courses to be done simultaneously, however at six months they would be issued with certificates, graduate and be eligible to deployment. After two years, those who would have passed would be awarded diplomas by the University of Zimbabwe ("UZ").

[12] The applicants contend further that the first respondent informed them that no one would be punished for failure to complete and pass the diploma programme. They aver that they were informed that diploma programme was to be done through a semester-based curriculum, such that failed courses in one semester would be carried over to the next semester. However, those who failed more than half of the courses in a semester will repeat the semester.

[13] The applicants aver further that they all passed the six months course and they were issued with certificates. No graduation ceremony or pass out was done because the second respondent did not have enough uniforms to cover all the graduates. On the diploma programme they contend that they did the first semester and completed it, and proceeded to the second semester. In the middle of the second semester, they were informed that they failed half of the courses in the first semester. They were further informed that they would be expelled from the diploma programme and from the police service. No reasons were given for the decision, the first respondent just released a list of names of those who were to be stood down from the diploma programme and expelled from the police service.

[14] The applicants argued that they should not have been discharged from the police service for failing the diploma programme. They should have been retained in the police service on the basis of the six-month certificate. Further, it was argued that the diploma is a UZ programme, and only the UZ could expel the applicants from the programme, not the respondents. It was contended that the respondent did not afford the applicants the right to be heard, did not provide reasons for their decision, and made arbitrary decisions. It was argued that the decision to discharge the applicants from the police service was illogical and unlawful.

[15] *Per contra*, the respondents contend that at the beginning of 2021, the ZRP in this quest to keep pace with the ever-reaching policing environment, introduced a two-year basic training programme. The programme is done in conjunction with the University of Zimbabwe. The programme is composed of a Certificate and a Diploma in Police Studies. The Diploma programme was tailor made, aiming to produce professional and competent police officers, capable of discharging high quality, contemporary policing services to the nation. Trainees are required to sit for Certificate examinations before they sit for the Diploma examinations.

[16] The first respondent contends that the applicants underwent all the recruitment process and, on 9 November 2021, they were attested into the Police Service and formed part of the

pioneers of the Diploma training programme. On commencement of training, the applicants underwent an Induction Programme from 18 to 21 November 2021. The trainees, including the applicants were informed of the consequences of failing the two programmes. The applicants passed the Certificate programme, and proceeded to the Diploma Programme. A total of 972 trainees set for the first semester examinations and 377 passed all the modules and were allowed to proceed. 551 failed less than half of the modules and were allowed to repeat the failed modules and they later passed. 44 who include the 10 applicants failed more than half of the modules and were not given an opportunity to repeat. A recommendation was made to the first respondent to discharge the recruits who failed to pass at least half of the modules, and these included the applicants. The applicants were considered unsuitable for police duties and were discharged.

[17] It was averred that the applicants were appointed for an initial period of two years. They all signed a ZRP Form 1, which is appointment Form, accepting the initial appointment for two years. After the expiry of their two-year contract, on 8 November 2023, the applicants were discharged in terms of s 13(1) of the Police (Appointment) Regulations, 1965 as read with s 50(4) of the Police Act [*Chapter 11:10*]. It was contended further that the applicants were provided with the reasons their contracts were not renewed, being that they failed to satisfy the requirements of their police training and were found to be unsuitable for re-appointment.

[18] It is clear that the version of the applicants is materially different from that of the respondent. The rule in *Plascon- Evans Paints Ltd* v *Van Riebeck Paints* (Pty) Ltd 1984(3) SA 620 (SCA) ought to apply in the instant matter since these are motion proceedings – final relief will be granted if the facts alleged by the applicants, which the respondent admits, together with the facts alleged by the respondent justify the granting of such a final order. This court will be entitled to accept the facts alleged by the applicant in so far as they are admitted by the respondent, and those alleged by the respondent in so far as his version is plausible and credible. The version put forward by the respondent is plausible and credible. It is the version of the applicants that is far-fetched or clearly unsustainable that the court is justified in rejecting it merely on the papers.

[19] It is common cause that the ZRP in this quest to keep pace with the ever-reaching policing environment, introduced a two-year basic training programme. The Diploma programme was tailor made, aiming to produce professional and competent police officers, capable of discharging high quality, contemporary policing services to the nation. The two-year training

programme conforms to aim to produce professional and competent police officers. The court recognizes that this is an area in which the police authorities have expertise.

[20] It is important to note that prior to their release, the results were scrutinized by the academic board meetings that were held internally and externally. The first academic board meeting was held at the Police Academy, and the second at Police Staff college. Thereafter, the examination scripts and the marks schedule were taken to the University of Zimbabwe Faculty of Law, for consideration and moderation. After this thorough process the results of the first semester were then released. It was found that the applicants failed the first semester of the Diploma Programme, and were deemed not suitable for police duties.

[21] The task of the court is to ensure that the decisions taken by police fall within the bounds of reasonableness as required by the law and the Constitution, but not to usurp the functions of police authorities in the area of their expertise. The issues of training and what renders a trainee suitable for police duties is in the exclusive jurisdiction of the police. In other words, the court must in essence admit the expertise of police authorities in the terrain of police training. The court cannot undermine this process by ordering the police to retain in its ranks individuals who have been assessed and found unsuitable for police duties. This would be a text-book case of judicial overreach.

[22] The applicants were informed of the reasons of their discharge, that they had failed to meet the requirements of the University of Zimbabwe Diploma in police studies. The court cannot order the respondents to allow the applicants to carry over the failed courses into second semester. This is not the function of the court. The court must defer to the University and Police authorities in the area of their expertise. The Regulations are clear that a student who fails more than half of the modules offered in an academic semester shall be deemed unsuitable police duties. It is not the court that determines the suitability of a trainee for police duties, it is the prerogative of the police authorities. This is a court of law; it cannot order the respondents to do what the Regulations say cannot be done. The applicants were lawfully discharged from the police service, i.e., they were found to be incompetent and unsuitable for police duties. It is for these reasons that this application must fail.

[23] 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 first respondent is clearly entitled to his costs. The first respondent sought costs on a legal practitioner and client scale. It is trite that costs of suit on a legal practitioner and client scale are not merely for the asking. Something more underlies the practice of awarding costs on a legal practitioner and client scale

than the mere punishment of the losing party. The operative principle is whether a litigant's conduct is frivolous, vexatious, manifestly inappropriate or amounts to abuse of the process of the court. See *Kangai* v *Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H).

[24] I take the view that this is a frivolous and vexatious application predicated on contrived, fabricated and manipulated narrative. There must be premium for such deplorable conduct. I say so because the applicants knew at recruitment that the six months training programme had been abolished and replaced by a two-year programme. The applicants were, during the Induction Programme informed of this development, and the consequences of failing. In addition, the advert that led to their recruitment stated that they were to train for a Diploma in Police Studies. The applicants signed Forms accepting appointment for two years in terms of the Constitution and the Regulations. The applicants failed more than half of the Modules offered in the first semester. This came to light when they had proceeded to the second semester because the University delayed releasing the results. They were discharged after the expiry of two years, and given reasons for the discharges. The applicants were informed in writing of the reasons of their discharge, and acknowledged in writing. The applicants choose to anchor this application on manufactured facts. This amounts to abuse of the process of this court. It is for the above reasons that the applicants must be penalized with costs on a legal practitioner and client scale.

In the circumstances, this application is dismissed with costs on a legal practitioner and client scale.

DUBE-BANDA J:…….

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