EX-CONSTABLE MAKUMBI **HC 1229/17**
Versus
THE COMMISSIONER GENERAL OF POLICE
And
THE CHAIRPERSON OF THE
POLICE SERVICE COMMISSION
And
THE MINISTER OF HOME AFFAIRS

EX-SERGEANT MAFENYA **HC 1214/17**
Versus
THE COMMISSIONER GENERAL OF POLICE
And
THE CHAIRPERSON OF THE
POLICE SERVICE COMMISSION
And
THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 FEBRUARY & 20 DECEMBER 2018 & 10 JANUARY 2019

Opposed Court Application

R. Ndou for the applicants
L. Musika, R. Taruberekera, I. Dube & B. T. Nyoni for the respondents

TAKUVA J: At the hearing of these matters *Mr L. Musika* applied to have the two cases consolidated since the facts, issues and legal principles to be argued are the same. *Mr Ndou* for the applicants agreed and both cases were consolidated. The result is that I will deliver one judgment instead of two.

The background in respect of each case is as follows:

1. **<u>Ex-Sergeant Mafenya</u>**

Both parties have not divulged what caused the applicants' discharge by the 1st respondent. Be that as it may, on 7 November 2016, applicant received a radio communication from the 1st respondent to the effect that he had been discharged from the police service with

effect from the 2nd day of November 2016. Aggrieved, applicant filed his notice of intention to appeal to the 2nd respondent on 7 November 2016. On 14 November 2016 applicant filed his notice and grounds of appeal with the 2nd respondent.

The 1st respondent did not reinstate the applicant pending the determination of his appeal. Instead, in a letter dated 24 March 2016, served to his legal practitioners, applicant was advised that the 2nd respondent had turned down his appeal. He was not informed of the reasons despite asking for them verbally. According to him the failure to supply him with reasons is unlawful and wrongful. Further, he also contended that the respondents' failure or refusal to reinstate him into the police force is unlawful and wrongful. Applicant also argued that the decision of the 2nd respondent is not only "unlawful but unconstitutional in that this body is not recognized by law".

Finally, applicant's prayer for a declaratur is as follows;

"1. The discharge of the applicant from the Police Service by the 1st respondent be and is hereby declared wrongful and unlawful and accordingly set aside.

2. The 1st respondent is ordered to reinstate the applicant to the Police Service and the 2nd respondent is ordered to regularise the applicant's reinstatement by the 1st respondent forthwith.
3. The 1st respondent is ordered to pay costs of suit."

Ex-Constable Makumbi

Facts

This is a court application for a declaratur on the following background facts: Applicant was discharged from the Police Service on 1st September 2016. After being served with a discharge radio on 27 October 2016 he immediately filed a notice of intention to appeal together with a notice of appeal plus grounds of appeal with the 2nd respondent in terms of section 51 of the Police Act (Chapter 11:10). Applicant was reinstated into the Police Service on the 10th of November 2016.

On 24 March 2017, applicant was informed of his appeal's dismissal through a letter served to his legal practitioners. The letter did not contain reasons for the 2nd respondent's decision notwithstanding having made a "verbal request" to be furnished with reasons.

Unhappy with the outcome applicant filed this application seeking the following relief:

"1. The discharge of the applicant from the Police Service by the 1st respondent be and is hereby declared wrongful 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 1st respondent is ordered to pay costs of suit".

The following issues are common to both applications.

1. Whether or not applicants were properly furnished with reasons for the dismissal of their appeal by the 2nd respondent?
2. Whether or not the Police Service Commission is properly constituted in terms of the Constitution?

The third issue is whether or not Ex-Sergeant Mafenya noted his appeal against discharge within the prescribed time frame?

Both applicants seek a declaratur as their relief. Section 14 of the High Court Act (Chapter 27:06) provides as follows:

> "The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

In *Mpukuta* v *Motor Insurance Pool &Ors* 2012 (1) ZLR 192 (H) at p192E – 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 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 (1) ZLR 387 (S).

Applying the law to the facts, I find that both applicants as ex-employees have a direct and substantial interest in the lawfulness or otherwise of their dismissal. In my view, the applicants' cases pass the 1st stage of the inquiry.

In respect of the 2nd stage, the initial 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 right or obligation that appear to flow from the grant of the declaratory order sought". In order to answer this question, I must turn to the merits of the applications. I shall deal with the 3rd issue first, namely whether or not Ex-Constable Mafenya's appeal was properly filed. The appeal procedure is set out in section 15 (1) of the Police (Trials and Boards of Inquiry) Regs 1965. The section provides;

> "15(1) A member who wishes to appeal in terms of s51 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 (7) days of being notified of the decision of the Commissioner General of Police, lodge with him or her officer commanding a notice of appeal in writing setting out fully the grounds upon which his or her appeal is based and any argument in support thereof.

(c) Upon receipt of a notice given in terms of paragraph (a) of subsection (1) the member's superior officer shall notify the Chief Staff Officer (Police) by the most expeditious means." (my emphasis)

In the present case the applicant properly gave notice of his intention to appeal through his officer in charge. However, applicant failed to give notice of appeal and grounds thereof in writing to his officer commanding in accordance with s15 (1) (b) *supra*. This is fatal to his appeal because the provision is peremptory in that compliance is mandatory. In his founding affidavit Constable Mafenya concedes that he filed his grounds of appeal with the 2nd respondent on 14 November 2016. Failure to comply with the provisions of section 15(1) of the regulations renders the appeal a nullity.

Section 51 of the Police Act (Chapter 11:10) 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 Commissioner had been given". (my emphasis)

In casu, Ex-Constable Mafenya did not comply with this section by not filing his appeal "in the manner prescribed". In my view, the 1st respondent was not obliged to invoke the provisions of section 51 where like in the present case the applicant has filed a defective appeal. In other words, the 1st respondent was not notified of the appeal through the proper legal channels. In the circumstances the respondents' failure to reinstate Constable Mafenya is not a gross violation of the law.

As regards the 1st issue both applicants have contended that they were not furnished with reasons for the dismissal of their appeals by the 2nd respondent. The precise argument is that the 2nd respondent violated section 68 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (the Constitution).

The section provides:

"68. Right to administrative justice

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable proportionate, impartial and both substantively and procedurally fair.
(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
(3) …" (my emphasis)

Both applicants submitted that they verbally requested to be furnished with reasons for the decision to dismiss their appeals but none were supplied. The 2nd respondent denied receiving such request from the applicants.

In *Commissioner South African Police Service and Ors* v *Maimela & Anor* 2003 (S) SA 450T, DU PLESSSIS J while interpreting a similar provision in the South African Constitution, held that;

> "When interpreting section 33 (c) of the Constitution, it must be borne in mind that the right to be furnished with reasons is very wide, it applies to every person whose right or interests are affected by any administrative action. In many instances the persons affected may not be interested in the reasons. The practical interpretation of section 33(c) is that reasons must be furnished to affected persons who assert the right to be furnished with reasons. The purpose of section 33(c) is not to oblige administrative decision-makers to furnish without a request, reasons from every single administrative action taken in this country". (See Klaaren (in Chaskalson & Others Constitutional Law of SA (Revision Services, 1999) at 25-19). (my emphasis)

In *Mahachi & Ors* v *Officer Commanding Matabeleland South Province & Anor* HB-146-16, it was held that;

"It is my considered view that section 68 gives a person a right to prompt and written reasons for any administrative action taken. It therefore follows in my view that where administrative action is taken, and a party is adversely affected by it, he has a right to request for and be promptly supplied with written reasons. I do not hold the view that an affected party should sit back, and not ask for reasons only to say the decision is unfair as no reasons were provided. Section 68 of the Constitution of Zimbabwe simply endorsed and incorporated into the Supreme Law of the land, the provisions of the Administrative Justice Act [Chapter 10:28].

In my view, the Administrative Justice Act *(supra)* is an act of Parliament that compliments the provisions of section 68 of the Constitution. It actually provides in its preamble as follows:

"To provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair, to provide for the entitlement to written reasons for administrative action or decisions----."

Section 3(1) (b) of the same Act provides thus:

"An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall ---

(c) where it has taken the action, supply written reasons therefore within the relevant period specified by law, or if there is no such specified period after being requested to supply reasons by the person concerned."

What comes out from the above provisions is that the affected person must 1st request for reasons of a decision before the decision-maker can be deemed to have failed to comply with section 68 *supra*. *In casu,* both applicants have simply proffered bold and unsubstantiated claims that they verbally requested for reasons. I remain unconvinced that a verbal request can be effectively made to an institution like the 2nd respondent. Applicants have the onus to prove that they requested for reasons and none were forthcoming. Both have dismally failed to discharge the onus in that they have not identified the person to whom their requests were made. They have not supplied the place or date when such requests were made. I do not share the view that in terms of the Constitution, the applicants are entitled to be furnished with reasons even without the need to request for same. I come to the conclusion that the applicants did not request for reasons and the respondents' failure to furnish reasons for their decisions does not make those decisions null and legally untenable.

Finally, both applicants contended that the 2nd respondent's commission is not properly constituted as is required by section 227 of the Constitution. The argument here is that the 2nd respondent was not appointed by the President making the whole commission unconstitutional. In my view this matter was not fully argued and the information supplied is so scanty that I am unable to decide one way or the other. Applicants may file an application with the Constitutional Court if they so wish.

In the circumstances, I find that the applications have no merit. Accordingly, I make the following order.

Both applications be and are hereby dismissed with costs.

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