

NICHOLAS MUDZINGWA
versus
POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 5 August 2014 and 20 August 2014

Opposed Matter

Mrs *M. Khumalo*, for the applicant
Miss *R Hove*, for the defendant

MTSHIYA J: This is an application for review wherein the applicant seeks the following relief

“IT IS ORDER THAT:-

1. The decision of the Police Service Commission to discharge Constable Nicholas Mudzingwa from the Police Force be and is hereby set aside.
2. The applicant be reinstated to his position
3. The respondent pay costs of suit”.

The application is opposed.

It is common cause that prior to the termination of his services on 15 December 2010, the applicant had served in the police force for over 19 years.

On 15 November 2010 a Board of Inquiry sat (the Board) to determine the applicant’s suitability to remain in the force. In terms of the Board’s Report the reasons for the inquiry emanated from the following facts:

- “4. Member’s record of service reflects that he appeared before a single officer on 2/9/10 facing two counts, firstly for Contravening Paragraph 35 of the Police Act Chapter 11:10, “**Acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Force;** and the secondly for Contravening Paragraph 13(1) of the Police Act Chapter 11:10, “**Being absent without official leave**”. He was sentenced to 14 days imprisonment for both counts. The circumstances being that he received USD 600 as an exhibit for a report of Theft and converted the whole sum to his own use. The following day member did not report for duty.

5. Member is facing a criminal charge of Theft and is on a \$50 bail and will appear for continuation of trial on 2/12/10 on Harare CR 19/9/10.
6. The committed offence has an element of dishonest on the part of Constable **Mudzingwa** and not expected to be committed by a member with such a service in the Police Force.
7. Constable **Mudzingwa** suffered mental sickness in 1996 and was re-examined by a psychiatric specialist **Dr Chibanda** on 21 October 2010 who asserted that member's mental illness may affect his concentration and execution of his duties".

At the end of its inquiry the Board recommended the applicant's discharge from the force with effect from 10 November 2010 for being "unsuitable for police duties".

Initially the applicant's grounds of review were indicated as follows:-

- (a) Gross irregularity in the proceedings or the decision, and
- (b) Gross unreasonableness.

The first ground fell away when the respondent produced the Board's report. The applicant then conceded that there were no procedural irregularities.

In his supplementary affidavit filed on 18 November 2013, the applicant states:-

- “10. I suffer from Schizophrenia and have been undergoing treatment since 1996. This condition causes me to not function appropriately at times. I attach hereto a letter from Dr Mushonga of the Harare Psychiatric Hospital confirming the above (Annexure B).
11. I believe that this condition may have affected my recollection of events and hindered my ability to fully appreciate the exigencies and consequences of the Board of Inquiry. This failure to appreciate the above led to my inability to furnish my legal practitioners with full instructions at the commencement of these proceedings. My legal practitioners have now confirmed that a hearing was conducted in terms of Section 50 of the Police Act.
12. However, though a hearing was conducted, I still firmly believe that the decision to discharge me from the police Force was grossly unreasonable. I have worked for the Police Force for over 15 years without any problems. No complaints were levelled against me regarding my unsuitability to carry out police duties save for this charge of theft which I was never convicted of. I have always performed my duties with due diligence and care to the best of my ability”.

The trust of the review is now based on the unreasonableness of the Boards decision.

Notwithstanding the fact that there is still a pending criminal case against him, it is not disputed that charges referred to in the Board's report were proved against him in terms

of the Police Act. Furthermore once the charges were brought before him the applicant availed to the Board a medical report which confirmed his mental condition – a condition that “may affect his concentration and execution of his duties” I therefore appreciate the circumstances under which the Board arrived at its decision.

There is, however, evidence that upon being diagnosed of a mental illness in 1996 the applicant had continued to carry out his duties without any complaints from the authorities. The applicant confirmed his mental condition to the Board but did not plead that because of his mental condition, he could not follow the Board’s proceedings. He did not tell the Board that he was incapable of following the proceedings.

The Board’s report shows that in addition to the criminal charges, the Board also actually considered the applicant’s mental condition. That position is clear from the handwritten minutes of the Board. That was an error on the part of the Board. The Board had no capacity to deal with the issue relating to the applicant’s mental condition. This is so because s 20 of the Police Act, [*Cap 11:10*], (“the Act”) provides as follows:-

“20 Discharge on medical grounds

- (1) Subject to subsection (2), the Commissioner-General may at any time discharge a Regular Force member, other than an officer, on the grounds of continued ill-health or some infirmity of body or mind which prevents the Regular Force member from efficiently performing his duties.
- (2) The Commissioner-General shall not discharge a member in terms of subsection (1) unless a board appointed in terms of subsection (3) certifies that, in the opinion of that board, the member concerned is suffering from ill-health or infirmity referred to in subsection (1).
- (3) A board referred to in subsection (2) shall consist of two or more medical practitioners appointed by the Secretary responsible for health at the request of the Commissioner-General and the opinion of any two of such medical practitioners shall constitute the opinion of the board”.

Clearly the Board referred to in subsection 4 above is not the Board whose report is before this court. The Board that dealt with the applicant’s matter could not address the applicant’s medical condition. To the extent that it did, it renders its proceedings unprocedural. I note that the respondent’s opposing affidavit makes no reference to the applicant’s mental condition. This is however, contained in the Board’s report (See para 7 of report). Given its own report and minutes, the Board is disabled from denying that its decision took into account the applicant’s mental condition.

Furthermore s 49 of the Act provides for the discharge of a member of the force upon an inquiry such as was carried out *in casu*. It was therefore irregular to mix

the requirements of ss 20 and 49 of the Act. That being the case, there is merit in this application. The relief sought ought to be granted.

I therefore order as follows:-

IT IS ORDERED THAT:-

1. The decision of the Police Service Commission to discharge Constable Nicholas Mudzingwa from the Police Force be and is hereby set aside.
2. The applicant be reinstated to his position from the date of discharge.
3. The respondent shall pay costs of suit.

Atherstone & Cook, applicant's legal practitioners

Civil Division of the Attorney General's Office, respondent's legal practitioners