

EX-SERGEANT MAFENYA GODFREY 055072K
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE CHAIRPERSON OF THE POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 12 November 2019 & 20 November 2019

Opposed Application

N Mugiya, for the applicant
P Musvingise, for the respondents

TAGU J: This is a court application for review. The facts are that the applicant, an ex-sergeant in the Zimbabwe Republic Police appeared before a single trial officer on 20 April 2016 for contravening paragraph 34 of the Schedule to the Police Act [*Chapter11:10*]. He was facing allegations of omitting or neglecting to perform any duty or performing any duty in an improper manner. The applicant was convicted and sentenced to pay a fine of US\$10.00 which he paid fully. On 4 2016 the applicant was served with a Notice of Board of Inquiry (Suitability) which was to be conducted on 11 October 2016. On 2 November 2016 the applicant was discharged from the Police Service through a discharge radio number DIS 864/16 which advised that the applicant was being discharged from the Police Service as being unsuitable for Police duties. He filed an appeal against the discharge to the second respondent on 14 November 2016 in terms of s 51 of the Police Act. The second respondent dismissed his appeal on 24 March 2017 and was advised through a letter addressed to his legal practitioners Messrs Mugiya and Macharaga Legal Practitioners. Then on 15 March 2019 the applicant filed the present application for review alleging among other things that-

- “a) It is improper for the 1st Respondent to discharge the Applicant from the police service without giving her reasons for her discharge.
- b) It is improper for the 2nd Respondent to dismiss the Applicant’s appeal against the 1st Respondent’s decision to discharge the Applicant without awarding the Applicant an opportunity to be heard and also without giving him reasons for such dismissal of appeal.
- c) The second Respondent Commission is not properly constituted in terms of the Constitution which deems the whole body unconstitutional and therefore unrecognized.”

The applicant is now seeking the following relief-

“IT IS ORDERED THAT

1. The discharge of the Applicant from the police service by the 1st and 2nd Respondents be and is hereby held to be irregular and accordingly set aside.
2. The 1st and 2nd Respondents are ordered to reinstate the Applicant into the police service from the date of termination of his contract without loss of salary and benefits.
3. The Respondents are ordered to pay costs of suit on a client-attorney scale.”

The respondents opposed the application. The respondents raised a preliminary point that the applicant’s application for review does not comply with the rules of this honourable court in that it was filed out of time. It was submitted that in terms of Order 33 r 259 of High Court Rules, 1971, any proceedings by way of a review shall be instituted within 8 weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred. According to the respondents the proceedings on which the irregularity complained of in this matter were terminated on 24 March 2017 and therefore this application is outside time. They therefore pray that this application be dismissed with costs for its non-compliance with the rules.

In her/his answering affidavit to the point *in limine* the applicant submitted that the point *in limine* is misplaced and was taken as a matter of fashion and the cause of action for this matter is based on paragraph 14 of the founding affidavit and if the first respondent is to compute his time from that date, he will appreciate that this application was filed within time.

It is necessary that I determine the point *in limine* first. If I find that it has merit then that is the end of the matter. If not I will determine the matter on the merit.

Order 33 Rule 259 reads as follows-

“259. Time within which proceedings to be instituted

Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time.”

The use of the word “shall” clearly mean that any proceedings by way of review should be instituted within 8 weeks. It is peremptory. However, there is a proviso that allows the court to extent the time on good cause shown. Good cause can only be shown when an application to extent time within which to institute the review application has been made. No application for extension of that time was made by the applicant.

In the present case the applicant was discharged from the Police Service through a discharge radio number DIS 864/16 on 2 November 2016 by the first respondent. He appealed against the discharge to the second respondent in terms of section 51 of the Police Act. This appeal suspended the decision of the first respondent. The second respondent then dismissed the appeal and advised the applicant by letter dated 24 March 2017. If the two dates are taken into account then the present application which was filed on 15 March 2019 is clearly out of the 8 weeks period within which it was supposed to be made. In paragraph 14 of the applicant’s founding affidavit it is said-

“This prompted me to write a letter to the Respondent on 29 January 2019 and on 7 February 2019 through my legal practitioners so that I could get reasons for the discharge from the police service.”

Assuming it is correct, though I doubt it because no copies of those letters have been attached, the question is what has been happening between 24 March 2017 and 29 January 2019? Mr *Mugiya* attempted to give evidence on the bar to the effect that up to or about 29 January the applicant had not yet received the letter that informed him/her/ them of the discharge or dismissal of the appeal. I do not think this was the correct position. If it was so then the applicant should have stated such a vital fact in the founding affidavit or in the answering affidavit clearly explaining when the applicant got to know that the appeal had been dismissed. To me this is but an afterthought. Assuming but not admitting that the applicant wrote the first letter on 29 January 2019, the applicant did not explain the exact date he/she knew that the appeal had been dismissed. Paragraph

14 was deliberately inserted or crafted in order to mislead the court to believe that the application for review was being filed within 8 weeks as required by the rules. I therefore dismiss the explanation that the application for review was filed within 8 weeks and I agree that this application was made out of time. I therefore uphold the point *in limine* and dismiss this application without dealing with the merits.

IT IS ORDERED THAT

1. The Point in lime is upheld.
2. This application for review was filed out of time.
3. The application is dismissed with costs on a client-attorney scale.

Mugiya & Macharaga law Chambers, applicant's legal practitioners.

Civil Division of the Attorney General's Office, 1st and 2nd respondents' legal practitioners