

OSCAR BOMA

AND

LAMECK MWANZA

VERSUS

COMMISSIONER GENERAL OF ZIMBABWE REPUBLIC POLICE

AND

CHAIRMAN OF THE POLICE SERVICE COMMISSION

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13, 15 AND 28 FEBRUARY 2013

Mr S Sibanda for the applicant
Mr J. Mbengegwi for the respondents

Opposed Application

MAKONESE J: In this matter both applicants were attested members of the Zimbabwe Republic Police stationed at Sauerstown Police at Bulawayo holding the ranks of Sergeant and Constable, respectively until their discharge from the force on 1st August 2011. On the 12th October 201 both applicants appeared before Superintendent Marshall Dube in a police disciplinary trial on charges of contravening paragraph 34 of the Schedule to the Police Act [Chapter 11:10], that is, “omitting or neglecting to perform any duty or performing a duty in an improper manner.” Both applicants pleaded not guilty to the charges against them but were convicted and sentenced to 12 days and 5 days imprisonment with labour at Fairbridge detention barracks. Being dissatisfied with the outcome of the disciplinary hearing the applicants unsuccessfully appealed to the Commissioner General of the Zimbabwe Republic Police in terms of section 34(7) of the Police Act. The applicants have served their sentences.

A Board of Inquiry was subsequently convened by the Commissioner General to look into the conduct of the applicants, to determine whether they were still suitable persons

to remain in the regular force or to retain their relevant ranks in terms of the provisions of section 50 of the Police Act. The Board of Inquiry (commonly known as a Suitability Board) made its recommendations to the Commissioner General, who discharged them. The applicants appealed to the Police Service Commission, cited herein as the second Respondent in terms of section 51 of the Police Act. Applicants' appeal was again not successful and they were then forced to turn to this court and have made an application for review against the decision to discharge them from service.

Background

The background to this matter is that on or about the 6th March 2009 one Philip Sithole was driving from Plumtree to Bulawayo. He was carrying some passengers and when he got to a place called Emganwini some passengers robbed the other passengers in the vehicle of various items of clothes including some electrical goods. Sithole went and reported the case at Luveve Police station but the police officers on duty refused to take his report for reasons that are not clear. The following day Sithole went to Sauerstown police station where he made a formal report to the applicants in this matter, Oscar Boma and Lameck Mwanza. The applicants offered to assist Sithole who took the two police officers to the addresses of the suspects in Cowdray Park. The undisputed evidence shows that the applicants recovered some property from the robbery suspects but they chose not to arrest the robbers. The applicants also received cash amounting to 200 Rands and 4 litres of cooking oil from one suspect Ephraim Shoko, presumably to protect him from arrest and prosecution for the criminal offences. The two applicants it would seem were conducting some kind of a private investigation and purported to restore the stolen goods to the complainants.

It is on these brief facts as outlined above that the applicants were arraigned before a disciplinary hearing and convicted for having performed their duties in an improper manner.

Issues for Determination

The Applicants filed an Application for Review seeking the following order:

"IT IS ORDERED THAT:

1. The dismissal of Applicants from the Zimbabwe Republic Police be and is hereby reversed.
2. The Applicants be and are hereby re-instated into the Zimbabwe Republic Police without loss of benefits or seniority."

At the hearing of this matter Advocate *S Sibanda*, for the Applicants amended the Draft Order by deleting the above relief and substituting it with the following:

- "1. The dismissal of applicants from the Zimbabwe Republic Police be and is hereby reversed and annulled forthwith.
2. The Respondents be and are hereby ordered to facilitate for the applicants' reinstatement into the Zimbabwe Republic Police without loss of benefits, rank or seniority.
3. The Respondents be and are hereby ordered within 30 days of this order to facilitate for the payment of salaries and benefits from date of dismissal to date of reinstatement,

ALTERNATIVELY, that the Respondents be and are hereby ordered that in lieu of reinstatement Applicants be paid damages as follows:

- (a) a sum equal to the salaries and benefits that the Applicants would have been paid from the date of dismissal to date of payment.
- (b) a sum equal to the salaries and benefits extending for a period from date of payment of damages in para (a) of the alternative relief to date of envisaged retirement or an amount agreeable to the parties.
4. that the Respondents be ordered to pay costs on an attorney and client scale."

The Applicants' legal practitioner then raised the following points *in limine*:

- (1) That the 2nd Respondent is barred as it failed to file Heads of Argument in this matter.
- (2) That the applicants have not been furnished with a record of proceedings of both the Disciplinary Hearing and the Suitability Board of Inquiry.

I quickly disposed of the preliminary points and dismissed them as it was abundantly clear that the failure by 2nd Respondent to file heads of Argument was a non-event. The Heads of Argument filed by 1st Respondent for the purposes of these proceedings canvassed the issues between the parties and 2nd Respondent was merely cited for the purposes of giving effect to any order granted by this court. Secondly, the transcript of proceedings from the Disciplinary

Hearing was furnished to the court and to both applicants and is clearly detailed and captures all the material evidence regarding both the background to the case and the procedure adopted throughout the hearing. It is noted that the applicants were legally represented at disciplinary hearing at some stage and they were able to conduct their defence effectively.

The points raised *in limine* had no merit and I accordingly dismissed them and proceeded to hear argument on the merits.

The main issues for determination are these:

1. Whether the decision to discharge the applicants was in accordance with the law.
2. Whether there was any bias by the Board members.
3. Whether the confirmation of the discharge by the Police Service Commission was not in accordance with the law.

The applicants were discharged from the force by the Commissioner General of the Zimbabwe Republic Police after they were found to be unsuitable for police duties following their conviction under the Police Act for contravening section 34 of the Schedule to the Police Act. A Board of Inquiry was convened in terms of section 50(3) of the Schedule to the Police Act and it was properly constituted for that purpose. The Commissioner General acted in terms of the law. The Applicants sought to argue that the Board was composed of members or a member who was biased against these applicants. It is noted, that it is a requirement of the law in terms of section 50(1) of the Schedule to the Police Act that:-

“an officer who is a material witness or has a personal interest in the matter shall not be appointed to such a Board.”

The Applicants did not object to being heard by the officers who constituted the Board of Inquiry and their allegations of bias have no basis at all. The applicants failed to place any facts before the court to establish the alleged bias. The applicants only make reference to an incident where one of the Board officers was seen conversing with the Board Chairperson as an indication that the Board was biased. The issue of bias cannot be inferred. It has to be proved and established by the wronged party. In any event the main task of the Board was to look into the summary of the career history of the applicants and make appropriate recommendations. Their recommendations were not final. The decision on the matter once the findings of the

board were compiled vested in the Commissioner General of Police in terms of section 50(3) of the Schedule to the Police Act. I am satisfied that there does not appear to have been any bias in this matter, whether real or imagined against the applicants.

The Police Service Commission is constituted in terms of PART VI of the Schedule to the Police Act. Its functions are clearly enunciated in the Police Act (see section 51 and 55). The Police Service Commission deals with appeals, pertaining to discharges of members, by the Commissioner General of the Zimbabwe Republic Police. The Commission has the mandate to scrutinize all the evidence presented to it and will on that basis determine the matter. In this case the Commission has made a decision based on the record and all the facts presented to it including all the complaints raised by the applicants in the conduct of proceedings. The Commission decided that on the basis of the record the applicants were not suitable persons to remain in the force. It is my view that the Police Service Commission's dismissal of the appeal was in accordance with the law and there is no legal basis to interfere with its decision.

See the case of *Moyo v President Board of Inquiry and others* 1996(1) ZLR 319

I find that there is no merit in the assertion by the applicants that the disciplinary trial and Board of Inquiry were conducted unfairly and not in accordance with the Constitution of Zimbabwe. Further there is no legal basis for the argument that the Police Service Commission acted improperly. To the contrary, it is clear that the applicants though having a right to pursue their case in this court on review, the background to the matter highlighted above tends to show an abuse of court process by the applicants. The applicants did not have a defence to the allegations against them. The allegations are serious. The applicants are lucky that they were not prosecuted in the criminal courts for more serious charges for obstructing the course of justice and corruption.

In the result, I conclude that the application for review has no merit and accordingly, the application is dismissed.

Advocate SKM Sibanda and partners' applicants' legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners