

EX SUPERINTENDENT MASIMBA DZIVA
versus
THE CHIEF STAFF OFFICER
(SENIOR ASCOM J.C. CHENGETA)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 6 and 29 June 2016

Opposed Matter

Mr. N Mugiya, for the applicant
Ms. S Chafungamoyo, for the respondent

TAGU J: The undisputed facts in this opposed application for a mandatory interdict are that the applicant Masimba Nesbert Beaven Dziva rose to the rank of Superintendent within the Zimbabwe Republic Police (ZRP) after his attestation two decades ago.

It turned out that when the applicant filed the present application he had surpassed his retirement period of twenty years in terms of s 22 (1) (b) of the Police Act [*Chapter 11:10*] which for the avoidance of doubt specifies that:

“Subject to Section 25 on giving to the Commissioner General in writing at least three months’ notice of his intention to do so or such lesser period of notice as the Commissioner General may in his case permit a Regular Force member may retire from the Regular Force.

(b) if he does not exercise his right to retire in terms of para (a), on pension, when his pensionable service amounts to twenty years or more”.

It appears from a reading of s 22 (1) (b) that before a member proceeds to go on retirement a member has to give three month notice or a shorter period in writing and then obtain the Commissioner General’s permission to do so. This was not the case in this case. After clocking the pensionable period of 20 years the applicant elected to extend his service within the ZRP organization. It is further undisputed that the applicant then undertook a police sponsored Educational program at the Bindura University of Science Education. He studied towards

obtaining a Bachelor of Business Administration in Police and Security Studies which he by now must have completed.

The court is alive to the fact that the applicant undertook the same study program when he was overdue for retirement because an opportunity advantageous to him had arisen. It was only when the applicant was some few months away from completing the study program that he sought to retire on a hurried basis. He expected his authorities above him to react and approve his retirement within a period of three to four days. It is however unfortunate that this did not turn around in his favour and his application was turned down by the respondents.

The reasons for turning down his application to retire on short notice were that-

- 1) the applicant was a Senior Officer who was a sponsored student who was still pursuing studies,
- 2) the applicant was a Senior Officer who was to be charged for contravening para 37 of the Schedule to the Police Act [*Chapter 11.10*] in that the applicant had engaged into another contract of employment without the authority of the Commissioner General of Police.

The applicant has brought this application seeking the following relief-

“IT IS ORDERED THAT

1. The Respondents are barred from harassing and threatening the Applicant in whatsoever manner.
2. The Respondents are ordered to process the Applicant’s resignation papers to finality within 30 days from the date of this order.
3. The Respondents are interdicted from forcing the Applicant to sign a bonding contract with the Zimbabwe Republic Police.
4. The Applicant is declared an ex-Chief Superintendent and member and member of the Police Service from the 16th of March 2015.
5. The Respondents are ordered to pay cost of suit on a client to attorney scale”

The respondents opposed the application on a number of grounds. Some of the grounds were that the applicant was approaching the court with dirty hands having entered into another contract of employment without terminating his current contract and that the applicant used the wrong forum before exhausting domestic remedies available to him.

THE BACKGROUND

The applicant did not resign from the Police Service at the time he was eligible to do so. The applicant was employed by the Zimbabwe Republic Police on 5 February 1991. He served the organization for over 24 years, some 4 years beyond his retirement age. He was now on what is known as “contract”. Be that as it may the Police regulations were still binding on him. While on contract with the ZRP he then under took the employer sponsored study program with the Bindura University of Science Education studying for a Bachelor of Business Administration in Police and Security Studies degree. He was earmarked to complete his studies in August 2015. However, without notification and approval from his employer the applicant signed and entered into another contract of employment with the United Nations Development Programme (UNDP) on 9 March 2015 before terminating his current contract of employment with the ZRP. On 11 March 2015 after signing the new contract of employment with (UNDP) the applicant applied for a waiver of notice of discharge through the normal channel. Attached to the application for waiver of notice of discharge was an application for discharge [Form 71] wherein the applicant wanted his last working day to be the 16th of March 2015. He further applied for an urgent occasional leave pending retirement commencing from 0001 hours on 13 March 2015 to 2359 hours on 15 March 2015. After tendering the above applications the applicant immediately absented himself without official leave (AWOL) and is currently not reporting for duty and neither had he been attending classes at Bindura University of Science Education.

The applicant in his founding affidavit stated that he had resigned from the organization by merely tendering his applications. On the other hand the respondents submitted that the applicant is still a member of the force and that he is appearing in court with dirty hands. It was on the above reasons that the respondents refused to approve his applications and recommended that applicant be charged with an act of misconduct.

Having considered the papers filed of record and hearing counsels the court noted that the applicant signed a contract with United Nation Development Programme (UNDP) which was to be effective from 17 March 2015. This he did before he terminated his contract with the respondents.

Further, the hurried nature of his applications demonstrated that the applicant was motivated by his failure to act in good faith and the strong desire to catch up with time with the prospective employer because:

- (a) An application for waiver of notice of discharge for the applicant was penned on 11 March 2015 pursuant to the need for a shorter notification period deviating from the main three months' notice in terms of the Act;
- (b) Application for an urgent occasional leave pending retirement of the applicant was also prepared in writing on the same day 11 March 2015; and
- (c) The applicant then absconded from duty and from studies without leave.

The court wishes to comment that paragraph six and seven of the report dated 11 March 2015 as appears on p 8 marked as Annexure C put it to light that the above applications in (a) and (b) were turned down. Further, there are recommendations that the applicant be charged for contravening para 37 of the schedule to the Police Act [*Chapter 11:10*] which makes it a chargeable offence for a serving member to engage into other employment without the authority of the Commissioner General. To this end there would be no valid basis upon which the application for an interdict could succeed and it therefore follows that it has no substance.

Be that as it may, at p 9 to the opposing papers filed of record appears a note to the effect that the applicant's application for waiver of notice of discharge and application for occasional Leave was not approved. The need for approval by supervisors was therefore a pre-requisite.

Turning to the nature of relief sought by the applicant, the third prayer seeks to bar the respondents from forcing the applicant to sign against his will the bonding contract. Paragraph 11 to the applicant's founding affidavit speaks of Annexure "B" being an unsigned bonding contract. However a perusal of the applicant's papers does not show even a single leaf of the purported contract. Nether, is there any Annexure "A" in the record itself. The applicant simply made references to documents not attached to the application. For that matter the relief sought as appears in the applicant's third prayer therefore cannot stand and is dismissed.

During the hearing the applicant was silent in relation to the first prayer relating to threats or any form of harassment by the respondents. In the absence of any such alleged threats or harassment, the court is therefore at pains to grant such relief. As such, the first prayer of the applicant suffers the same fate as above and it ought to fall away.

What appears to be the main thrust for determination relates to **whether or not the respondents are entitled to deny the applicant right to resign and whether or not failure to**

exhaust domestic remedies renders the application for an interdict unsuitable? These are the questions that this court has to examine further.

The position of the law in relation to resignation of employees is well settled. With or without giving the requisite notice, an employee **may resign**. A resignation need not be in writing (See *Fonda v Mutare Club* HH 40/1991).

It has been held that a resignation is a unilateral act requiring neither acceptance nor rejection by the employer. (See *Muzengi v Standard Chartered Bank and Another* 2000 (2) ZLR 137 (H), (2002 (1) ZLR 334 (S)) and *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1955 SR 114 and *Kudada v City of Harare* HH 26/1994. In the *Muzengi v Standard Chartered Bank* case *supra* it was said at p 141 that:

“The giving of notice is an unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given is final, and cannot be withdrawn – except obviously by consent – during the time in excess of the minimum period of notice. In the present case, the position was undisputed and I think undisputable, the town clerk is the authorized agent of the applicant council empowered to receive communications to it: once therefore the resignation in question had been lodged with him, it constituted a final act of termination by the third respondent, the effect whereof he could not avoid without the permission of the applicant council.”

In my view, **resignation takes effect as soon as it has been communicated to the correct person or authority.** (See *Jakazi & Another v Church of Province of Central Africa* 2010 (1) ZLR 335H.

However, that is as far as the legal position ought to have been. *In casu*, we have a situation where, for some reasons, the authorities in terms of the Police Act, may refuse to accept a member’s notice of resignation. This brings me to the second point whether or not a member should rush to court without exhausting all the available remedies. It was stated elsewhere in the same case of *Muzengi v Standard Chartered Bank* 2002 (1) *supra* at p 337 that where there is a registered code of conduct which sets out the grievance procedures to be adopted by employees, these must be exhausted first before the aggrieved party approaches the High Court, unless there are special circumstances that exist for doing so. The learned judge in that case in making such sentiments relied on the case of *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S). See also *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) and *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 where it was observed that:

“...where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there is good reason for not doing so.”

In *casu*, the applicant forwarded his application for waiver of Notice of Discharge as well as his application for urgent occasional leave pending retirement to Staff Officer (Human Resources Administration) for processing. The Staff Officer (Human Resources Administration) Chief Superintendent C Nhete turned down the applications and refused to approve them. After refusing to approve the same Superintendent C Nhete forwarded the applications together with his recommendations to the Acting Senior Staff Officer (Human Resources Administration) as per protocol. In turn the Chief Staff Officer (Human Resources) Senior Assistant Commissioner J C Chengeta confirmed the refusal. The applicant was then advised accordingly. In my view if the applicant was aggrieved by these administrative decisions made by his immediate supervisors, the applicant ought to have appealed to the Commissioner General of Police. In the event that the Commissioner General of Police had turned down his appeal, the applicant was still supposed to appeal further to the Police Service Commission. In the event that the Police Service Commission turned his appeal, he was now free to approach the High Court because by then he would have exhausted all the domestic remedies available to him. The applicant therefore jumped the gun and made the present application. In doing so he failed to allege let alone show special circumstances why he had to approach the High Court without exhausting domestic remedies.

I therefore find merit in the submission made by the counsel for the respondent.

While I agree that the Constitution of Zimbabwe on the other hand provides that every person has the right to choose and carry on any profession, trade or occupation, the practice of a profession trade or occupation may be regulated by law. See s 64 of the Constitution. This court is alive to the fact that the Constitution itself provides an inroad to the right to profession, trade or occupation thereby allowing any other law to regulate how resignation may proceed in any organization such as what is contained in the Police Act. It is clear that resignation of members of the Police force is done in terms of s 22 of the Act which subjects such resignation to the approval of the Commissioner General. It is clear that the applicant's resignation was not

approved for want of compliance with the Act and regulations governing his trade or occupation. The conditions set out in terms of s 22 ought to have been followed and obeyed.

What is quite clear in this application is that the applicant's resignation was motivated by his desire to assume duty with new employer. It is therefore one of the rarest cases where the court's hands would be tied and cannot sanction the resignation of the applicant since he ought to have complied with the requirements of the law governing the nature of his contract.

It is not even clear whether any handover take over took place to establish that indeed the resignation was only thwarted at a later stage. In the court's view there should have been proof to that effect. The applicant also failed to disclose to the respondents that he had signed a new contract of employment and kept quiet and thus he acted in bad faith towards the organization as a whole whilst deriving benefit and should therefore not cry foul. To make matters worse he went (AWOL) absent without official leave. At this point the conduct by the applicant fall short of the requirements required of an honest employee hence the recommendations that he charged for contravening para 37 of the Schedule to the Police Act [*Chapter 11.10*].

It is for the above reasons that the court found that the application is without merit and it is hereby dismissed with costs.

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