EX CONSTABLE RWAFA A 052885H
versus
THE CHIEF STAFF OFFICER
(SENIOR ASCOM CHENGETA JC)
and
COMMISSIONER GENERAL OF POLICE N.O

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 2 March 2018 & 21 March 2018

Unopposed Application

N Mugiya, for the applicant

MUREMBA J: The applicant was discharged from the Zimbabwe Republic Police on 30 December 2014 by the second respondent, the Commissioner General of Police in terms of the Police Act [*Chapter 11:10*] after having been declared a deserter. He received the notice of discharge on 20 January 2015. On 21 January 2015 he gave notice of his intention to appeal against the discharge to the Police Service Commission. On 23 January 2015 he duly filed his notice of appeal within the prescribed period. The applicant attached proof of all this.

It is the applicant's averment that in terms of s 51 of the Police Act, once he filed his appeal properly, the decision to discharge him was automatically stayed by operation of law and he should have been reinstated immediately. The provision reads,

> **"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 Commission has been given."(My emphasis)

The applicant averred that despite writing correspondence to the respondents for him to be reinstated pending the determination of the appeal he was not reinstated. He attached a letter that

he wrote on 6 February 2015 to this effect. It is this failure to reinstate him that resulted in him filing the present application on 9 December 2015 seeking the following relief.

"It is ordered that

1. The respondents are ordered to reinstate the applicant forthwith without loss of salary and benefits.
2. The respondents' conduct is declared unlawful and wrongful.
3. The respondents are ordered to pay costs of suit on a client – attorney scale."

The respondents opposed this matter by filing a notice of opposition and opposing affidavits but at the hearing they were barred for having filed their heads of argument out of time. Despite the heads of argument being already in the file, Mr *K Chimiti* of the Attorney General's Office – Civil Division who was representing the respondents made no effort at all to make an application to have the bar operating against the respondents uplifted. He simply stood up and made an admission that the respondents were indeed barred and said that the application for condonation which had been filed by his colleague from the Attorney General's Office was defective and as such there was no application for condonation which was pending before the court. He submitted that in that regard the respondents were barred and the court could proceed to deal with the matter as unopposed. This kind of attitude by an officer from the Attorney General's Office is very disappointing to say the least. The least he could have done was to make an attempt to make an oral application for condonation in court for the upliftment of the bar in court seeing that the heads of argument had already been filed. Be that as it may, I proceeded to hear the matter as unopposed.

Having gone through the opposition papers, I was alive to some pertinent issues which I felt Mr *Mugiya* needed to address me on before I could decide whether or not to grant the applicant's application. The first issue was that in filing the answering affidavit the applicant had gone on to include the Police Service Commission as the third respondent in the matter yet in the initial papers there was only the Chief Staff Officer and the Commissioner General as the first and second respondents respectively. Consequently, the applicant had gone on to file an amended draft order which included the Police Service Commission as the third respondent. Apparently what had prompted the applicant to include the third respondent was the fact that in opposing the application, the first and second respondents had raised a point *in limine* to the effect that the applicant had sued the wrong parties instead of suing the Police Service Commission which was the employer and had the mandate to employ and discharge its employees. In his answering affidavit, the

applicant averred that it was not the Police Service Commission that had discharged him, but the second respondent. He averred that the same Commissioner General (the second respondent) had the power to reinstate him. He went on to aver that the Police Service Commission is there to regularize the acts of the Commissioner General. Further, he went on to aver that for the purposes of this regularization by the Police Service Commission he had amended his application to include it as a third respondent. The amendment had been done by the citation of the Police Service Commission as the third respondent in the answering affidavit. The applicant went on to attach a notice of amendment to that effect as an annexure to the answering affidavit. Resultantly, an amended draft order was filed. The applicant was now seeking an order against three respondents including the Police Service Commission.

I queried with Mr *Mugiya* the kind of procedure the applicant had adopted in joining the third respondent as a party to these proceedings as the procedure that the applicant adopted is not provided for in the rules of this court. In terms of order 13 r 87 (2) (b) of the High Court Rules, 1971, it is the court which orders a party to be joined in proceedings. It does that either *mero motu* or on application. It reads:

> "At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application—
> (*a*) …….
> (*b*) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;…….
> (3) A court application by any person for an order under sub rule (2) adding him as a defendant shall, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter."

This means that the applicant could not just add the third respondent as a party to these proceedings without having made a proper application on notice to the Police Service Commission itself and to the first and second respondents. The purported joinder was therefore irregular. When I raised the issue with Mr *Mugiya* he initially wanted to argue over the issue but was quick to submit that the purported joinder of the Police Service Commission was being abandoned because no relief was actually being sought from it, but from the second respondent, the Commissioner General of Police. The hearing then proceeded as against the first and the second respondents only.

The second issue that I asked Mr *Mugiya* to address was the issue that the applicant had not disclosed in his founding affidavit, but which issue had been disclosed by the respondents in

their opposing affidavit. The issue goes to the root of the application. The issue was that the applicant's appeal to the Police Service Commission had been heard and dismissed on 5 August 2015 and that the dismissal of the appeal had been communicated to the applicant by way of a letter via his lawyers of record on 6 August 2015. That letter was attached as proof of the communication, but there was no proof to show that the applicant's lawyers had acknowledged receipt of same.

Mr *Mugiya* submitted that this letter was never served on his law firm. He submitted that his client only became aware of it after the respondents had filed their notice of apposition in the present matter. Mr *Mugiya* however, went on to say that even if the applicant had become aware of this letter notifying him of the dismissal of his appeal as far back as August 2015, this would not have stopped him from filing the present application in December 2015 seeking the same relief he is seeking now. Mr *Mugiya*'s argument was that the dismissal of the applicant's appeal does not change the complexion of his application because the failure by the second respondent to reinstate him upon the filing of his notice of appeal with the Police Service Commission rendered the subsequent hearing of the appeal null and void thereby making the outcome of the appeal a nullity. The thrust of Mr *Mugiya's* argument was that anything that followed after the failure to reinstate the applicant is void as the respondents were in contempt of the law for having failed to comply with the provisions of s 51 of the Police Act.

It was Mr *Mugiya*'s submission that it is the failure by the respondents to comply with the law which demands that the applicant be reinstated to his position without loss of salary and benefits despite the appeal having been subsequently dismissed on 5 August 2015. He further submitted that this court should pronounce or declare the failure to comply with the law as unlawful and wrongful. Citing the case of *Muchakata* v *Netherburn* 1996 (1) ZLR 153, he submitted that this court held that if an act is void, it is a nullity and every proceeding founded on it is incurably bad.

Mr *Mugiya* sought to rely on the dirty hands principle arguing that because s 51 had not been complied with, the Commission's hands were dirty and as such it should not have proceeded to hear the appeal. In making this submission he relied on the Supreme Court case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity &Ors* 2004 (1) ZLR 538 at 548 B-C wherein it was said,

> "This court is a court of law, and as such, cannot connive at all or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination of the court, in the absence of an explanation as to why this course was not followed, the inference of disdain of the law becomes inescapable"

Mr *Mugiya* submitted that because the Commission's hands were dirty when it heard the appeal, its decision cannot be allowed to stand. He further submitted that since the subsequent discharge of the applicant on appeal flowed from a flagrant defiance of the law, it is a nullity. He quoted what was said by Lord Denning in the case of *Macfoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I. Lord Denning said,

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it is so bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Mr *Mugiya* submitted that the Police Service Commission's dismissal of the appeal should be set aside to enable the respondents to comply with the law first, which is to reinstate the applicant before his appeal is heard afresh.

I am in agreement with Mr *Mugiya*'s interpretation of s 51 of the Police Act that the effect of appealing against a discharge from the police service by the second respondent is that the filing of an appeal automatically suspends the decision of the second respondent since the provision says an order of the Commissioner General shall not be executed until the decision of the Commission has been given. Suspension of an order means that the *status quo ante* should be maintained until the appeal is determined. This therefore means that the appellant is entitled to continue working as a member of the police force. I, therefore, agree with Mr *Mugiya* that the applicant was entitled to be reinstated on full salary and benefits when he lodged his appeal with the Commission. It is a fact that the reinstatement was not effected. Obviously this failure to comply with the law was unlawful. The critical question now is what is the effect of the non-reinstatement? Does the non-reinstatement render the appeal that was subsequently heard null and void? Is the dirty hands doctrine applicable in the circumstances of this case? Unfortunately, the Police Act has no provision which states the effects of non-compliance with s 51.

Mr *Mugiya* submitted that s 51 requires the Police Service Commission to first comply with this provision in order to preserve its right to hear an appeal. However, I do not agree with this interpretation of s 51 because the provision simply says that the order of the Commissioner General shall not be executed until the decision of the Commission has been given. The provision does not go further to say that if it is not complied with the appeal becomes invalidated or null and void. Mr *Mugiya* could not point to any authority which supports this interpretation of s 51. In the absence of such authority I am not persuaded to agree that the failure to comply with s 51 renders the appeal a nullity. It appears to me that there is no link between the hearing of the appeal and the failure to comply with s 51. The appeal in the present matter related to the discharge of the applicant from service and not the failure by the respondents to comply with s 51. The dirty hands doctrine is therefore not applicable. As such the appeal cannot be rendered a nullity by virtue of s 51 not having been complied with.

Whilst the conduct of the respondents in not complying with s 51 was unlawful, the remedy would not be to nullify the appeal proceedings and order the reinstatement of the applicant so that the appeal can be heard afresh. It is a fact that the appeal was dismissed. The applicant cannot seek reinstatement on the basis of non-compliance with s 51 which is not what was being appealed against. As I have already stated what the applicant was appealing against was the order to discharge him from the Police Service and not the failure to reinstate him after he had filed his appeal. The Commission was thus entitled to hear the appeal notwithstanding the non-compliance with s 51 by the respondents. Since the appeal was dismissed, I therefore cannot order the applicant's reinstatement. This does not mean that this court condones the non-compliance with s 51 which was done by the respondents, but the remedy of reinstatement at this stage is out of the question as the appeal has already been heard and dismissed. The application for reinstatement should have come before the appeal was determined. What is exercising my mind right now is whether or not in the circumstances of this case an application for damages for loss of salary and benefits can be made in respect of the period between the date the applicant was discharged by the second respondent and the date the appeal was determined by the Commission. Whether or not the applicant can succeed in such a claim is an issue for another day because the key question is, what is the effective date of the applicant's discharge from the Police Service between the date the

applicant was discharged by the Commissioner General and the date the appeal was dismissed by the Commission in light of the provisions of s 51?

As I have already stated above, by not complying with s 51 the respondents acted unlawfully. I will thus grant a *declaratur* to that effect. I will not order any costs against the respondents in view of the fact that the applicant partly succeeded in his application.

In the result, it be and is hereby declared that:

1. The respondents' conduct in not complying with s 51 of the Police Act [*Chapter 11:10*] pending the decision of the Police Service Commission was unlawful and wrongful.
2. It be and is hereby ordered that:
   (a) The application for reinstatement without loss of salary and benefits is dismissed.
   (b) There is no order as to costs.

Mugiya and Macharaga, applicant's legal practitioners