ROBERT SAMAYA
versus
COMMISSIONER GENERAL OF POLICE N.O.
and
POLICE SERVICE COMMISSION
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE N.O.

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 17 May & 2 June 2021

Court Application

B. Mlauzi, for the applicant
R.B. Madiro, for the respondents

MANZUNZU J This is an opposed court application seeking a declaratory order and other ancillary relief in the following terms;

> "IT IS HEREBY ORDERED THAT:
> 1. The decision by the first respondent to hold a disciplinary trial in 2001 and the conviction of the applicant be and is hereby declared null and void.
> 2. The decision by the first respondent to hold a Board of Inquiry (Suitability) be and is hereby declared null and void.
> 3. The applicant be and is hereby reinstated forthwith without loss of salary and benefits.
> 4. Respondents pay costs of suit on an attorney and client scale."

At the hearing both counsels took a lackadaisical approach by adhering to the heads filed of record as they declined any oral submissions other that urging the court to decide the matter on the papers.

There is a long history to this case which backdates to the year 2000. The brief of it all is that the applicant was a member of the Police Service. He was charged with misconduct for having performed his duty in an improper manner and went through disciplinary proceedings in which he was convicted and sentenced to 7 days detention at Chikurubi Police on 16 January 2001. The Commissioner General of Police thereafter constituted a Board of Inquiry to look into the suitability of the applicant to continue serving as a member of the Police Service. The Board recommended for his discharge and accordingly he was discharged from employment on 31 May 2001.

The applicant's appeals against his conviction and discharge were dismissed. However, applicant continued to mount a fight with his ex-employer by writing several letters of complaint. None of these letters yielded any positive results. On 16 January 2020 he then filed the present application with this court.

The first reaction by the respondents in opposition was to raise points *in limine*, the first alleging that the application was bad at law as it is an application for review clothed as a declaratur and that the action has prescribed. The applicant also raised a preliminary point that the notice of opposition was filed out of time and as such respondents were barred. Applicant urges the court to treat the matter as unopposed and grant the relief prayed for.

Is there a valid notice of opposition?

This application is on form 29. It warns the respondents to file a notice of opposition together with opposing affidavits within 10 days of service of the application upon them. The application was filed with the Registrar on 16 January 2020. According to the certificates of service filed of record the application was served on the respondents on 17 January 2020. The ten day grace period would expire on 31 January 2020. The notice of opposition was filed on 6 February 2020 way out of the *dies induciae*.

Rule *233(1) on Notice of opposition and opposing affidavits provides that;*

> "The respondent shall be entitled, within the time given in the court application in accordance with rule 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits."

Rule 233 (3) further provides that;

> "A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

However a perusal of the record shows a deliberate attempt by the applicant to mislead the court. The bar was uplifted by the order of this court under case number HC 2594/20 when the following order was made;

> "IT IS ORDERED THAT:
> 1. The applicants' non-compliance with the rules of this court by failing to file notice of opposition within the stipulated ten (10) day period be and is hereby condoned,
> 2. The notice of opposition filed by the applicant on the 6th of February 2020 be and is hereby deemed to have been filed within time.
> 3. Costs of the application shall be costs on the cause."

There is therefore a valid notice of opposition in this case.

Is the application bad at law?

The respondents maintain that the application is bad at law in that while it purports to be a declaratur it is in essence a review. Secondly that the action has prescribed. For that reason they seek for the dismissal of the application with costs. What then is the distinction between a declaratur and a review?

This court derives its power from s 14 of the High Court Act [*Chapter 7:06*] in respect to a declaratur. Section 14 reads:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

On the other hand, s 27 of the High Court Act which deals with the grounds for review state that;

> "27 Grounds for review
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c)gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall effect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

An application for a declaratur must meet the requirements of an application for such a relief.

In Johnson v AFC 1995 (1) ZLR 65 (S) at p 72E GUBBAY CJ said,

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto…
>
> At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. It must take account of all the circumstances of the matter."

The cardinal principle in deciding whether a matter is for a declaratory order or review is not so much of the relief sought but rather the grounds upon which the application is based.

In *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) at 484 G, MALABA JA said,

> "In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not in itself proof that that application is not for review." (My emphasis)

It was stated in the *Geddes* case (*supra*) that,

> "setting aside of a decision or proceedings is a relief normally sought in an application for review."

The applicant's founding affidavit is clear that it is a challenge of the procedure and that the first respondent was biased leading to his discharge. The applicant is simply saying the procedure used by the first respondent was wrong and those who led to the decision of his discharge did not independently act. In other words the adjudicators of his case were not impartial subjecting him to an unfair trial. In his founding affidavit the applicant states in paragraph 26 that;

> "Second respondent ought to have acted independently in assessing the matter and arriving at a just and equitable decision. They did not do so. Moreover so, the previous composition of the Commissioners of the second respondent were captured and served at the whims of the then Commissioner General and the old regime. They never acted independently as envisaged by the law to the extent that my rights enshrined in section 68 and 69 were infringed by the decisions of the trial officer, the suitability board and subsequent endorsement by the second respondent."

In paragraph 28 the applicant proceeded to say;

> "I have demanded the legal basis of my discharge from service but the respondents have been shutting me out. The discharge as confirmed by the second respondent who acted in terms of section 55 of the Police Act [*Chapter 11:10]* was unlawful and violated the tenets of natural justice, fairness and equity. I have made efforts to engage with the respondents to no avail."

It is apparent from the content of the application that what the applicant seeks is not a declaration of rights but rather to set aside decision of the first respondent in respect to the appeal and discharge. It was stated in the *Geddes* case (*supra*) that,

> "setting aside of a decision or proceedings is a relief normally sought in an application for review."

I find this application one for review rather than one for a declaratur. An application for review is filed within 8 weeks of the decision being made in terms of rule 259 of the High Court Rules. This is not a proper case for the court to exercise its discretion under s 14 of the Act. Applicant said nothing of substance in response to the point that his action has prescribed.

Disposition:

The application be and is hereby dismissed with costs.

Nyama Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners