

Ex-Constable Masunda & Ors v Comm Gen Police & Ors

HMA 02-2020
HC 382/17 & Ors

EX-CONSTABLE MASUNDA
and
EX-ASSISTANT INSPECTOR MUKWINDIDZA
and
EX-CONSTABLE MBERIKWENHAMO
and
EX-CONSTABLE MDLONGWA
and
EX-CONSTABLE MHANDU
and
EX-CONSTABLE CHIBATE
and
EX-CONSTABLE CHIKWENYA
and
EX-CONSTABLE MUSENGEZI
and
EX-ASSISTANT INSPECTOR NDLOVU
and
EX-CONSTABLE MUNYANYI
and
EX-CONSTABLE KASIRA
and
EX-CONSTABLE MUPHAMBA
and
EX-CONSTABLE CHIPUNZA MUGOVE
and
EX-CONSTABLE MARAWANYIKA
and
EX-CONSTABLE ZINYEKA
and
EX-SERGEANT WACHEKWA
and
EX-CONSTABLE MACHAURE
versus
COMMISSIONER GENERAL OF POLICE
and
CHAIRPERSON, POLICE SERVICE COMMISSION
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 11 July 2019

Date of written judgment 29 January 2020

Opposed application

Mr *N. Mugiya*, for the applicants
Mr *T. Undenge*, for the respondents

MAFUSIRE J

[1] The seventeen applicants had been members of the police force of different ranks until their discharge at different times for various misdemeanours. Through the law firm of *Mugiya & Macharaga* they each applied to this court, on separate processes and on different dates, to challenge their discharge and seek reinstatement. One group brought review applications. Another sought declaratory orders. The two counsel, in consultation with the Registrar of this court, agreed that the circumstances of the applicants' discharge, the nature of their complaints before the court and the remedies sought, were substantially the same. As such, counsel arranged to have all the matters combined to be argued together. Some kind of statement of agreed facts was filed. I heard argument on 11 July 2019 and reserved judgment. Regrettably, judgment could not be delivered soon enough. I was indisposed for much of the 2019 first term vacation, and part of the second term. But this now is the combined judgment.

[2] The court applications across all the seventeen records were largely a 'cut and paste' job. The averments were largely the same, save for a few instances peculiar to particular individuals,

[3] The dominant ground for relief was that the first respondent, i.e. the Commissioner General of Police ("CGP"), had failed or refused to furnish the applicants with the reasons for discharge despite repeated verbal requests. The other was that the second respondent, i.e. the Police Service Commission ("PSC"), had denied them the right or opportunity to be heard before dismissing their appeals to it. Yet another ground was that the PSC had not been properly constituted as none of its members had been duly sworn into office, allegedly as required by the Constitution. Finally, in some cases was the argument that the CGP had violated the provisions of the Police Act, *Cap 11:10*, which, in s 50, require that a member who has appealed his discharge, is entitled to be reinstated pending the determination of the appeal.

[4] The respondents opposed the applications. In the cases for review, the respondents argued that the applicants had been duly furnished with the reasons for their discharge and that if they had wanted elaboration, they could have easily made written requests. The respondents also argued that it was wrong for the applicants to seek reinstatement because even if it had been true that they had been denied the reasons for their discharge, the proper remedy would have been an order of mandamus to compel delivery of the reasons for discharge, in accordance with the dictates of the Administrative Justice Act, *Cap 10:28*.

[5] In regards to declaratory orders in particular, the respondents argued that those applications were in reality reviews in disguise and that most of them were hopelessly out of time for want of compliance with the eight weeks rule of r 259 of the Rules of this Court.

[6] In regards the composition of the PSC, the respondents argued that it had been properly constituted. In regards to reinstatement pending appeal, the respondents argued that such of the applicants as had been entitled to reinstatement pending appeal, had indeed been reinstated.

[7] In reply, the applicants argued that they had not been required to seek reasons for their dismissal in writing as these should have been automatically furnished. They further argued that the Administrative Justice Act had been rendered invalid by the Constitution, s 68 (2) of which guarantees to every person the right to be given promptly and in writing, the reasons for any administrative conduct that adversely affects their right, freedom, interest or legitimate expectation.

[8] I have gone over all the records, save for the one in respect of *Ex-Constable Mdlongwa* which was not brought to me. None of the applicants is entitled to relief. Below are my reasons.

- i/ *Ex-Constable Masunda Case No HC 381/17*
- ii/ *Ex-Assistant Inspector Mukwindidza Case No HC 385/17*
- iii/ *Ex-Assistant Inspector Ndlovu Case No HC 365/17*
- iv/ *Ex-Constable Munyanyi Case No HC 388/17*
- v/ *Ex-Constable Muphamba Case No HC 39/18*

vi/ *Ex-Constable Marawanyika Case No HC 351/17*

[9] I see nothing in the Administrative Justice Act that purports to take away the right to prompt reasons of an administrative decision or conduct. I also see nothing in the Constitution that renders the Administrative Justice Act invalid. On the contrary, s 68 (3) of the Constitution requires that there be an Act of Parliament to give effect to the rights given in s 68(2), which include the right to prompt reasons of an administrative conduct. The Administrative Justice Act is obviously that Act. In s 3 and s 4 it spells out how the rights enshrined in the Constitution shall be exercised and what remedies are available to anyone that may be aggrieved by any administrative conduct.

[10] By wilfully disregarding the Administrative Justice Act, the applicants listed above simply failed to lay out a proper case for consideration by this court. In fact, in respect of Ex-Constable Munyanyi and Ex-Constable Marawanyika in particular, the respondents produced documents to show that they had been reinstated pending their appeals.

[11] No basis was laid out for insisting that the applicants should have been given an opportunity to make submissions before either the CGP, before he discharged them from service, or the PSC, before it dismissed their appeals. There was no violation of the *audi alteram partem* rule of natural justice. The opportunity to make representations had been availed before the board of enquiry on their suitability to remain in service.

[12] That the PSC was improperly constituted was just a nude allegation. The respondents emphatically refuted it. The so-called statement of agreed facts took the issue no further. I have no material to decide whether or not the PSC was improperly constituted.

vii/ *Ex-Constable Mberikwenhamo Case No HC 59/18*

viii/ *Ex-Constable Chibate Case No HC 135/18*

ix/ *Ex-Constable Chikwenya Case No HC 46/18*

x/ *Ex-Constable Chipunza Mugove Case No HC 299/17*

xi/ *Ex-Constable Zinyeka Case No HC 58/18*

xii/ *Ex-Sergeant Wachekwa* Case No HC 28/17

xiii/ *Ex-Constable Machaure* Case No HC 41/18

[13] The respondents were right to argue that the applications by the applicants in this group were mere review applications disguised as applications for declaratory orders. It is not what a process says it is that classifies it. It is the substance of it that matters. All these applications were filed out of the eight weeks' time frame prescribed by r 259 aforesaid as shown below:

- Ex-Constable Mberikwenhamo's discharge and dismissal of appeal were on 11 April 2014 and 12 February 2015 respectively. His application was only filed on 31 January 2018, almost three years later.
- Ex-Constable Chibate's appeal against discharge was dismissed on 16 November 2015. His application was only filed on 3 April 2018, again almost three years later.
- Ex Constable Chikwenya's discharge and dismissal of appeal were on 23 September 2013 and 30 July 2014 respectively. His application was only filed 23 January 2018, more than three years later.
- Ex-Constable Chipunza Mugove's discharge was on 17 December 2016. His application was only filed on 26 October 2017, almost a year later.
- Ex-Constable Zinyeka's discharge was on 10 February 2016. His application was only filed on 31 January 2018, more than a year later.
- Ex-Sergeant Wachekwa's discharge was in December 2015. His application was only filed on 17 January 2018, more than two years later.
- Ex-Constable Machaure's discharge was on 13 March 2015. His subsequent appeal was dismissed, although the records do not clearly indicate when this was. None of the parties said when. However, it seemed common cause this was in 2015. His application was only filed on 22 January 2018, about three years later.

xiv/ *Ex-Constable Mhandu* Case No HC 349/17

xv/ *Ex-Constable Musengezi* Case No HC 384/17

[14] These two sought reinstatement pending the determination of their appeals by the PSC. The applications to this court were based on s 51 of the Police Act that says a discharge order by the CGP shall not be executed until the decision of the PSC has been given.

[15] Apart from the problems common to all the applications as outlined, it was not explained why the applicants sought declaratory orders when clearly all they desired was the substantive relief of reinstatement pending appeal. But such a remedy is, in fact, a mandatory interdict. It is a mandamus. One has to plead and satisfy the requirements of an interdict. The applicants sought a final interdict. The requirements are a clear right; a well-grounded apprehension of an irreparable harm; the balance of convenience; the absence of an alternative remedy, and reasonable prospects of success in the main case. Plainly, that was the last thing on the applicants' minds or that of their counsel.

[16] Furthermore, for a declaratory order, the provisions of s 14 of the High Court Act, *Cap 7:06*, have to be strictly complied with. Firstly, a declaratory order is at the discretion of the court. Secondly, the court enquires into, and determines existing, future or contingent rights, even if the applicant does not claim consequential relief. Nothing was placed before me to show that the declaratory orders sought herein were in respect of contingent or future rights.

xvi/ *Ex-Kasira* Case No HC 350/17

[17] In addition to the deficiencies noted before, in respect of Ex-Constable Kasira, the papers showed that he had been on probation, that he had habitually absented himself from duty, that he had not been engaged on a permanent basis and that his contract of employment had simply not been renewed, reasons thereto having been duly furnished.

[18] In all the circumstances therefore, all the applications are dismissed with costs.

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Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Civil Division of the Attorney-General's office, respondent's legal practitioners