EX CONSTABLE SHOKO 069995F
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE CHAIRMAN OF THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 2 February 2017 and 28 February 2018

Opposed Matter

N. Mugiya, for the applicant
J. Mumbengegwi, for the respondents

MAKONI J: The applicant approached this court seeking a declarator in the following terms:

That,

1. The discharge of the applicant from the Zimbabwe Republic Police by the first and second respondents be and is hereby declared unlawful and wrongful.
2. The first and second respondents are ordered to reinstate the applicant with full benefits from the date of discharge to the date of reinstatement.
3. The respondents are ordered to pay costs of suit.

The background of the matter is that the applicant, an ex-police officer was convicted of contravening s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] at Harare Magistrates Court on 7 March 2013. The applicant was sentenced to 4 months imprisonment which was suspended on condition that applicant performs 140 hours of Community Service at Kuwadzana Polyclinic. The first respondent, acting in terms of section 48 of the Police Act [*Chapter 11:10*] 2001 (the Act), discharged the applicant. The applicant, dissatisfied with the discharge, filed an appeal to the second respondent. Whilst awaiting the determination of appeal, the applicant was reinstated into the Police Service. The second respondent eventually dismissed

the appeal. The applicant then filed the present application seeking a declarator that his discharge from the Zimbabwe Republic Police by the first and second respondents was unlawful and wrongful.

The applicant avers that he was not furnished with the reasons why he was discharged. He further avers that if he was discharged in terms of the Act, then the procedure was grossly irregular as he had been charged in terms of the criminal law. If he was discharged in terms of s 48 of the Act, the process would have been irregular as the section is vague and ambiguous in relation to how one should be discharged in view of the provisions of s 68 (2) of the Constitution.

He concludes his Founding Affidavit by stating in para 11:

> "It is apparent that my discharge from the Zimbabwe Police by the respondents was grossly irregular and the discharge is therefore incompetent and ought to be rescinded or declared unlawful and wrongful."

The respondents averred that the applicant was discharged from the Police force in terms of s 48 of the Act after he had been convicted of contravening s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and sentenced to four months imprisonment which was wholly suspended on condition he performed community service. He appealed to the second respondent and was reinstated pending the determination of the appeal. He was then summarily dismissed in terms of s 48 of the Act, when his appeal was determined. Thereafter he could not be located so that he could be furnished with the reasons. He never requested for reasons of his discharge.

The respondents further averred that criminal proceedings are not a bar to disciplinary proceedings.

Most of what the applicant avers in its founding affidavit and heads of argument are merely grounds for review. In para 9 of his founding affidavit he states:

> "9. Assuming that the Respondents discharged me for the conviction in terms of the Police Act, that would be irregular in that since l had been charged in terms of the ordinary law, l could not at law be charged in terms of the Police Act on the same conduct. **That will be grossly irregular**. (my emphasis)

The learned authors Herbstein & van Winsen in *Civil Practice of the Supreme Court of South Africa* 5 ed p 1271 explains a review as:

> "Where, however the real grievance is against the method of the trial, it is proper to bring the case on review… The essential question in review proceedings is not the correctness of the decision under review, but its validity."

In *Kwete* v *Africa Community Publishing and Development Trust and Ors* HH 226/98 at p 3 of the cyclostyled judgement Honourable Smith J had this to say:

> "It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation as long as a declaratory order is sought. A declaratory order is after all merely one species of relief available on review, one can imagine the case of a litigant who institutes an application for review and reinstatement well out of time. He applies for condonation which is refused. All then he has to do is to institute a fresh application for review, but instead of seeking reinstatement, he wants a declaratory order. Should he be able to get round the provisions of order 33 of the High Court Rules 1971 that easily? I think not."

In *Thokozani Khupe* v *The Officer in Charge Law and Order Bulawayo Central Police Station and 2 Others* HB 15/05 NDOU J had this to say:

> "Although couched as a declarator, this latter prayer is one for review. What the applicant seeks is that l review the decision of the second respondent that "the police have to be notified of all meetings by politicians, be they public or private." That being the case, the provisions of Rule 259 of the High Court Rules apply. A declaratory order is, in any event, merely one of the species of relief available and the applicant should not be able to get around the time limits for review proceedings by instituting proceedings for a declaratory order."

As correctly submitted by the respondent, what comes out of the founding affidavit, is that the applicant is aggrieved by the procedure which was adopted in discharging him in terms of s 48 of the Act. In para 2 of his Draft Order, he therefore seeks re-instatement. Clearly what the applicant seeks is a review which he filed clothed as a declaratur to get round the time limits for review. This cannot be countenanced.

The applicant avers that he suffered double jeopardy in that he was subjected to a trial both in a Magistrates court and before the court of a single officer regarding the same matter. His contention that disciplinary proceedings and criminal proceedings are not independent is unmeritorious. The law is clear on this. Section 278 of the Criminal Law Codification and Reform [*Chapter 9:23*] provides:

> "**278 Relation of criminal to civil or disciplinary proceedings**
> (2) A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be."

From the above it is clear that a criminal conviction is not a bar to disciplinary hearing. If one is convicted of an offence he or she can still undergo disciplinary proceedings.

The other concern of the applicant is that he was not furnished with reasons for his discharge. What is clear from the papers is that he never requested for the reasons. The respondents' explanation that they could not locate the applicant after the dismissal of his appeal is reasonable. In any event, there are procedures that are available to the applicant in terms of the Administrative Justice Act [*Chapter 10:28*], where someone has not been furnished with reasons for an adverse decision made against him, by an administrative authority.

> "**48 Procedure on conviction of member for certain offences**
> If a member, other than an officer, is convicted of any offence and sentenced therefor to imprisonment without the option of a fine, whether or not the execution of such sentence is suspended, the Commissioner may-
> (a) discharge the member, in which case the discharge may take effect from the date of his conviction; or
> (b) impose any one or more of the following penalties-
> (i) reduction in rank;
> (ii) loss of seniority;
> (iii) withholding of an increment of salary; or
> (c) reprimand the member."

In *Reginald Mapika* v *Chairman of Police Service Commission and Others* HB 56/13 CHEDA AJ had this to say on s 48 of the Police Act:

> "Section 48 deals with a "member" while s 49 deals with an "officer"... I do not understand this section (s 48) to grant a member the same rights as an officer, who, under s 49, is subject to an inquiry in terms of the Commission of Inquiry Act… The applicant in this case is a member, not an officer. The Commissioner was within his right to discharge him from the force."

It is clear from the above that from whichever angle you look at the matter, the applicant cannot succeed.

Accordingly, the application is dismissed with costs.

Mugiya and Macharaga, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners