

TYMON TABANA
versus
CHIEF STAFF OFFICER
and
COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 20 and 24 October 2016

Urgent Application

T Mpofu, for the applicant
S M hashiti, for the respondent

FOROMA J: This is an application filed as an urgent chamber application for relief in terms of the provisional order.

In para 4 of the application, applicant lists as one of its grounds for the application as follows:-

- “4. This is an application for an interim interdict that the respondents be prohibited from interfering with applicant’s right to retire pending a declaratory order by this Honourable court on the validity of a purported bonding agreement between applicant and respondents. The purported bonding agreement is in reality between applicant and the 2nd respondent”

Applicant’s application has been prompted by his belief that respondents have wrongfully and unlawfully interfered with his right to retire on attaining a pensionable service of 20 years which he has since achieved. The complaint arises from the fact that he has learnt that the attitude of the respondents to his notice of intention to retire in terms of s 22 of the Police Act

[Chapter 11:10] is to hold him to the bonding period in terms of sponsorship agreement between him and 2nd respondent in 2010. In terms of the sponsorship agreement the applicant undertook on completion of his studies and upon return to duty to serve the Zimbabwe Republic Police for a period of not less than 96 months. Applicant considers that the bonding was conditional upon the Police Service Commission sponsoring his study which sponsorship did not take place. He accordingly considers that the bonding is not valid. The respondents on the contrary contend that there exists a validly signed sponsorship agreement with a bonding clause which appellant has yet to fulfil. For this reason the respondents believe that applicant cannot retire before the expiry of the bonding period unless the second respondent waives the bonding period. Applicant attached correspondence/memoranda between the respondents and other Police Service Departments entered into upon receipt of the applicant's notice of intention to retire aforesaid from which he considers that the attitude to be gleaned from such correspondence is that his notice of intention to retire should not be allowed to take effect. In fact applicant in his founding affidavit puts it in the following terms in para 16:-

“16. The respondents have ignored the notice given but instead they have insisted on specific performance of my personal services in terms of the contract of employment.”

This interpretation of the correspondence as I will show is an incorrect representation of second respondent's view to applicant's notice of intention to retire. At the hearing of the application respondents took some points *in limine* two of which urge that the matter is not urgent.

The first and second respondents filed opposition to applicant's application in which principally they raise two points *in limine* namely:-

- (i) That the applicant has no cause of action as second respondent is yet to complete his consideration of the applicant's application thus the application has not been turned down as it is being processed and for this reason
- (ii) The matter is therefore not urgent.

I directed the parties to deal with the issue of urgency before going into the merits and after submissions I reserved my ruling on the points *in limine* raised.

After carefully considering submissions I consider the crisp issue to be:-

- (a) Whether the second respondent has power in terms of the Police Act to decline or refuse to accept a member his right to retire from the Police Service in terms of s 22 of the Police Act after giving the requisite notice of his intention to so retire. If second respondent has such power has he turned down applicant's application to retire at the end of the notice given by applicant? Applicant did not attach a copy of the written notice he gave to second respondent in terms of s 22 of the police Act

The applicable section of the Police Act that deals with retirement of members is s 22. It reads as follows:-

22(1) Subject to section twenty-five, 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 –

- a) On gratuity when his pensionable service amounts to ten years or more; or
- b) If he does not exercise his right to retire in terms of paragraph (a) on pension when his pensionable service amounts to twenty years or more.

Applicant did not state precisely in terms of which paragraph he gave notice as between 22 1(a) or (b) but nothing turns on this for purposes of this ruling as either way the applicant is entitled to exercise his right to retire – the only difference being in terms of s 22(1) (a) the member retires on gratuity and on pension in terms of s 22 (1) (b).

The meaning of s 22 quoted above does not call for any interpretation of the said section as the intention of the legislature is clear once the words used are given their ordinary grammatical meaning. All that a member who has attained pensionable service must do if the member intends to retire is to give the Commissioner General 3 months written notice of his intention to so retire.

The reason for giving notice is obvious - a member need not retire on attaining pensionable service as retirement at that stage is optional. Retirement is not optional, if it is in terms of either s 22(2) or 22(3). It is therefore desirable from an administrative point of view once an election to retire is made that the second respondent be notified. As the applicant does not seek to retire in terms of s 22 (2) or 3 this should not detain me.

The question then is, once notice of intention to voluntarily retire in terms of s 22(1) is given can the Commissioner General refuse the member his right to retire? The provisions of s

22(1) do not give the Commissioner General the power to refuse a member the right to proceed on retirement at the end of the 3 months notice period. In view of the right of the member retiring in terms of s 22(1) to proceed to retire at the end of notice any purported exercise of a power to decline or restrict such members right to proceed on retirement at the end of the notice period would be ultra vires the Act and thus null and void.

In the circumstances applicant's application is precipitate and no urgency can possibly arise as that would be presumptuous.

Even assuming that I am wrong in this conclusion the applicant would still not succeed on urgency as second respondent has not formally responded to applicant's notice of intention to retire. The assumption that the Chief of Staff's response per memo to the Director Legal Services is tantamount to an intention to decline applicant's right to retire is misplaced. It is a misunderstanding of the correspondence. Annexure D to applicant's founding affidavit specifically recommends the applicant's discharge and attention is brought to the bonding condition which second respondent can waive Annexure C which is a memorandum to the Chief Staff Officer Human Resources Administration makes a conditional proposal to overcome the bonding issue – i.e. recover damages from applicant for not completing the bonding period should second respondent approve the application for retirement.

This was on 17 August 2016.

The Senior Assistant Commissioner's memorandum to the Director Legal Services seeks guidance on how the bonding aspect as understood by his office would be addressed in light of the recommendation made (supporting applicant's retirement). The memorandum clearly indicates – “referred for your consideration please.”

From the foregoing it is clear that applicant has misunderstood the attitude that Police Administration seems to hold that Police Administration i.e. that bonding is some impediment to his retirement, to mean that the second respondent will be obliged to adopt the view that bonding precludes appellant from proceedings on retirement. Because he has misconstrued the correspondence his approach to the court on an urgent basis before receiving second respondent's response to his notice makes the application precipitate. It should be reiterated that second respondent's position is that he has not completed his consideration of applicant's application. Besides applicant has not shown that if the matter is not dealt with urgently he

would suffer irreparable harm as he claims that if the relief being sought is refused he will lose hope in the legal system as he would have been denied any protection of the law. This is not the test of urgency – irreparable harm is the test – see *Kuverenga v Registrar General and Anor* 1998 (1) ZLR 188. In the circumstances, the applicant’s application does not pass the test of urgency.

I accordingly order that the application be and is hereby removed from the roll of urgent matters with costs.

Rubaya & Chatambudza, applicant’s legal practitioners
Attorney General’s Office, respondents’ legal practitioners