EX-CONSTABLE MATSEKETSA A. 073911M

versus

THE COMMISSIONER GENERAL OF POLICE

and

THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE

MANGOTA J

HARARE, 9 July, 2018 and 9 August, 2018

**Opposed Application**

*N. Mugiya*, for the applicant

*Ms M. Gezera*, for the respondents

 MANGOTA J: The applicant applied for a declaratur. He moved the court to declare that:

1. his trial under the Police Act for the offence he was tried under ordinary law which amounted to dual prosecution be declared unlawful - and
2. his discharge from the Police Service following his conviction under the Police Act for the offence he was acquitted of under ordinary law be declared unlawful.

His statement is that he was charged under the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and was acquitted by the court of the magistrate. He states, further, that he was also charged under the Police Act [*Chapter 11:10*] for the same set of facts, same evidence and same witnesses as for what was preferred against him under the Criminal Law (Codification and Reform) Act. He says he was convicted under the Police Act, was fined $10 and was discharged from the Police Service.

 Amongst the allegations which the applicant levels against the first respondent is the one which relates to the charge. He says he faced an ominibus charge which was not pleadable at law. The charge, he submits, was defective. He indicates that, because he was acquitted by the court of the magistrate, the defence of *autrefois acquit* should remain available to him. He avers that the first respondent failed to comply with s 332 of the Constitution of Zimbabwe. He states that the first respondent should have tried him under the Police Act. He submits that he was subjected to dual prosecution for the same offence. He, therefore, moves the court to enter judgment in his favour as has been stated in the foregoing paragraph of this judgment.

 The first respondent oppose the application. The second does not. My assumption is that he intends to abide by the decision of the court.

 The first respondent’s *in limine* matter is that the application is for review which has been filed under the guise of a declaratur. He states, on the merits, that he preferred a specific charge against the applicant. He attached to his notice of opposition Annexure B. The annexure, he says, is proof of the charge which he preferred against the applicant. He insists that the applicant’s acquittal at the magistrate’s court does not take away his right to inquire into his suitability to remain in the Police Service. He relies on s 278 (2) and (3) of the Criminal Law [Codification and Reform] Act as read with s 193 (b) of the Constitution of Zimbabwe in the mentioned regard. He submits that, at the magistrate’s court, the applicant faced the charge of *Criminal Abuse of Duty as a public officer*. He states that the charge in question is different from that of *performing duty in an improper manner* which he preferred against him under the Police Act. He insists that the objectives of the two laws are separate from each other and, therefore, different. He refutes the allegation that the applicant suffered dual prosecution for the same offence. He moves the court to dismiss the application with costs.

 I cannot make any head or tail of the first respondent’s preliminary matter. He makes a statement on the same but does not support the allegation with either evidence or argument. He should have gone further than what he did and showed the way in which he alleges that the application is one for review as opposed to that of a declaratur.

 The draft order which the applicant is moving the court to grant to him has all the indication that his application is one for a declaratur. The events which he narrates in the same are *in sync* with those of an application which he made. They fall under the purview of s 14 of the High Court Act [*Chapter 7:06*].

 The applicant’s right to employment can hardly be underestimated. It constitutes his means to a livelihood. He is, in the words of Gubbay CJ, an interested person. He has a direct and substantial interest in the subject matter of the suit which was prejudicially affected by the judgment of the court *a quo* [see *Johnsen* v *AFC*, 1995 (1) ZLR 65 (5)]. The first respondent’s *in limine* matter is, therefore, devoid of merit.

 The applicant’s assertion, on the merits, is that he was tried and acquitted by the court of the magistrate. He produced no evidence of his acquittal. Nor does he make mention of the charge which the state preferred against him when he appeared before the magistrate. All he says on that matter is that he was charged in terms of the Criminal Law [Codification and Reform] Act and was acquitted. He states, in the same breadth, that he was again charged under the Police Act for the same set of facts, same evidence and same witnesses as for the charge under the Criminal Law (Codification and Reform) Act.

 The statements which the applicant made lack substance. He did not attach to his application the charge under which he was tried at the magistrate’s court. Nor did he attach to the same a summary of evidence which the state led from each of its witnesses in support of its case against him. He did not attach to the application the charge which the first respondent preferred against him under the Police Act. Nor did he attach to the same the list of witnesses who testified against him when he appeared before the trial officer or a summary of the evidence of each witness for the state.

 The attachments would, no doubt, have made it easier than otherwise for the court to make a comparative analysis of his complaint. It would have known what he was made to endure at the court of the magistrate. It would have compared that with what the trial officer subjected him to under the Police Act. The comparison would, in short, have satisfied the court of whether or not his complaint has merit.

 The applicant’s assertion which is to the effect that he was subjected to dual prosecution under some substantially similar set of circumstances, would, in the absence of the attachments, not hold. He cannot prove his case on the basis of unsubstantiated statements which are part and parcel of his founding affidavit. The affidavit constitutes the bare bones of his application. Those require flesh to be added on to them as proof of what he is alleging.

 It is trite that, in action proceedings, *viva voce* evidence which is led from witnesses requires concrete evidence in the form of exhibits in areas of serious dispute as between the parties. Where exhibits are a requirement in a case and are capable of being produced but have, for some reason, not been produced, a party’s case has, more often than not, fallen to pieces, on the mentioned basis alone. Similarly, in motion proceedings, attachments form an integral part of a party’s proof of its case. It follows, therefore, that, where these are available but have not, for some reason, been produced when they should have been, as *in casu*, a party’s reliance on its unaided affidavit would not assist it to prove its case to the satisfaction of the court. The party cannot, in the mentioned set of circumstances, persuade the court to place reliance on the contents of its affidavit, and that alone, to find for it.

 The onus lies on the applicant to prove the veracity of what he alleges. Where, as is alleged *in casu*, concrete evidence is available, he does well to produce it in substantiation of what he states in his affidavit. The produced evidence would leave his case intact and not open to doubt.

 The statement of the first respondent places the application in a balance. He challenges the applicant to prove that he was acquitted for the same charge at the magistrate’s court as he was charged with under the Police Act. He submits that the applicant was charged with the offence of *Criminal Abuse of Duty as a public officer* when he appeared before the court of the magistrate. He says he charged him with the offence of *Perfoming Duty in an Improper Manner*. He states that the two charges cannot be the same. He denies, on the basis of the stated matter, that the applicant was subjected to dual prosecution.

 The applicant gives the distinct impression that that he decided not to mention specifics which relate to the two charges which each court preferred against him. He appears not to have wanted to rock the boat, as it were. He must have realised that, if it were to be discovered that the charge which was preferred against him at the court of the magistrate was different from the one which the first respondent preferred against him, his application for a declaratur would not hold.

 The two charges, as stated in the first respondent’s unchallenged statement, are similar. They are similar in that they both relate to the issue of corruption. They are, however, not the same.

 The applicant’s trial at the magistrate’s court aimed at punishing him for corruption, if such was the finding of the court. His trial under the Police Act aimed at instilling discipline in him as a member of the Police Service if such was the finding of the Suitability Board which dealt with his case. He was, in my view, not subjected to dual prosecution as he would have the court believe.

 The fact that the applicant did not appeal or review the decision of the trial officer supports the view that he agrees with the same. His application which he filed some ten (10) or so months after the trial officer’s decision appears to be an after-thought. It is my considered view that he made up his mind to try his luck and challenge his dismissal from the Police Service. Luck was, however, not with him at all. The untruths which he told coupled with his many unsubstantiated statements destroyed any chance of him salvaging his case from the deep pit into which he had thrown it.

 The applicant was not being candid with the court when he alleged that he faced an omnibus charge which was not pleadable at law. Annexure B which the first respondent attached to his notice of opposition is the charge which was preferred against him under the Police Act. The charge is not an omnibus one as he alleges. It is specific. It informs him of the period he is alleged to have committed the offence, the manner he is alleged to have committed it as well as the place of the commission of the same.

 The specific allegation which is contained in the charge is that the applicant released one Cloudy Kaundo who was charged with the crime of assault. It states that he released him without authority and demanded a bribe of $50 from him. The charge is, no doubt, clear and specific. It is, therefore, pleadable.

 The first respondent violated no law when he set up the Suitability Board to inquire into the applicant’s suitability to remain in the Police Service. Section 193 (b) of the Constitution of Zimbabwe as read with s 278 (2) and (3) of the Criminal Law (Codification and Reform) Act confers power upon him to act as he did.

 Whilst the proceedings which the first respondent constituted have the connotations of a criminal trial as stated in s 193 (b) of the Constitution, the substance of the same is very clear. It is, as is stated in the Suitability Board’s terms of reference, to look into the suitability or fitness of the applicant to remain in the police service as well as to retain his rank, salary or seniority. The terms are *in sync* with s 278 (2) and (3) of the Criminal Law (Codification and Reform) Act which reads:

 “278 RELATION OF CRIMINAL TO CIVIL OR DISCIPLINARY PROCEEDINGS

 (1)……

 (2) A conviction or acquittal in respect of any crime shall *not be a bar* to civil or *disciplinary proceedings* in relation to any conduct constituting the crime at the instance of or ….. the *relevant disciplinary authority*.

 (3) Civil or disciplinary proceedings, in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings.”

 The section, no doubt, makes a clear distinction between criminal proceedings and civil or disciplinary proceedings. It is a misnormer for the applicant to suggest that the criminal proceedings which he underwent at the magistrate’s court are equivalent to the disciplinary proceedings which the first respondent preferred against him under the Police Act.

 The first respondent stated, and l agree, that the objectives of the two pieces of law are different. They do not, as has already been stated, aim at addressing the same mischief. They deal with different aspects of the applicant’s conduct. If he was convicted by the court of the magistrate, the sanction which he would have endured would have been punishment which is in tandem with the Criminal Law of Zimbabwe. His conviction under the Police Act aimed at not so much as at punishing him, but at instilling discipline in him.

 The applicant could not, under the stated circumstances, plead the defence of *autrefois acquit*. That defence was not, and is not, available to him owing to the difference, not only in form but also in substance, of the two set of proceedings. The proceedings under the Police Act bear the connotations of a criminal trial in the sense that they should follow, as nearly as is possible, the stages as well as the manner of leading evidence in a criminal trial. They are however, not a criminal trial in the strict sense of the word. They are more of an inquiry than they fall into the area of a criminal trial proper.

 The findings which the trial officer made at the conclusion of the disciplinary, and not criminal, proceedings led to the discharge of the applicant from the police service. It is trite that if the magistrate had convicted him, he (the magistrate) would not have imposed upon him the sanction of having to discharge him from the Police Service. His mandate did not, and does not, extend to that type of sanction. I mention this fact, in passing, as a way of demonstrating the difference between the two sets of proceedings.

 The applicant states, in his answering affidavit, that:

1. he was not given reasons for his discharge - and
2. the person or officer who convened the Board of Suitability did not, at law, have the power to convene such. He submits that it should not have been convened by anyone else but (by) the first respondent.

He moves the court to find in his favour on the abovementioned basis. He insists that the first respondent’s notice of opposition is, to the extent of the stated matters, fatally defective.

 The applicant did not raise the abovementioned two matters in his founding affidavit. He advanced no reason for not having done so. He, in the process, did not accord an opportunity to the first respondent to comment on those. He placed him in a very invidious position. He cannot deal with such after the answering affidavit has been filed.

 The submissions which the first respondent’s legal practitioners made on the same fall into the realms of speculation more than they deal with his evidence on the two matters. Because he was not offered the opportunity to deal with them, that cannot be held against him. The blame for the same lies entirely on the applicant’s shoulders. He embarked upon what may be referred to as an ambush to the attainment of real and substantial justice.

 It is trite that an application stands or falls on its affidavit. It is well established that, in application proceedings, the cause of action should be fully set out in the founding affidavit and that new matters should not be raised in an answering affidavit. (See *Mangwiza* v *Ziumbe No & Anor*, 2000 (2) ZLR 489 (SC), 492E-F per Sandura JA). In *Coffee, Tea and Chocolate Co Ltd* v *Cape Trading Co Ltd* 1930 (PI) 81 at 82 which Sandura JA placed reliance upon when he made the remarks which appear in *Mangwiza* v *Ziumbe*. Gardiner JP discussed the same subject matter extensively and said;

 “A very bad practice and one by no means uncommon, is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now, these affidavits of Barnes, Turnshall, Lee, Gardner and Long should in my opinion properly have been put in support of the notice of motion. They are not a reply to what has been said by the respondent and I am not prepared to allow them to be put at this stage.” [emphasis added]

 It is on the basis of the above cited *dicta* that the matters which the applicant raised in his answering affidavit cannot be allowed to strengthen his case. Allowing them into the record when the respondent has had no chance to comment upon them would be akin to the act of administering injustice as opposed to justice in respect of the respondent’s case.

 The *onus* lies on he who alleges. He must prove his case on a balance of probabilities. It is not for the defendant or the respondent to disprove what the plaintiff or the applicant alleges against him. That is the immutable rule of criminal or civil procedure.

 The applicant failed to prove his case on balance of probabilities. His application stands on nothing. It is devoid of merit. It is, in the premise, dismissed with costs.

*Mugiya & Macharaga Law Chambers*, applicant’s legal practitioners

*Civil Division of the Attorney General’s Office*, respondents legal practitioners