HB 110-16
HC 989-16
XREF HC 685-16

FELIX SANGU
versus
COMMISSIONER GENERAL OF POLICE
and
THE BOARD OF SUITABILITY
and
CHIEF SUPERINTENDENT MBENGWA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 14 APRIL AND 21 APRIL 2016

Urgent Chamber application

Applicant in person
Ms *D Ndou* for the respondents

MATHONSI J: The applicant is a police constable who has served the Zimbabwe Republic Police (ZRP) for 8 years and is currently based at Queenspark Police station. At the material time he had been assigned canteen duties at Hillside Police Station. It was while he was performing those duties that accusations of misappropriation of funds amounting to $1264-00 were made against him, it being alleged that during the period extending from 5 January 2015 to 3 February 2015 he had prejudiced the canteen of that sum of money.

In addition he was accused of being absent without official leave on 10 and 11 April 2015. The applicant duly appeared before the court of a single officer facing two charges namely "omitting or neglecting to perform any duty or performing any duty in an improper manner in contravention of paragraph 34 of the Schedule as read with section 34 of the Police Act [Chapter 11:10] and "being absent without official leave" in contravention of s13 (1) of the schedule as read with s34 of the same Act.

Following a full trial, the applicant was found guilty and sentenced to 10 days detention at Fairbridge detention barracks. In addition, he was fined $10-00. He says that he has since served his sentence. What has prompted him to come to this court is the convening of a suitability board which was set to sit on 11 April 2016 and inquire into the suitability or fitness

of the applicant as a regular force member to remain in the force, or to retain his rank, seniority or salary.

The board was convened by the first respondent in terms of s50 (1) and (2) of the Police Act [Chapter 11:10] as read with s 12 and s13 (1)(b) of the Police [Trials and Boards of Inquiry] Regulations, 1965. He states in his founding affidavit that he appealed against the determination for the single officer to the commissioner general which appeal was made in terms of s34(7) of the Act. Sitting as an appellate court the commissioner general dismissed the appeal by judgment dated 26 February 2016. In arriving at that conclusion, he meticulously analysed the evidence on the record and discussed all the ten grounds of appeal relied upon by the applicant reasoning that "the state managed to prove its case against the appellant beyond reasonable doubt on count one" and that there was equally no merit in the appeal against conviction in count two as "the decision to convict was well justified."

The applicant says that he has now filed an application for review in this court in HC 685/16 challenging the decision of the first respondent. That application was filed on 16 March 2016 a day before the suitability board was convened on 17 March 2016. He has opted for the option of a review application in this court because proceeding by way of an appeal in terms of s51 of the Act:

> "is just academic because the police service is undergoing a massive discharge to rationalise the wage bill. Such remedy cannot be trusted and it is on record even before this Honourable Court that the first respondent executes his dismissal even if any appeal in terms of section 51 of the Act is pending."

The applicant would therefore want to interdict the sitting of the suitability board to enable him to prosecute the review application he has filed. In the event that the board would have sat, the applicant would like their recommendations to be suspended and the first respondent interdicted from acting upon them.

Mr *Sangu*, who appeared in person, submitted that he was tried by the magistrates court at Bulawayo on a charge of theft involving the sum of $264-00 and was in August 2015, found not guilty and acquitted. For that reason, it was improper for the police authorities to prefer a charge of improper conduct against him arising out of the same set of facts. I do not agree.

It is trite that the same conduct can give rise to both criminal and civil sanction. Where an employee has allegedly stolen from an employer, the latter is entitled to prefer criminal charges against such employee to be pursued in the criminal court. That however does not oust the employer's jurisdiction to discipline such an employee under civil law, an exercise which may result in misconduct charges being preferred against the employee and disciplinary sanction eventuating. As an employee, the applicant remains subject to disciplinary law internally even where criminal prosecution has taken place. The acquittal by a criminal court cannot exonerate an employee from the consequences arising from disciplinary law. After all, the acquittal is merely the opinion of the criminal court under circumstances where the burden of proof, beyond a reasonable doubt, is more onerous than that obtaining under civil law being on a preponderance of probabilities.

I am fortified in that view by the provisions of s278 (2) of the Criminal Law Code [Chapter 9:23] which read:

> "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."

It is also pertinent to note that in terms of s 30 (5) and s 34 (9) of the Police Act, a conviction under the Act is not regarded as a conviction for purposes of any other law. Subsection (9) of s 34 provides:

> "A member who is found guilty of contravention of this Act by an officer shall not be regarded as having been convicted of an offence for the purpose of any other law."

See also s193(b) of the Constitution of Zimbabwe.

What this boils down to is that like any other employee, a police officer may be subjected to both criminal prosecution and disciplinary law in respect of the same set of facts. He or she cannot lawfully rely on the outcome of the proceedings in the criminal court to except to disciplinary proceedings.

Mr *Sangu* also submitted that he is entitled to appeal to the High Court against the decision of the Commissioner General dismissing his appeal in terms of s 70 (5) of the Constitution. He has not appealed despite having been served with the appeal judgment on 17

March 2016 because he had not been given appeal papers by his superiors. Before he could note the appeal he was arrested and taken to detention at Fairbridge detention barracks where he has been held unlawfully.

Considering that the applicant has had almost a month to file his appeal to the High Court but did not do so electing instead to file a review application, those submissions are mere redherring by a recalcitrant police officer who thinks he can use all means possible to avoid the consequences of his actions. In any event, the Commissioner General is the final court of appeal and not the High Court.

I have already pronounced myself on that point in *Tamanikwa* v *Commissioner General of Police and Another* HH676/15 where I took the view that it was never the intention of the legislature in enacting s70 (5) of the Constitution to allow any party aggrieved by a decision of any tribunal including the Commissioner General of Police, to appeal to the High Court because such an appeal is not provided for in any enactment. This is because s171 (1) (b) of the Constitution provides that the High Court may only exercise appellate jurisdiction conferred to it by an Act of Parliament. See also s30 (1) of the High Court Act [Chapter 7:06].

Ms *Ndou* who appeared for the respondents submitted that the suitability board has already sat and made certain recommendations which await consideration by the first respondent. It is unfortunate that the respondents elected to disregard the pending application and proceeded with the hearing of the suitability board as if nothing had happened. The board was convened to sit on 11 April 2016 but was postponed to 13 April 2016 on which date it sat and dealt with the matter. The application and notice of set down for hearing were served on the respondents on 12 April 2016 and I do not accept Ms *Ndou'*s submission that they did not know which board it related to because the applicant cited "The Board of Suitability" as the second respondent instead of the President. She stated that the legal practitioners could not instruct the board to stay proceedings until this application had been disposed of because the officers constituting the board were unknown.

In my view that it a mendacious explanation tending to take the court for granted. A brief perusal of the application would have revealed that the convening order, annexure "D", contains the names of the three board members. It has been stated repeatedly that it behoves a party in the position of the respondents who would have been served with a court process calling into

question a certain activity they intend to undertake to respect the process of the court and refrain from conduct that would negate the process of the court. See *Rukonda and Others* v *Minister of Local Government, Public Works and National Housing N.O and others* HH 360/14; *The Evangelical Church of Zimbabwe* v *Rev Soda* HH 458/15.

I would not want to believe that the respondents wanted to circumvent the due process by rendering the application of academic importance only, especially as the applicant was carted away to a detention camp, the very day that he launched this application. No matter how frustrated police authorities may be by the upsurge in applications of this nature brought by police officers trying to avoid disciplinary action, care must be taken not to appear as if these officers are now being persecuted. They must still maintain a dispassionate approach to disciplinary action and remain on a moral high ground. Appearing to disrespect courts of law cannot possibly be helpful in resolving their problems. If there was merit in this application, I would not have hesitated to nullify the proceedings. However, the respondents' conduct automatically disentitles them to costs.

I now have to resolve the issue of whether the filing of an application for review in this court entitles the applicant to an interdict. In that regard, we are covering ground that has already been traversed. A suitability board is convened by the first respondent in the exercise of his constitutional mandate as the supreme commander of the police service appointed in terms of s221 of the Constitution. In that capacity he has command, control and authority over the police service.

The convening of a suitability board is an administrative function carried out in terms of s50 of the Act which provides;

> "(1) A board of inquiry consisting of not less than three officers of such rank not being below that of superintendent, as may be considered necessary by the Commissioner General may be convened by the Commissioner General to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary;
>
> Provides that no officer who is a material witness or has a personal interest in the matter shall be appointed to such a board.
>
> (2) ---
> (3) If a Regular Force member, other than an officer, is found after inquiry by a board

to be –

(a) unsuitable or inefficient in the discharge of his duties; or
(b) otherwise unfit to remain in the Regular Force or to retain his rank, seniority or salary; the Commissioner General may—

(i) discharge the Regular Force, member;
or
(ii) reprimand the Regular Force member."

What is clear therefore is that a suitability board does not decide only the discharge from service of a member. It may, after the inquiry, decide on the change of rank, seniority or salary of a member. It is not the board which decides the fate of a member as its brief is only limited to making recommendations to the Commissioner General who still retains the discretion to act as provided for in subsection (3) of s50. With that in mind one then wonders why all the hullabaloo by police officers the moment a suitability board is convened.

For our present purposes I must point out that the Act reposes upon the Commissioner General, in his sole discretion, the administrative authority to convene such a board. Accordingly a board so constituted is in accordance with the law and it performs its duty according to the provisions of that law, the Act. I have already expressed myself on that issue in *Nkululeko* v *Commissioner General of Police and Others* HB 11/16 where I stated that for an applicant to succeed in interdicting the proceedings of a suitability board, he or she must establish all the requirements of an interdict, namely a *prima facie* right, an injury actually committed or reasonably apprehended; the absence of similar protection afforded by any other ordinary remedy and a balance of convenience favouring the grant of the interdict.

In that matter I drew the following conclusion which I still adhere to:

> "The convening of a suitability board by police authorities is provided for the Act. In *Tamanikwa* v *Board President (Chief Superintendent Baleni) and Another* HH676/15 I expressed the view that in an application such as the present the establishment of a right presents serious difficulties for the applicant because the convening of a board to inquire into the suitability of a police officer to remain in the police service, to retain his rank, salary or seniority is provided for in the law. Section 50 (1) of the Police Act reposes authority upon the Commissioner General to convene such a board. An event conducted in accordance with the law cannot lawfully be interdicted unless if, in so doing, the convener commits an irregularity or violates the law in terms of which he is so acting. I stand by that pronouncement."

This matter is on all fours with the cases I have cited and is not distinguishable at all. What it means is that the primary requirement for an interdict, namely the existence of a right, has not been proved because the first respondent has acted in accordance with the law.

Ms *Ndou* has drawn my attention to similar remarks made by MALABA DCJ in the case of *Jangara* v *The Board President and Another* SC 288/15. It is not a judgment but an endorsement on a matter placed before the learned Deputy Chief Justice whose force of law remains binding on me. He said:

> "The application seeks to interdict the convening (of) a suitability board that was due to sit on 3 June 2015. By the time the papers were placed before me the suitability board had sat, a court cannot interdict a past event. In any case a suitability board can be convened for many reasons relating to the performance of duty by a police officer. A court cannot interdict the convening of a suitability board which is authorised by law."

Having said that, the matter is resolved. However, I must add that the applicant has other remedies provided for in the Act. In terms of s51 he is entitled to appeal against the decision arrived at following a suitability board. The appeal lies to the Police Service Commission. For the applicant to say that he has opted for a review application in the High Court because an appeal provided for in the law cannot be trusted is simply disingenuous. The fact remains that he has not exhausted domestic remedies and therefore fails to establish one of the requirements for an interdict, the absence of any other ordinary remedy.

In the result, it is ordered that:

1. The application is hereby dismissed.
2. Each party shall bear its own costs.

Civil Division, Attorney General's Office, respondents' legal practitioners