

TRYMORE GORE
versus
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 5 JUNE 2017 AND 8 JUNE 2017

Urgent Chamber Application

Applicant in person
L Dube with *L Musika* for the respondent

MATHONSI J: The applicant is a police constable based at ZRP Luveve and has been a police officer for 10 years. He has made this application as a self-actor in which he has cited only the respondent but seeking to interdict the convening of a Suitability Board of three members whose president is Chief Superintendent P. M. Mashingaidze pending the determination of his review application filed in this court under case number HC 1413/17.

In his founding affidavit which is lacking so much in detail, the applicant stated that he had been implicated in not taking the finger prints of a suspect who later turned out not be an accused person at all given that he had done nothing wrong and was never taken to court. Quite to the contrary, his wife who was the complainant had come to his rescue saying the two had had a misunderstanding which was not an issue.

Notwithstanding those circumstances the police authorities now want to discharge him from employment for allegedly receiving a bribe of \$100-00 from the same complainant which charge he was never tried for. He stated further that in terms of the Police Act a suitability board cannot be convened before he has been charged and subjected to a trial which is what the respondent is trying to do. For that reason he has filed an application for review in HC 1413/17 in which he seeks to bring under review the disciplinary proceedings under the Police Act on the ground that they were irregular given that he had been subjected to a criminal trial and the criminal court found him not guilty of criminal abuse of office and acquitted him. Therefore the disciplinary proceedings should be declared unlawful.

Pending the determination of the review application, the applicant would like the proceedings before the Suitability Board to be interdicted. Allowing the Board of Inquiry to proceed would render his review application meaningless.

The respondent opposed the application. Mr *Dube* who appeared on behalf of the respondent submitted that there was a serious non-joinder in that the president of the Suitability Board Chief Superintendent Mashingaidze was not cited when it is the sitting of his board which is sought to be interdicted. He added that because of that non-joinder the board was unaware of the application and the set down as a result of which it sat at 0900 hours on 2 June 2017 and deliberated on the matter in the absence of the applicant who had not attended. For that reason this court cannot interdict what has already occurred.

While the non-joinder of the Board President indeed paralyses the application in my view the argument around the sitting of the Board is dishonest in the extreme. The notice of board of inquiry served on the applicant on 23 May 2017 specifically set the hearing date as 2 June 2017 at 1000 hours. Therefore the board could not have sat and deliberated on the matter at 0900 hours, an hour earlier. If it did that was irregular and indeed a nullity.

Apparently, the papers placed before me show that the urgent application was served at the Legal Services office of ZRP at 09:37 hours on 2 June 2017 before the time the board was scheduled to meet. Further to that, the applicant submitted that he also served the notice of set down of this application at 0945 hours on 2 June 2017 upon the board president who informed him that his board would seek guidance from their legal services department on how to proceed. Therefore the board was aware of this application and that it had been sat down for hearing on 5 June 2017 before 1000 hours the time it was scheduled to sit.

It is now trite that it behoves a party who has been served with a court process calling into question certain intended action to respect the process of the court and refrain from conduct which would negate the process of the court. That party cannot be allowed to ignore the court process and proceed with the action sought to be interdicted and then come to this court to argue that the horse has already bolted and therefore there is no point in closing the stable door. See *The Evangelical Church of Zimbabwe v Soda* HH 458-15; *Sangu v Commissioner General of*

Police and others HB 110-16. I conclude therefore that whatever action the respondent or his subordinates took while aware of this application but in a bid to defeat it, was a nullity.

However the applicant's problems do not end there. This application is fraught with material non-disclosures. Throughout his founding affidavit, the applicant pretended as if the suitability board was convened because he is accused of soliciting a bribe. He studiously avoided attaching material documents including the convening order to which was attached the circumstances under which the board was convened including the fact that on 10 November 2016 he had appeared before a single officer charged with contravening paragraph 34 of the Schedule to the Police Act [Chapter 11:10], that is omitting or neglecting to perform any duty or performing any duty in an improper manner.

The circumstances giving rise to that charge were that he had solicited a bribe from a suspect arrested for malicious damage to property and proceeded to release the suspect without a charge. The applicant did not disclose that he had been convicted and fined \$10-00. He did not disclose that he had appealed to the Commissioner General who dismissed the appeal by judgment dated 26 April 2017. It is for that reason that the Suitability Board was convened. This court frowns upon urgent applications punctuated by material non-disclosures and would dismiss such applications even for that reason alone. See *Moyo and Another v Central Africa Building Society and Another* HH 431-14; *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H) 555 C-D.

That is not all. It is now settled in this jurisdiction that an event conducted in terms of the law cannot lawfully be interdicted. I have specifically stated before that given that s50 (1) of the Police Act empowers the Commissioner General of Police to convene a Suitability Board at any time to inquire into the suitability of a member to remain in the force, to retain his or her rank, salary or seniority, the convening of such board cannot be interdicted unless if, in convening the board, there is an irregularity. That arises out of the fact that what is authorized by law cannot be interdicted. See *Nkululeko v Commissioner General of Police and Others* HB 11-16; *Sangu v Commissioner General of Police and Others, supra*.

In my view it matters not that the applicant has filed a review application because whatever the case, the Commissioner General is at liberty to convene such a board at any time.

He cannot be precluded from doing so merely because a review application has been made. In any case, I have had sight of that application which at this stage is not before me. I am entitled to take a peep into it to see whether it is an arguable case in order to decide whether to grant the interdict pending its determination.

Regrettably the argument that is sought to be relied upon in that application, that of double jeopardy, cannot succeed. In essence, the applicant is saying that he was tried in the criminal court and as such it is unlawful to then subject him to disciplinary proceedings in terms of the Police Act because it amounts to double punishment. The argument is lacking in merit.

It is trite that the same conduct can give rise to both criminal and civil sanction. While an employer is entitled to prefer criminal charges against an employee who has committed a criminal offence, that employer is not precluded from bringing disciplinary proceedings against the same employee in respect of the same offence. An employee's acquittal by a criminal court does not exonerate him or her from the consequences of disciplinary law. See the case of *Sangu, supra*.

Proceedings under the Police Act are disciplinary and therefore civil in nature. Therefore a police officer may be subjected to both criminal prosecution and disciplinary proceedings under the Police Act on the same facts. The applicant can therefore not rely on the outcome of proceedings in the criminal court to avoid disciplinary proceedings.

The application is clearly without merit for these many reasons.

In the result, the application is hereby dismissed with costs.

Civil Division of Attorney General's Office, respondent's legal practitioners