CONSTABLE T. MUSHATI
versus
THE BOARD PRESIDENT
(CHIEF SUPERINTENDENT THETHE)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 4 June 2015

Urgent Application

A. Mugiya, for the applicant
L. Mutambisi, for the respondents

MATHONSI J: The applicant is a police constable in the Zimbabwe Republic Police based at Police General Headquarters. He has been served with a notice of the convening of a Suitability Board to sit on 4 June 2015 to inquire into his suitability to remain in the force, to retain his rank, salary or seniority which will be chaired by the first respondent.

His career summary was also attached to the papers served upon him. It contains a rundown of his misdemeanors from the date of his appointment on 25 April 2008 to date including a misconduct which occurred on his 7th year of service resulting in him being convicted on 12 January 2015 of contravening s 176 of the Criminal Law (Codification and Reform)Act [*Chapter 9:23*], that is assaulting or resisting a peace office as well as contravening para 35 of the schedule to the Police Act [*Chapter 11:10*]. He appealed to this court against that conviction in CA 61/15 and the appeal is yet to be determined.

The applicant had made this urgent application seeking the following relief:

"A TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondents be and are hereby interdicted from conducting the board of suitability against the applicant unless in terms of the law.
2. The respondents proceedings be and are hereby declared to be unconstitutional.
3. The respondents be ordered to pay costs of suit on a higher scale.

B. INTERIM RELIEF GRANTED
Pending the confirmation of this provisional order

IT IS ORDERED THAT
1. The respondents are barred from the proceedings (sic) with the board of suitability pending the return date."

The applicant complains that the respondents have violated s 68(2) of the constitution in that he has not been furnished with the reasons for the need to make an administrative decision against him. Appearing to contradict himself, the applicant states that the suitability board has been convened because of his conviction in the magistrates' court aforesaid, which he has appealed against. For that reason the matter is still pending. In addition, there is another matter against him pending in the courts where he has applied for a discharge at the close of the state case and a ruling on that application is yet to be made. For those reasons he will suffer irreparable harm should the hearing proceed.

What the applicant is seeking is a temporary or interim interdict. For him to succeed he must therefore establish all the traditional requirements for the grant of such an interdict namely;

1. A *prima facie* right.
2. A well-grounded apprehension of irreparable injury.
3. The absence of an ordinary remedy
4. That the balance of a convenience favors the grant of the interdict.

See *Bozimo Trade and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd & Ors* 2 000 (1)ZLR I(H) 9 F – G.

In terms of s50 of the Police Act [*Chapter 11:10*] the Commissioner General of police is empowered to convene a board of inquiry consisting of not less than 3 officers of a rank not below that of superintendent 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. A board on inquiry so convened may, in terms of subs(s) (3) of s 50 find a member to be unsuitable or inefficient in the

discharge of his duties or unfit to remain in the force or retain his rank, seniority or salary, whereupon the commissioner general may act on such findings. So *prima facie* the convening of the suitability board was done in accordance with the Act and therefore lawful.

The applicant would want to prevent the sitting of the board on the ground that there has been a violation of his rights enshrined in s 68(2) of the constitution of Zimbabwe and that he has appealed against his conviction in the magistrates court. Section 68(2) of the constitution provides:

> "Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct."

The provisions of s 68(2) clearly require that reasons be given for administrative conduct. The applicant has been served with papers forming the basis of the inquiry, an inquiry which the police authorities are entitled to make in respect of any member of the force. No decision has been taken yet because the hearing has not taken place. If the papers that have been served upon him are insufficient, he is perfectly entitled to request further particulars to enable him to prepare sufficiently for the hearing. He has not done that but instead opted to rush to hide under the aprons of this court.

Regarding the appeal that he has noted against his conviction at the magistrates court, I am unable to discern the relevance of that. In terms of s 63(b) of the Magistrates Court Act [*Chapter 7:10*];

> "The execution of any sentence of imprisonment, fine or community service shall not be suspended by the noting of an appeal referred to in section sixty; unless –
>
> (i) in the case of imprisonment or fine, bail is granted by a judge or magistrate in terms of section 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; or
>
> (ii) in the case of community service, an application is granted by the magistrate to suspend the operation of the sentence pending determination of the appeal."

In my view, until such time that the conviction has been set aside by the appeal court, it stands and can be acted upon. Therefore the noting of an appeal to the High Court against a conviction and sentence cannot be used as a weapon to bar the police authorities from acting upon the conviction and sentence because they have not been suspended by the noting of an appeal.

From where I am standing the applicant has not been able to establish a *prima facie* right to stop the sitting of the suitability board. He has not been able to establish any of the other grounds for the grant of an interim interdict. What the applicant is trying to do is to use this court to prevent his employer from disciplining him under circumstances where the employer is ordinarily entitled to do so. The alleged violation of his rights is nothing but a smoke-screen to hide the real intention of preventing due process. This court will not allow itself to be used to usurp the authority of administrative bodies from carrying out their statutory power where it has not been shown that such power is being exercised in violation of the law.

The applicant is entitled to defend himself before the statutory tribunal and if not satisfied with the conduct of the hearing or out come to then seek recourse in the courts. What he has done is to jump the gun in the hope of avoiding the consequences of the alleged misconduct.

There is no merit in this application. It is accordingly dismissed with costs.

Mugiya & Macharaga, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners