CONSTABLE MAVUNGA W. 078981Y
versus
THE BOARD PRESIDENT
CHIEF SUPERINTENDENT KAPITAU W)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 and 13 October 2015

Urgent Chamber Application

N Mugiya, for the applicant
D Mambo, for the respondent

MANGOTA J: The applicant is a member of the Zimbabwe Republic Police. He, on 27 April 2015, was convicted of contravening para 35 of the Schedule to the Police Act, [*Chapter 11:10*]. He was sentenced to 7 days imprisonment.

The applicant filed an application with the court for a review of the proceedings which related to his conviction and sentence. The application is under case number HC 7733/15. He also applied, and successfully so, for stay of execution of the sentence which was imposed upon him. The sentence will not, therefore, be executed until his review application has been heard and determined.

Following his conviction and sentence, the second respondent issued a convening order and served it upon the applicant. The order was issued in terms of s 50 (1) and (2) of the Police Act as read with ss 12 and 13 (1) (b) of the Police [Trials and Boards of Inquiry] Regulations, 1965 [No. GN 97 K of 1965]. It invited the applicant to appear before a Board of Inquiry. The inquiry was aimed at ascertaining and establishing the suitability or fitness of the applicant to remain in the police force or to retain his rank, seniority or salary.

The applicant attached to his application a copy of the convening order. He marked it Annexure A. The annexure appears to have been prepared on 26 August, 2015.

The convening order prompted the applicant to file the present urgent chamber application. He prayed that the inquiry be stayed pending the finalisation of the review which

he filed under case number HC 7733/15. He said he would suffer irreparable harm if the inquiry was not stayed on an urgent basis. He said his colleagues, whom the trial officer charged, convicted and sentenced together with him, have had their boards of inquiry stayed by the court pending finalisation of their respective applications for review of their convictions and sentences.

The second respondent opposed the application. He had been cited in his official capacity. The first respondent who was also cited in his official capacity did not appear in person or through legal representation. He filed no papers with the court. He was, in fact, as good as having been in default.

In his opposition to the application, the second respondent stated in *limine* that the applicant's grounds for review were not supported by evidence. He said the applicant made bold allegations in his founding affidavit.

It goes without saying that the second respondent's in *limine* matters were directed at the application for review more than they related to the present urgent chamber application. The court will not, therefore, pay any regard to them in its determination of this application. It will, however, not remain obvious to what the second respondent stated in his opposing affidavit. What he stated therein was and is relevant to the present application.

The date on which the inquiry was scheduled to take place was not stated with any degree of particularity. It was, in fact, as unclear as a foggy morning part of a day.

The notice on which the application was premised gave 4 September, 2015 as the date on which the applicant would appear before the suitability board which would inquire into his suitability or fitness to remain in the police force or to retain his rank, seniority or salary. Paragraph I of the notice reads:

> "The Applicant has been called to appear before a board of suitability on the 4th of September, 2015 and the primary aim of the board of suitability is to discharge the applicant from the police service." [emphasis added].

The certificate of urgency's date was different from the above mentioned date. Paragraph I of the certificate reads:

> "The respondents have called the applicant to appear before a board of suitability on the 2nd of October, 2015 and the objective of the board is to discharge the applicant from the police service." [emphasis added].

The court was left in a quandary as to what the exact date of the inquiry was between the two dates. The importance and relevance of the exact date on which action was/is contemplated can hardly be over-emphasised. Where 25 September 2015 was the date to go

bye, the basis of urgency would have disappeared altogether as the application would have been overtaken by events. The stated was the court's *prima facie* view which it discarded in the interests of fairness and justice.

During the hearing of the application, the applicant clarified the position which related to the two dates. He advised that the inquiry was scheduled for 2 October, and not 25 September, 2015.

The applicant, it is evident, moved the court to interdict the respondents from executing a lawful action. The action is provided for in s 50 of the Police Act. The section confers authority on the second respondent to convene such a board. The question which begs the answer is whether or not the applicant can interdict the second respondent from acting in terms of the authority which the law confers upon him. The court's view is that he cannot. It, in this regard, associates itself with what Mathonsi J said in *Tamanikwa* v *Board President and Another*, HH 676/15 wherein he remarked as follows:

> "An activity conducted in accordance with the law cannot lawfully be interdicted unless if in so doing the convenor commits an irregularity or violates the law in terms of which he is so acting" [emphasis added].

In his certificate of urgency, the applicant made insinuations which tended to show that the second respondent, in convening a board of suitability, is committing an irregularity or is violating the law in terms of which he (the second respondent) is acting. He referred the court to s 68 (2) of the Constitution of Zimbabwe in the mentioned regard. He stated that the respondents did not comply with that section. He said that was so because the respondents did not furnish him with the reasons why they decided to take administrative action against him.

It is accepted that the applicant's conviction and sentence of 27 April, 2015 is pending review at this court. The applicant admitted that, in addition to the stated conviction and sentence, he was, on 22 January 2014, convicted of contravening para 12 of the schedule to the Police Act. He, admitted, further, that he was sentenced to 10 days imprisonment. He made the admission after the second respondent had revealed that matter to the court in his opposing papers.

The applicant did not say that he appealed against his conviction and sentence of 22 January, 2014. He did not state that he applied for review of that conviction and sentence. The conviction and sentence, therefore, stand.

The second respondent cannot, under the circumstances, be said to be acting irregularly or in violation of the law which confers upon him the authority to convene the

Board of Inquiry. Put differently, the second respondent does not act in a vacuum. He exercises his discretionary powers which s 50 of the Police Act conferred upon him in terms of the law. He therefore, does have the requisite authority to institute the board of inquiry to determine the suitability or otherwise of the applicant to remain in the police force or to retain his rank, seniority or salary. The board is premised on the applicant's conduct on or off duty.

The fact that the applicant did not challenge the conviction and sentence of 22 January, 2014 prompted the second respondent to exercise his authority and convene the board of suitability which would inquire into and determine the status of the applicant in the police force. The applicant was being economic with the truth when he stated that he did not know why the respondents were taking that administrative action against him. He knew why they were doing so and he chose to hide that fact from the court when he filed his urgent chamber application. The respondents did not, under the circumstances, violate s 68 (2) of the Constitution of Zimbabwe. The reasons for their conduct were known to the applicant. In any event, nothing prevented the applicant from seeking such reasons if he so wished.

Subsection 1 of s 68 of the constitution confers a right on any person to administrative conduct which is lawful, efficient, reasonable proportionate, impartial and both substantively and procedurally fair. There is no doubt that the respondents complied with s 68(1) of the Constitution when they issued a convening order in terms of s 50 of the Police Act. Their aim and object were to promote an efficient administration as is contemplated by s 68 (3) (c) of the constitution.

Section 50 is not in the Police Act for no reason. It serves a very useful purpose. It confers authority on the second respondent to instil discipline on all officers and members who fall under his command. Discipline is a hallmark of all members of the uniformed forces the world over.

The section should not be read as a stand-alone provision. It should be read together with subsections (1) and 3(c) of s 68 of the Constitution of Zimbabwe. It operationalises the mentioned two subsections of s 68 of the constitution.

The applicant stated that the objective of the inquiry was to discharge him from the police force. He did not advance any plausible reasons which supported his claims.

Subsection (3) of s 50 of the Police Act confers a discretion upon the second respondent as regards the punishment which he may met out on errand members of the police force. It allows him to:

(i) discharge a member from the police force; or

(ii) impose any one or more of the following penalties-

A - reduction in rank or salary;

B - loss of seniority

C - withholding of an increment of salary;

(iii) reprimand a member.

Any of the abovementioned options are open to the second respondent in respect of a member whom the board finds, after inquiry, to be-

(a) unsuitable or inefficient in the discharge of his duties; or

(b) otherwise unfit to remain in the police force or to retain his rank, seniority or salary.

The applicant's insistence on the claim that the respondents want to discharge him from the police force remains a matter to which no one else but him is privy. The applicant was aware that he was convicted and sentenced on 22 January 2014. He knew that disciplinary action would be taken against him in respect of that conviction and sentence. He selectively stated his conviction and sentence of 27 April 2015 which is pending review at this count. He deliberately omitted to mention his conviction and sentence of 22 January, 2014. He, instead, chose to dwell on the application for review as a way of avoiding the inevitable. That is serious abuse of court process which the court would not condone.

Litigants who bring cases to court should be discouraged from making a selection of what they will, and will not, tell the court. They should lay all the facts which are within their knowledge before the court. Candidness of a party particularly with the court is a salutary principle of the country's system of justice delivery. Half-baked truths are not good for the court or for anyone else for that matter let alone the applicant who is moving the court to take a certain position which is favourable to him.

The applicant stated that his colleagues whom the trial officer charged together with him and convicted as well as sentenced did have their boards of suitability stayed pending finalization of their applications for review. He stated that he attached copies of the orders which the court granted in favour of his colleagues whose circumstances he said were an all fours with his own. He referred the court to Annexures B and C which he said were copies of the orders which the court made in favour of his colleagues. He submitted, on the stated basis, that the law should be uniformly applied. He stated that, if his colleague one Constable Ngwazi who faced the same circumstances as his did have his board of inquiry stayed after he (Ngwazi) applied under case number HC 8315/15 to have the inquiry stayed pending his application for review of the trial officer's proceedings, the applicant must have the same

protection of the law. He, in this regard, referred the court to s 56(1) of the constitution of Zimbabwe. The section reads;

> "56 Equality and non-discrimination
> (1) All persons are equal before the law and have the right to equal protection and benefit of the law".

A perusal of the record showed that Annexures B and C which the applicant referred the court to were not part of the papers which he attached to his application. In its desire to do justice to him, the court made an effort to establish the presence in the record or the whereabouts of the annexures. The applicant's response was that the order which he was referring to related to only one, and not two, of his colleagues. He said it related to a Constable Ngwazi. He promised to avail to the court the order which he said related to constable Ngwazi. He said he would avail the order in question before close of business on 9 October 2015. Towards the end of the day, he filed with the court a copy of an interim order which related to the stay of the detention of his colleagues and him pending the determination of their application for review. The furnished order was not in any way connected to a stay of the board of inquiry which is the subject of these proceedings.

The applicant, it is evident, had once again stated as true what he knew was not such. When he realised that he had no route through which he would escape he did the right thing. He eventually had to, and he did actually, hone up. This is not how it should be. The applicant should at all material times conduct himself in an honest manner. No one let alone the court would allow him to engage in a game of hide and seek as he did *in casu*. His conduct cannot remain uncensored.

Apart from the fact that his application did not meet the requirements of an interdict, the application falls on the basis that he chose to lie in-between his teeth both on paper and through the submissions which he made when the application was being heard. The court remains uncertain if his legal practitioner acted in collusion with him in respect of the lies which he told. If the legal practitioner did, he must desist as that has bearing on his profession. His duty is first and foremost to the court without, at the same time, neglecting his obligation towards his client whose interests he must protect to the best of his ability. The court's view is that the legal practitioner did not check his facts with his client and was, therefore, placed in a very awkward position out of which he found it difficult, if not impossible, to emerge unscathed.

The court has considered all the circumstances of this case. It is satisfied that the applicant failed to discharge, on balance of probabilities, the *onus* which rested upon him. The application is, in the premise, dismissed with costs on a higher scale.

Messrs Mugiya & Macharaga, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st to third respondents' legal practitioners