SERGEANT MUTASA C. 0477442S
versus
THE BOARD PRESIDENT
(CHIEF SUPERINTENDENT DUBE N)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 30 December, 2014 & 7 January, 2015

Urgent Chamber Application

N. Mugiya, for the applicant
T. Tabani, for the respondent

MANGOTA J: The relief which the applicant is seeking is contained in the Draft Order which he filed of record. It reads:-

"TERMS OF THE FINAL ORDER SOUGHT

1. The Respondents are interdicted from conducting the Board of suitability until the appeal of the Applicant to the Commissioner-General of Police is finalised and an application for review on case No. HC 9985/14 is finalised.
2. The Respondents are ordered to pay costs of suit.

INTERIM RELIEF GRANTED

Pending the confirmation of the Provisional Order,

IT IS ORDERED THAT

1. The Board of Suitability proceedings against the Applicant on the 24th December 2014 be and is hereby suspended pending the return date" (emphasis added).

The sequence of events which pertain to the present application run in the following order:

(a) On 13 November, 2013 the applicant who is a Sergeant in the police force was tried and convicted on a charge of contravening para 35 of the Schedule to the Police Act, [*Cap 11:10*] as read with s 34 of the Act. He was, on the same mentioned date, sentenced to 14 days imprisonment;

(b) On 19 November, 2013 the applicant appealed against the decision of the trial officer to the Commissioner-General of Police.

(c) Between 23 October, and 6 November, 2014 the applicant served his 14 days sentence at Chikurubi Detention Barracks;

(d) On 7 November, 2014 the applicant was released from Detention;

(e) On 10 November, 2014 the applicant was served with a convening order for the Board of suitability which aimed at determining his status in the police force. The Board hearing was scheduled for 14 November, 2014.

(f) On 11 November, 2014 the applicant filed his application for review of the trial officer's proceedings of 13 November, 2013. The application was filed under case number HC 9985/14.

(g) On 12 November, 2014 the applicant filed his first urgent chamber application with the court. The application's case number is HC 10015/14.

(h) Pursuant to the urgent chamber application which had been filed, the court did, on 13 November 2013, order that the suitability Board proceedings of 14 November, 2014 be suspended pending the hearing and finalisation of the application with which it was seized. It set down the matter which pertained to the application for hearing at 9 am of 17 November, 2014.

(i) On 17 November, 2014 the parties appeared before the court and Ms *Zvimba*, for the applicant, withdrew the application. She informed the court that there were some procedural irregularities which she wanted to address.

(j) On 13 December, 2014 the respondents served the applicant with the second convening order for the Board of suitability. The Board's sitting was scheduled for 24 December, 2014.

(k) On 19 December, 2014 the applicant filed yet another urgent chamber application with the court. He filed it under case number HC 11333/14.

(l) On the same mentioned date, the court ordered that the Suitability Board proceedings of 24 December, 2014 be suspended pending the hearing and finalisation of the second urgent chamber application which the applicant had filed.

In the second application, the applicant made reference to:

(i) his trial and conviction of 13 November, 2014;

(ii) the appeal which he filed with the Police Commissioner-General;

(iii) the convening order of 10 November, 2014 – and

(iv) proceedings of the Suitability Board which he said did sit on 14 November, 2014 to determine his status in the police force.

He stated that he was ignorant of the reasons which persuaded the respondents to convene the second Suitability Board when, according to him, the results of the Suitability Board of 14 November, 2014 had not been availed to him. The conduct of the respondents, he claimed, was not consistent with s 50 of the Police Act. It was his contention that he would suffer irreparable harm if the Suitability Board's proceedings which were scheduled for 24 December, 2014 were allowed to proceed. He, accordingly, made every effort to move the court to grant him the interim relief for which he had prayed.

The respondents opposed the application. They raised one preliminary matter after which they proceeded to deal with the substantive aspects of the application. They stated, correctly so, that the applicant withdrew the first application on 17 November, 2014. They said the application was withdrawn because it was not compliant with the rules of court. They remained of the view that the application was bad at law and had, therefore, to be withdrawn. They said the Board's hearing was aborted following service upon them of the court order of 13 November, 2014. It was their view that the withdrawal of the application allowed the second Suitability Board to sit and determine the applicant's status in the police force. They insisted that their conduct of 13 December, 2014 was within, and not outside, the law.

The issue which falls for determination is whether or not the application is urgent and, if it is, the second issue is whether or not the applicant treated his case with the urgency which it deserved.

The applicant was tried, convicted and sentenced on 13 November, 2013. He filed his appeal with the Police Commissioner-General some six days after his conviction. The Police Commissioner-General handed down judgment in respect of the appeal on 16 September, 2014.

The applicant stated that, as at the date of the hearing of this application, the respondents had not furnished him with the result of his appeal to the Police Commissioner-General.

On 12 November, 2014 the applicant filed a notice of appeal with this court. He did so under case number CA 979/14. He, in that regard, was, or is, appealing against the judgment which the Police Commissioner-General handed down following the appeal which he had filed with him. He cited the Police Commissioner-General and the State as the first, and the

second respondents respectively. He cited himself as the appellant in the mentioned appeal. His grounds of appeal in that matter read as follows:-

"(A) AD CONVICTION

1. The 1st Respondent erred by upholding the conviction of the Appellant which did not link the Appellant by way of evidence to warrant a conviction.
2. The State witnesses were clearly not reliable such that the trial officer and the 1st Respondent should not have believed them.

3. The Appellant was actually exonerated by the State witnesses' evidence and the State, therefore, failed dismally to prove even a *prime facie* against the appellant.

(B) AD SENTENCE

4. The 1st Respondent erred when he confirmed the sentence by the trial officer which sentence is not based on principles of sentencing. It is unnecessarily excessive and harsh" (emphasis added).

There is no doubt that the applicant knew about the decision of the Police Commissioner-General earlier than 12 November, 2014. He knew, as at that date, that the Police Commissioner-General had:

(i) upheld the conviction of the applicant;

(ii) believed the State witnesses' evidence – and

(iii) confirmed the sentence which the trial officer imposed upon him.

The applicant was, accordingly, not being candid with the court when he said the respondents did not avail to him the judgment which the Police Commissioner-General handed down on 16 September, 2014. He, in fact stated, in his Notice of Appeal, that he was notified of the decision of the first respondent on 7 November, 2014. The court accepts the 7th November, 2014 as the date that the applicant became aware of the judgment of the Police Commissioner-General in respect of his appeal to the latter authority.

The applicant's application for review was filed under case number HC 9985/14. It was filed with the court on 11 November, 2014. He attached to the application the trial officer's record of proceedings. He did not include in the application for review the judgment of the Police Commissioner-General to whom he had appealed against the decision of the trial officer.

It is evident from a reading of the review application that what the applicant wants reviewed is not the judgment of the Police Commissioner-General as read with the trial officer's record of proceedings, but the trial officer's record of proceedings only.

Given the fact that the applicant was convicted on 13 November, 2013 and that he applied for review on 11 November, 2014 there is no doubt that the submissions of the respondents are not without merit. The applicant, it is evident, did not apply for condonation of late filing of application for review. It is as clear as night follows day that his review application will not be entertained at all. That will be so as the applicant did not apply for condonation of late filing of review and he was not condoned for the delay which occasioned his application for review.

The court cannot state with any degree of certainty if it is the applicant or the latter's legal practitioner or both who made up his or their mind(s) to display such craftiness as is evident from a reading of the record. He, or they, realised that the applicant had not applied for condonation of late filing of review. He, or they, realised further that the applicant had not been condoned by the court. He, or they, made a tactical withdrawal of the first chamber application which they had filed on the basis of urgency and waited for the respondents' next move. When the respondents whose first Suitability Board hearing was aborted following the court order which had been made served the applicant with the second convening order, the applicant mounted the present application. He did so in the vein hope that the law which he was flouting left, right and centre would come to his protection. The respondents were indeed correct when they submitted that the applicant was abusing court process. The court will demonstrate the view which it holds on this aspect of the matter as follows:

(i) the applicant knew that he had not been condoned. He, however, made no mention of that matter in his first, or second, urgent chamber application. All he did was to allege that he had a review application which he had filed with the court. He, in the mentioned regard, sought to woodwink the court into believing that his application for review was genuine when he knew that he had made it as a matter of course without any belief in its genuiness;

(ii) he lied to the court that judgment which related to the appeal which he had filed with the Police Commissioner-General had not been availed to him when he knew that it was furnished to him on 7 November, 2014. It was his belief that the lie which he told in that regard would strengthen the case which he was making in both urgent chamber applications which he filed with the court on:-

(a) 12 November, 2014 - and

(b) 19 December, 2014

(iii) The applicant's conduct of excluding from the record of the second urgent chamber application vital court process which would have assisted the court to come to grips with his present application speaks volumes of the type of crafty litigant who he is. He did not include in the present application the following court process:

(a) The Notice of Appeal which he filed with the court on 12 November, 2014 under case number CA 979/14,

(b) The review application which he filed on 11 November, 2014 under case number HC 9985/14

(c) The Police Commissioner-General's judgment which he received on 7 November, 2014 – and

(d) The trial officer's record of proceedings which he attached to his application for review.

The court remains convinced that he left out the above mentioned process not by accident but by design. He was cognisant of the fact that such process would not assist his case and he, therefore, made up his mind to exclude that process from the second urgent chamber application which he had filed. The court finds it extremely difficult, if not impossible, to condone dishonesty of such a serious magnitude.

Persons who approach the courts for protection must not be allowed to act in the manner which the applicant displayed and expect to receive sympathy from the courts. Litigation is not a game of chance where one party, through crafty conduct, ambushes the other party and is allowed to get away with it as easily as games of whatever nature are played. Litigation presupposes the well-known notion that a litigant who alleges that his rights have been interfered with or violated by the other approaches the court with the genuine belief that the violator of his rights will be brought to book. That litigant is enjoined, at law, to lay all the matters upon which his case is anchored before the court so that justice may be allowed to take its course and a just decision of the matter with which a court is seized is arrived at.

The applicant's legal practitioner is an officer of the court. His duty is first and foremost to no one else but the court. The oaths which he took when he was admitted into the profession beckon him to always remain truthful with himself, with the court, with fellow legal practitioners and with those whom he represents in, and out of, court. It is the court's

belief that the applicant's legal practitioner was not part and parcel of the dishonesty which was conspicuous in the present application.

The applicant's prayer was that the respondents be interdicted from conducting the board of suitability until:

(a) his appeal to the Commissioner-General of Police has been finalised – and

(b) his application for review has been finalised.

The abovementioned grounds upon which his prayer is based have no merit. The court found, as a fact, that the applicant's appeal to the Commissioner-General of Police was finalised on 16 September, 2014 and he was availed of the Commissioner-General's decision on 7 November, 2014. The court remains of the firm view that the applicant's application for review will not see a day in court as he did not comply with the rules of court. It will, in short, not be entertained at all.

The court has considered all the circumstances of this matter. It is satisfied that the application has no merit at all. The applicant could not, and did not, establish his case, on a balance probabilities, against the respondents. The application is, accordingly, dismissed with costs on a higher scale.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners