

SERGEANT CHIBAYA L 060200 J
versus
THE BOARD PRESIDENT
(Chief Superintendent Marufu)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 20 January 2016

Urgent Chamber Application

M Mugiya, for the applicant
H Magandwe, for the 1st & 2nd respondents

NDEWERE J: The applicant was accused of soliciting for a bribe from a commuter omnibus operator and tried by a single officer in terms of s 34 of the Police Act, [*Chapter 11:10*] on 16 October 2014. He was convicted and sentenced to 5 days imprisonment at Chikurubi Detention barracks plus \$10-00 fine. He appealed to the second respondent, the Commissioner-General of Police against the conviction in terms of s 11(c) of the Police (Trial Boards) Regulations of 1965 as read with s 34 (7) of the Police Act (*supra*). The second respondent dismissed his appeal on 13 April 2015.

On 13 May, 2015, the applicant alleges that he filed an appeal to the High Court challenging second respondent's decision. A copy of a notice of appeal was attached to the applicant's papers to confirm that indeed the applicant noted an appeal. The visible part of the case number on the notice of appeal is HC CA 436/1.

The respondents responded to the notice by inviting the applicant, through a letter to his legal practitioners dated 14 May, 2015, to deposit US\$100-00 being the estimated costs for the preparation of the record with their Director-Finance. It appears nothing was done and on 27 May, 2015, the respondents wrote to the Registrar, High Court, advising that the applicant had not complied with the Rules of Court requiring payment of estimated costs of the record within 5 days, and that therefore the appeal was invalid and should be struck off the roll.

On 17 July, 2015, the applicant filed an urgent chamber application challenging an invitation by the first respondent to him to attend a suitability inquiry in terms of s 35 of the Police Act [*Chapter 11:10*]. In his founding affidavit, the applicant said the inquiry should not be held because of the appeal he had filed with the High Court against his conviction. Paragraphs 5, 6 and 7 of his founding affidavit clearly reveal that the basis of his challenge to the inquiry was the appeal he had filed with the High Court. He also alleged non-compliance with s68 of the Constitution. The terms of the order he sought in the application was to interdict the respondent “from conducting a board of suitability against the applicant pending the final determination of CA 436/15.”

The first and second respondents opposed the application. The respondents said the application was not urgent; there was no legal basis to interdict the convening of the board and that there was no *prima facie* appeal which can suspend the convening of the Board of Suitability. They also said the applicant could not appeal to the High Court against a decision by a single officer. Both parties filed heads of argument before the application was argued; emphasising their points.

During oral submissions, applicant’s counsel started to refer to issues not raised in the founding affidavit. He alleged that applicant had been tried and acquitted in the Magistrates Court for the same offence and should therefore not have been tried again by a single officer. This was a completely new factor, previously not raised in the founding affidavit. The fact that it was not raised in the founding affidavit meant that the respondents were denied the opportunity to respond to that allegation. In addition, applicant’s counsel referred to some police standing orders not previously raised in the founding affidavit.

It is trite that in applications, an applicant stands or falls on his founding affidavit. He cannot be allowed to bring in new issues not previously raised in the founding affidavit. This legal point was emphasised in *Austerlands (Pvt) Ltd v Trade and Investment Bank & 2 Ors*, SC 92/05 where the court said,

“The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet.”

For this reason, the court had no choice but to disregard all reference to a previous trial and all reference to Police Standing Orders since these matters were not raised in the founding affidavit.

After submissions, all the parties submitted written closing submissions, restating their previous positions.

The respondents persisted with their argument that the High Court had no jurisdiction where the trial had been held by a single officer. In my view, this argument is not relevant in the determination of the urgent chamber application before me; it is relevant to the appeal court itself. I therefore agree with the applicant's submission in para 13 of his heads of argument that "whether or not the appeal can lie before this court shall be dealt with by the appeal court and not this court."

Consequently, the issues which remain for determination are whether the application is urgent and whether there is a legal basis to interdict the respondents from convening a suitability board. My view is that the application is not urgent. The chronology of this matter is as follows:

- 15 October, 2014 - applicant is convicted. He appeals to second respondent, Commissioner General
- 13 April 2015 - appeal is dismissed by second respondent
- 13 May, 2015 - applicant "files" an appeal to the High Court;
- 14 May, 2015 - applicant asked for costs of record, does not pay costs of preparation of record.
- 27 May, 2015 - respondents write to Registrar – High Court for him to strike off appeal for failure to pay costs of record.
- 22-27 June 2015 - applicant quietly serves his sentence
- 17 July 2015 - applicant makes an urgent chamber application to interdict respondents from convening a suitability board.

It is important to note that the applicant did not dispute the failure to pay for the record. This means the applicant accepted that he did not pay for the record. He also did not dispute the request by the respondents to strike off the appeal. So the probability is that the appeal, if it was ever noted, was struck off.

Furthermore, why approach the court on an urgent basis to interdict the convening of suitability 19 days after serving the sentence? The applicant is a police officer who was aware of all the procedures which follow after misconduct convictions so it is clear that when he served his sentence, he had accepted his fate. The urgent application which he filed 19 days after

serving his sentence is an afterthought which amounts to self-created urgency. The applicant merely wants to delay the day of reckoning by filing this application.

Since the pending appeal was given as the basis of this application, the court decided to check at which stage the appeal was. The court found itself faced with two conflicting case references. The first reference was CA 438/15 given on the face of the application on p 2 of the application where the applicant said,

“The applicant has challenged the very decision which the respondents seek to enforce and the appeal is pending before this court on case no. CA 438/15.”

The same case reference and statement were repeated in the certificate of urgency on p 4 of the application. However, a perusal of CA 438/15 revealed a different appeal by one Pride Masiyambiri.

The applicant’s founding affidavit then attached a copy of a notice of appeal. The visible part of the reference is given as CA 436/1. The draft order gave the case number for the pending appeal as HC CA 436/15.

So the court once more sought for CA 436/15. A perusal of CA 436/15 revealed another completely different appeal by one Simon Chibatamoto.

So it appears that the respondents were correct in their submission that there is no appeal pending before the High Court. Even if the respondents are incorrect, the fact remains that no pending appeal has been cited to this court by the applicant as the two references he gave to the court refer to appeals by other parties. So for purposes of this determination, applicant has failed to provide proof of a pending appeal, yet that appeal was the basis of his urgent chamber application to this court. So without the appeal, applicant’s application has no foundation. Without the appeal, there is no basis to interdict the convening of the suitability board.

It is clear from the facts of this matter that applicant accepted his fate after the dismissal of his appeal by the second respondent on 13 April 2015 and proceeded to serve his sentence quietly. His approach to this court on 17 July, 2015, three months after the dismissal of his appeal by second respondent is an afterthought to delay the day of reckoning. It amounts to self-created urgency. Why wait for the convening of a suitability board to spring into action? The application is therefore, not urgent.

Mugiya & Macharaga, applicant's legal practitioners
Prosecuting Authority, 1st & 2nd respondents' legal practitioners