EMPILWENI SIBANDA
and
PISTON MANGWANDA
versus
POLICE SERVICE COMMISSION
and
COMMISSIONER GENERAL OF POLICE
and
CHIEF SUPERINTENDANT TEMBO

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 17 & 19 March 2015

Urgent Chamber Application

P. Hamunakwadi, for the applicants
K. Mahodzwa with *P. Kapasura*, for the respondents

MATHONSI J: The 2 applicants are Police Constables who, at the material time, were based at ZRP Kennilworth base in Inyathi, Matabeleland North Province. They appeared before a single officer on 15 April 2014 at ZRP Nkayi District Headquarters each facing 2 counts under the Police Act [*Chapter 11:07*] for alleged infractions committed while on duty.

In the first count, they were charged with contravening para 35 of the Schedule to the Act as read with s 34 of the Act, that is, acting in an unbecoming manner prejudicial to good discipline likely to bring discredit to the police force, it being alleged that at ZRP Kennilworth base on 1 April 2014, they wrongfully and unlawfully assaulted Liverton Ndlovu with a button stick and sjambok all over the body.

In the second count, they were charged with contravening para 34 of the Schedule to the Act as read with s 34 of the Act, that is they wrongfully, unlawfully and unnecessarily detained the said Liverton Ndlovu at Kennilworth police base for 2 days without any charge preferred against him.

The applicants were found guilty as charged and in spite of their pleas that they were first offenders, who were very apologetic for what they did and very junior, they were sentenced to spend time in detention at ZRP Fairbridge detention camp. That trial was

completed on 19 April 2014. The applicants piously took their punishment and did not contest that outcome, an election they were to soon regret as, a Suitability Board was later set up in terms of s 50 of the Act to inquire into their suitability to remain in the police force.

The Suitability Board sat on 10 June 2014 and recommended their discharge from the force in light of their conviction and sentence by a single officer in April 2014. The Commissioner General obliged, promptly dispatching a police radio signal on 4 July 2014 which was brought to the applicants' attention on 7 July 2014.

The applicants responded by lodging an appeal against that decision to the Police Service Commission on 9 July 2014. While the appeal was still pending, the applicants filed a court application out of the Bulawayo High Court on 5 August 2014 seeking a review of the decision of the Suitability Board made on 10 June 2014 recommending their discharge from the force. The order that they craved was for the quashing and setting aside of the recommendation of the Board that they be dismissed, the setting aside of their dismissal by the Commissioner General of Police and that the matter be remitted for a fresh hearing before a new Suitability Board.

The review application is yet to be determined. Meanwhile the applicants pursued the appeal to the Commission which appeal was finalised on 12 February 2015. The appeal was unsuccessful as the Commissioner General's decision to dismiss them was upheld. That decision was communicated on 6 March 2015 with specific instructions that they be terminated on 13 March 2015.

It was however not until the eleventh hour on 12 March 2015 that, self-acting, they launched this urgent application seeking the following relief:

"A TERMS OF THE FINAL ORDER SOUGHT

That the provisional Order granted by the Honourable Court be confirmed in the following manner:

1. That the decision to dismiss applicants be and is hereby reversed.

2. Respondents to pay costs of the suit.

B INTERIM RELIEF GRANTED

1. That the discharge of the 1st and 2nd applicants be and is hereby set aside.

2. That the 1st and 2nd applicants must continue with their duties at ZRP Mbembesi Police Station pending finalisation of any outstanding matters".

The provisional order sought by the applicant is not in Form 29C and is clearly defective. In addition, the applicants appear to be seeking what is effectively substantive relief by urgent application, the setting aside of a dismissal, without them having proved their case. This is because interim relief is granted on the mere proof of a *prima facie* case: *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188(H).

Mr *Mahodzwa* for the respondents took 2 points *in limine* namely that the certificate of urgency in support of the application is fatally defective, it having been drawn by the first applicant and secondly that the matter is itself not urgent given that the applicants were dismissed as far back as July 2014.

Rule 242 (2) as read with r 244 of the High Court of Zimbabwe Rules, 1971 does not require an application by an unrepresented applicant to be accompanied by a certificate from a legal practitioner. It provides:

> "Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) to (e) of subrule (1)-
>
> (a) he shall set out the grounds for his relief fully in his affidavit; and
> (b) unless the applicant is not represented, the application shall be accompanied by a certificate from a legal practitioner setting out; with reasons his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a) ,(b), (c). (d) or (3) of subrule (1)."

It is only when the applicant is represented by a legal practitioner that a certificate from a legal practitioner should accompany the application and should state the urgency. I find no merit in the first point taken *in limine*.

The second point relates to urgency *perse*. The proceedings before a single officer were concluded on 19 April 2014. They were not challenged at all. The Suitability Board concluded its deliberations on 10 June 2014 with recommendations known to the applicant which the Commissioner General acted upon in discharging the applicants. That process was challenged by way of appeal to the Police Service Commission whose outcome was on 12 February 2015. Meanwhile the applicants proceeded on another adventure in the Bulawayo High Court seeking review without exhausting internal remedies.

The review application appears to have been made out of time to the extent that it related to the proceedings before a trial officer concluded on 19 April 2014 and the Suitability Board decision taken on 10 June 2014. Surprisingly it is that application which the applicant

would like to pursue even though he has not sought condonation. The applicants appear content to leave the dismissal of their appeal by the first respondent intact. They have not come to court seeking interim relief pending any challenge of the first respondent's decision but pending the pursuit of an ill-conceived and irregular review application.

More importantly, the applicants have known about their dismissal for several months but chose to pursue wrong options. Right now they have chosen not to contest the outcome of the appeal upholding their dismissal.

The totality of the foregoing facts is that the matter does not pass the test of urgency. It is a classic case of urgency which stems from a deliberate inaction until the day of reckoning is nigh. It is not what was contemplated by the rules. The applicants' woes have been exacerbated by lack of representation as whatever process they prepared and filed tended to misfire for that reason. The belated arrival of Mr *Hamunakwadi* for the hearing did not yield any useful result as he appeared ill-prepared having been instructed a short while before the hearing but still blindly prosecuted the ill-fated application.

In the result, it is ordered that:

1. The hearing of the application as urgent is hereby refused.
2. The applicants shall bear the costs of suit jointly and severally the one paying the other to be absolved.

Mugiya and Macharaga Law Chambers, applicants' legal practitioners
Attorney General's Office, respondents' legal practitioners