

CONSTABLE NYABEREKA 982058D
versus
THE BOARD PRESIDENT
(Chief Superintendent Marufu D)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 28 March 2017 & 7 June 2017

Urgent Chamber Application

N Mugiya, for the applicant
Ms A Magunde, for the respondents

MUREMBA J: On 28 March 2017 I heard this matter and dismissed it with costs. Now I have been asked for the written reasons thereof. These are they.

The facts of the matter as narrated by the applicant are as follows. On 3 March 2014, the applicant, a police officer was tried for an offence in terms of s 34 of the Police Act [*Chapter 11:10*] and was convicted. She was sentenced to 7 days at the detention barracks. She then appealed to the second respondent who on 17 December 2014 dismissed the appeal. The applicant filed an appeal in this court under HC CA105/15 against the dismissal of his appeal by the second respondent. Meanwhile, in March 2015 the second respondent convened a board of suitability against the applicant. The Board President was Chief Superintendent N. Saunyama. The applicant objected to the convening of the board of suitability whilst her appeal was still pending in this court. Consequently, she filed an urgent chamber application under HC 2679/15 and obtained an order which interdicted Chief Superintendent Saunyama and the second respondent from proceeding with the board of suitability until the appeal in HC CA 105/15 had

been finalized. The order was granted by consent on 30 March 2015. Chief Superintendent Saunyama and the second respondent respected that court order and stopped proceedings.

On 24 March 2017, the applicant filed the present urgent chamber application stating that on 23 March 2017 she had been served with another convening order to appear on 28 March 2017 before a board of suitability now being presided over by the first respondent, Chief Superintendent Marufu D. The applicant raised two complaints. Firstly, that the respondents had decided to convene another board of suitability when there was already another board of suitability chaired by Chief Superintendent Saunyama dealing with the same matter which was suspended by the order of this court under HC 2679/15. She averred that the suitability proceedings before Chief Superintendent Saunyama had neither been terminated nor ordered to start *de novo*.

The applicant's second complainant was that the order which was granted by this court in HC 2679/15 interdicting the second respondent and Chief Superintendent Saunyama from proceeding with suitability proceedings was still extant since it had not been set aside. She said that as such the respondents cannot disobey it by proceeding with the board of suitability when proceedings under HC CA105/15 are still pending. It was the applicant's prayer that the board of suitability convened by the respondents be stayed pending finalization of her appeal under HC CA 105/15.

In response to the application, the respondents filed opposing papers and raised a point *in limine* to the effect that the matter was not urgent. Apparently what the applicant had not disclosed in her papers was that her appeal in HC CA 105/15 had been dismissed by the Registrar of this court for want of compliance with the rules of this court on 15 November 2016. It was the respondents' contention that no appeal was no longer pending before this court and as such they were entitled to proceed with the board of suitability. They submitted that from the time the applicant became aware that her appeal had been dismissed in November 2016 she had not done anything about it but only sprang into action when she was served with the convening order on 23 March 2017. They submitted that this is not the kind of urgency contemplated by the rules of this court because she waited for the imminent arrival of the day of reckoning.

I found the point *in limine* without merit and dismissed it. Although the applicant's appeal was dismissed in November 2016, the respondents did not take any action against her until 23 March 2017 when they served her with a convening order to appear before a board of suitability on 28 March 2017. Her being served with a convening order is what prompted her to act, by filing this application. Surely, before that she would not have been expected to file an urgent chamber application since no situation had arisen which demanded her to so act. She could not have filed the present application when the respondents had not taken any action against her. It is for this reason that I dismissed the point *in limine*.

On the merits the respondents averred that there being no appeal pending anymore they are now entitled to proceed with the board of suitability. They further submitted that no fresh board of inquiry had been convened, but the old board was reconstituted as two of its members, Chief Superintendent Saunyama and Superintendent Ngwenya had since been transferred out of Harare Central Police District. The respondents averred that when the old board convened no deliberations had taken place as it had been served with the urgent chamber application to interdict it from proceeding pending the finalisation of the applicant's appeal in HC CA 105/15. They said that consequently the old board did not commence the suitability proceedings.

During the hearing Mr *Mugiya* was at pains to explain why he was saying the applicant's appeal was still pending in HC CA 105/15 when it had been dismissed by the registrar for non-compliance with the rules. He made a submission that the appeal was not necessarily pending but HC CA 105/15 was still pending. He made reference to the Practice Direction 3/14 by the Chief Justice which he said defines the word 'dismissal' and said that pursuant to that definition it means that the applicant's appeal HC CA 105/15 is still pending.

I found no substance in Mr *Mugiya*'s argument. Practice direction 3/14 which he referred to is irrelevant to the dismissal of the appeal which was made by the registrar as it deals with standard directions for service of notices of set down in the superior courts and nothing more. It was common cause that after the applicant's appeal had been dismissed by the registrar on 15 November 2016, she took no action to reinstate it. As at 23 March 2017 when she was served with a fresh convening order she had not even filed an application to reinstate the appeal. The applicant could not therefore seek to argue that her appeal was still pending and that the interdict

order granted by this court under HC 2679/15 was still binding the respondents not to proceed with the board of suitability. That interdict order automatically lapsed when the applicant's appeal was dismissed by the registrar. The argument by Mr *Mugiya* that the interdict order was still operational when the appeal had been dismissed by the registrar and the applicant had not had it reinstated was very illogical to say the least.

Even the letter that was written by the Registrar on 15 November 2016 addressed to Mr *Mugiya*'s legal firm and copied to the second respondent notifying them of the dismissal of the appeal fully explained the effect or consequences thereof. The letter explained that the applicant had failed to comply with r 22 (2) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules of 1979 by failing or neglecting to pay costs of preparation of the record. The appeal was said to be deemed abandoned and was thus dismissed, In the last paragraph the letter says:

“The record is returned herewith together with this notice to the court of *a quo* to enable the respondent to enforce the judgment of the court of *a quo*.”

This letter buttresses my point that with the appeal having been dismissed by the registrar and not having been reinstated by the applicant the respondents had the green light to proceed with the board of suitability. The interdict order which this court had granted had lapsed on 15 November 2016 with the dismissal of the appeal. Even when I heard the matter on 28 March 2017 no application for reinstatement of the appeal was pending before this court. So there was nothing that was standing in the way of the respondents from proceeding with the board of suitability.

About the applicant's second complaint that the respondent's had convened another board to be chaired by the first respondent when there was already another board which was chaired by Chief Superintendent Saunyama which had already partly heard the matter, I realised that this was an issue I could not resolve in the absence of the record of proceedings pertaining to what happened when the applicant appeared before the board that was chaired by Chief Superintendent Saunyama. It was just the applicant's word against the respondents' word. Consequently, I ruled that this was an issue that the applicant could raise when she appeared before the new board which was now being chaired by the first respondent for it to make its determination and decide on which board was to preside over the matter. It was not an issue that

was material to the determination of the application that was before me since the only relief that the applicant was seeking from me was an order to stay the convening of the board of suitability presided over by the first respondent until her appeal in HC CA 105/15 had been finalised.

It is for the above reasons that I dismissed the application with costs.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Attorney General-Civil Division, respondent's legal practitioners