CONSTABLE SITHOLE QEDISANI 0587340
versus
SUPERINTENDANT S. DUBE
(Head of the board of suitability)
and
COMMISIONER GENERAL OF POLICE
And
POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 14 March 2024
Judgment delivered on 29 August 2024

N.Mugiya for the Applicant
A Zikiti, for the Respondents

Opposed Application

ZISENGWE J: This judgment is dedicated entirely to the resolution of a preliminary point raised by the applicant within the boarder context of an application for review. The applicant, was up until his dismissal, a member of the Zimbabwe Republic Police (ZRP) where he held the position of Constable. His discharge followed a recommendation to that effect by the Suitability Board of Inquiry ("the Suitability Board"). He is aggrieved by his dismissal which he claims is tainted by several procedural irregularities, hence his overall quest to have it set aside on review. That application is opposed by the respondents who deny any impropriety whatsoever in the procedure leading up to the applicant's dismissal.

As a preliminary point, however, the applicant avers that the respondents must be denied audience by the court on the basis of the "*dirty hands*" doctrine. He contends that the respondents are in contempt of court for failing to reinstate him in terms of s51 of the Police Act [*Chapter 11:10]* ("The Act") when he appealed against the decision of the second respondent (to discharge him) to the Police Service Commission (hereinafter abbreviated as "PSC"). According to the applicant, a proper construction of s51 of the Act reveals that it obliges the second respondent to reinstate a member who has been discharged once an appeal has been noted against that decision.

The Background

The following is a broad outline of the key events leading to the present matter. The applicant was charged by a single officer for contravening paragraph 34 of the Schedule 34 to the Police Act. He was convicted and sentenced to serve 14 days' imprisonment at the detention Barracks. He then appealed to the Commissioner General of Police (the 2nd respondent). The appeal was unsuccessful.

Following the dismissal of his appeal, the suitability board was convened to determine his suitability to remain as a member of the ZRP. In the wake of the inquiry (whose conduct constitutes one of the bases for the main review application), the Suitability board recommended the applicant's dismissal. Acting on that recommendation, the second respondent discharged the applicant in terms of s50 of the Police Act.

It is common cause that the applicant filed a total of three separate review applications. The first was filed on 4 April 2023 under HCMSV CAPP 55/23. The respondents therein were the trial officer (Superintendent Jamela), the Commissioner General of police and the police Service Commission. The application was an attack on the conduct of the proceedings that led to the applicant's conviction. The grounds of review were couched as follows:

The first and Second respondents misdirected themselves when they convicted the applicant in that:

1) They failed to treat the court as a court of record.
2) They treated the charge as a conjunctive charge yet it is a disjunctive charge.
3) The second respondent failed to hear the applicant in terms of Section 69 of the Constitution.

4) The first respondent allowed exhibits to be produced or to be put in the record through the back door (sic).

The second review application was filed under HCMSV 61/23. It was filed some ten days after the first (on 14 April 2023 to be precise). The respondents in that matter were Superintendent Dube in his capacity as the president of the Suitability board (which capacity applicant erroneously referred to as the "*trial officer*"), the Commissioner General of Police and the Police Service Commission. In that matter the attack was directed at the propriety of convening of the Suitability board. The grounds of review were couched in the following terms:

1. The first respondent's [failure] to refer the board proceedings to the second respondent was grossly irregular in that:
    a) The convening authority is the one which must give the ruling to the points *in limine* and not the first respondent.
    b) The first respondent and the second respondent could not convene the board of suitability against the applicant since they are not his employees (sic).
    c) The summary of career is disorderly and outrageously misdirected.

The third and final review application was filed under 106/23. It was filed on 27 June 2023. The attack was also directed at the conduct of the Suitability board proceedings. However, on this occasion the applicant's main gripe with those proceedings was that he was unfairly denied the right to legal representation. The grounds of review record as follows:

1. The respondent made (sic) gross irregularities in that:
    a) The applicant was not afforded a fair hearing as he was denied his right to legal representation contrary to the provisions of Section 69 and Section 86(3) (c) (*sic*)
    b) The board of Suitability was based on gross procedural issues (sic) after the applicant had challenged his conviction by the trial officer under case No. CAPP 55/23 and it was therefore prudent that the conviction of the board of suitability be stayed pending the finalisation of CAPP 55/23.

Each of the three applications were opposed by the respondents. Ultimately, however, the parties agreed to a consolidation of the three applications. The parties further agreed that the issues for determination be crisply identified. It was on that basis that the court gave an order by consent in the following terms:

IT IS ORDERED THAT:

1. The applicants' applications in HCMSCAPP 106/23, HCMSCAPP 61/23 and HCMSCAPP55/23 be and are hereby consolidated.
2. The parties be and are hereby ordered to file issues for determination by the court on or before 9 February 2024.
3. The applicant is ordered to file a different draft order for the consolidated matters.
4. The parties are ordered to file supplementary heads of argument, if any, on or before the 16th of February 2024.
5. The consolidated matter is postponed to the 26th of February 2024 for argument.

The parties soon filed a list of issues for determination. These consisted primarily of a refined version of virtually all the issues in each of the individual applications. Additionally, however, the parties each raised a preliminary point. It was in the context of which that the applicant contended that the respondents were approaching the court with dirty hands for failing to reinstate the applicant pending the determination of her appeal to the PSC.

Section 51 of the police Act provides as follows:

> **"51. Appeal**
>
> A member who is aggrieved by any order made in terms of Section forty-eight or fifty may appeal to the Police Service Commission against the order within the time and in the manner prescribed, and the order shall not be executed until the decision of the Commission has been given."

The simple argument advanced by the applicant was that having appealed to the PSC against his discharge, the respondent was legally obliged to reinstate him. Accordingly, so the argument goes, failure to do so amounts to contempt of court which the court should mark its disapproval by denying the respondents audience until the applicant is reinstated.

Section 51 of the Police Act is couched in peremptory terms. It provides for the suspension of any decision made either in terms of s48 or s50 pending the outcome of an appeal against such decision. It amounts to no more than a re- statement of the common law position that the noting

of an appeal suspends the operation of the judgment or decision appealed against. See *Ex-constable Marumisa* v *Chairperson Police Service Commission &Others* HB315/18; Ex *Sergeant Maphosa &Another* v *Police Service Commission &Another* HB-257-17 &*Ex Constable Rwafa* v *Chief Staff Officer (Senior ASCOM Chengeta JC) & Another* HH-155-18.

The dirty hands principle which in appropriate cases may be invoked to deny a litigant audience before the court until he purges his contempt of the law is predicated upon the idea that a party who is in open defiance of the law cannot seek the protection of the very law that he is in defiance of. Allowing party audience would be inimical to the rule of law. See *Econet Wireless (Pvt) Ltd* v *Min of Public Service Labour & Social Welfare & Ors* SC-31-16, where BHUNU JA said the following:

> "Considering that Zimbabwe is a constitutional democracy firmly founded on the rule of law it is difficult to fault the learned judge's line of reasoning in any way. The term 'rule of law' connotes obedience and submission to the dictates of the prevailing laws of the land.
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> While s 69(3) of the Constitution guarantees the appellant's right to access the courts, it is no licence for it to approach the courts with hands dripping with dirt. The appellant is not being denied access to the courts. What it is being asked to do is to cleanse itself by obeying the prevailing laws of the land before approaching the courts."

In *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 at 548 B-C this doctrine was explained in the following terms:

> "This court is a court of law, and as such, cannot connive at all or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination of the court, in the absence of an explanation as to why this course was not followed, the inference of disdain of the law becomes inescapable"

However, in the context of the present matter the issue is whether the apparent failure to comply with s51 of the Police Act affects applications whose noting preceded the noting of that appeal. According to Mr Mugiya, counsel for the applicant, it is irrelevant that the review

applications antedate the noting of the appeal. Reliance in this regard was placed on the case of. *Ex-Constable Marumisa v CGP &Anor (supra).*

Per contra Ms Zikiti counsel for the respondents argued that since the review applications predate the noting of the appeal, the respondents cannot by any stretch of the imagination be found to be in contempt of an event which was yet to come.

In my view, the respondents cannot be denied audience on the basis of the "dirty hands" doctrine in the three combined applications for the following reasons. Firstly, the noting of the appeal cannot affect the review applications which antedate it. I say this in light that but for the delays in the progress of each of the three review matters, they could have been dealt with and disposed of well before the noting of the appeal in October 2023.

Secondly, and related to the above is the fact that the thrust and import of the appeal and the applications are different. Care, in my view, must be taken to keep the appeal procedure under s51 of the Police Act (as read with 1965 Regulations) on the one hand and the review process separate and distinct. The procedure and focus in either are different. An alleged irregularity or non-compliance in one should not be allowed to taint or cloud issues in another.

Further, while s51 does prescribe in mandatory terms that pending the outcome of the appeal to the PSC the decision in question shall not carried to execution, the Act does not spell out the consequences of non-compliance, see the case of *Ex Constable Rwafa* v *Chief Staff Officer (Senior ASCOM Chengeta JC) & Another* (Supra). As can be noted from the various cases that have been bought before the courts on the subject, there has been a consistent reluctance on the part of the courts to impugn collateral matters on the basis of non-compliance with s51. In *Ex Constable Marumisa v Chairperson PSC &2 others* (Supra) which *Mr Mugiya* heavily relies on, TAKUVA J declined the invitation to impugn the decision of the PSC to dismiss the applicant merely an account of the failure by the Commissioner General police to reinstate applicant pending his appeal. He had this to say in this regard:

> "My point of departure with Mr Mugiya is whether or not this failure to reinstate applicant pending the determination of his appeal, renders null and void the dismissal ordered by the 1st respondent pursuant to the dismissal of applicant's appeal. In my view, the error by the 2nd respondent has no bearing on the validity of the Commission's decision on applicant's appeal. Perhaps it is because of this realization that applicant has attacked

> the Commission's decision on another front, namely, that the Commission's decision is unlawful because it did not furnish applicant with reasons for that decision."

Similarly, on *Ex- Constable Rwafa v Chief Staff Officer* (*supra*) MUREMBA J refused to invoke the dirty hands doctrine to nullify a dismissal for failure by the CGP to a dismissal for failure by the CGP to reinstate applicant pending the determination of his appeal. She stated the following:

> "Mr *Mugiya* submitted that s 51 requires the Police Service Commission to first comply with this provision in order to preserve its right to hear an appeal. However, I do not agree with this interpretation of s 51 because the provision simply says that the order of the Commissioner General shall not be executed until the decision of the Commission has been given. The provision does not go further to say that if it is not complied with the appeal becomes invalidated or null and void. Mr *Mugiya* could not point to any authority which supports this interpretation of s 51. In the absence of such authority I am not persuaded to agree that the failure to comply with s 51 renders the appeal a nullity. It appears to me that there is no link between the hearing of the appeal and the failure to comply with s 51. The appeal in the present matter related to the discharge of the applicant from service and not the failure by the respondents to comply with s 51. The dirty hands doctrine is therefore not applicable."

By parity of reasoning, I cannot accept the invitation extended to me to deny the respondents audience ostensibly on the basis of the dirty hands doctrine in review matters that were filed (and could very well have been determined) well before the noting of the appeal. To conclude, therefore, I do not believe the failure by the second respondent to comply with s51 of the Police Act when the appeal was noted to the PSC in October 2023 can retrospectively taint the respondents standing before the court in respect of review applications filed in April and May 2023.

Accordingly, the point *in limine* raised by the applicant relating to "dirty hands" is hereby dismissed with costs.

The applicant is hereby directed to set down this matter for hearing on the remaining issues without any undue delay.

ZISENGWE J

Mugiya Law Chambers; The Applicant's legal practitioners.

Civil Division of the Attorney General's office; The Respondents' Legal practitioners.