CONSTABLE TAKAWIRA E
versus
THE BOARD PRESIDENT
(CHIEF SUPERINTENDENT MAGWENZI)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 19 December 2014 & 11 November 2015

Urgent Chamber Application

N. Mugiya, for the applicant
C. Saruwaka, for the respondent

MAWADZE J: On 19 December 2014, I dismissed this urgent chamber application with costs and gave my reasons *extempore.*

I was advised almost a year later on 29 October 2015 by the Registrar that I should provide reasons for the dismissal of this urgent chamber application as the applicant had appealed against my decision.

I now proceed to give the reasons.

The applicant filed an urgent chamber application on 15 December 2014 seeking interim relief in the following terms;

"PROVISIONAL ORDER GRANTED

Pending the confirmation of the provisional order

It is ordered that;

1. The respondents are interdicted from proceeding with the board of suitability against the applicant pending the return date.

SERVICE OF THIS ORDER

Service of this order shall be effected by the applicant's legal practitioners"

The terms of the final order sought are couched is a rather confusing manner as follows;

"TERMS OF THE FINAL ORDER SOUGHT

1. The Respondents be and are hereby ordered to stay the board of suitability pending the finalization of HC 11066/14 and the appeal to the 2nd respondent in terms of s 34 of the Police Act.

2. The board member – Superintendent Phuthi P be and is hereby ordered to recuse herself from the board of suitability.

3. The respondents are ordered to pay costs of suit"

The applicant is a Constable in the Zimbabwe Republic Police (ZRP). The second respondent is the president of the board of suitability. The second respondent is the Commissioner General of the Police.

The facts of this matter which I gleaned from the papers are as follows;

The applicant was arraigned before a court by an officer facing a charge of contravening para 34 of the schedule to the Police Act [*Chapter 11:10*] which related to omitting to perform or performing any duty in an improper manner. The applicant who was represented by one *Tawanda Takaindisa* of Mugiya and Macharaga Law Chambers pleaded not guilty to the charge but was convicted after a protracted trial.

The applicant was sentenced on 24 September 2014 to 7 days imprisonment at Chikurubi Detention Barracks. The applicant appealed to the Commissioner General and his appeal was dismissed on 12 November 2014 both in respect of the conviction and the sentence.

The specific facts of the case are that on the applicant was manning a roadblock at Inn on the Vumba along Chigodora road in Mutare with three female officers when he was approached by the Anti-Corruption Officers of the ZRP. The applicant then declared that he had no cash at the road block but was found to be in possession of US$18-00.

The certificate of urgency by one Rutendo Muchenje is not helpful at all. It states that the matter is urgent as the respondents seek to hold a board of suitability on 19 December 2014 to enforce the applicant's conviction which is suspended in terms of s 34 of the Police Act [*Chapter 10:11*] as the applicant was yet to get the outcome of his appeal and that this was also against the

'spirit' of HC 1106/14. It is further stated that the applicant has no other alternative remedy in the circumstances except to seek an interdict by way of this application.

The contents of the certificate of urgency are clearly contradicted by the applicant's founding affidavit. In his founding affidavit the applicant stated in para 4 that his appeal was dismissed by the Commissioner General of Police and that as a result he was taken to Chikurubi Detention barracks to serve his sentence on 3 December 2014. The applicant further stated that on 6 December 2014 he was served with the convening order for the board of suitability which he signed. The applicant said he was released from Chikurubi Detention Barracks on 10 December 2014 after serving the sentence of 7 days and returned to work. He said it was on 10 December 2014 when he was released that he realised that one of the board members Phuthi P who had dealt with his case is the same officer who had caused the convening of the board of suitability. The applicant therefore protests that the Phuthi P is an interested party.

The other issue raised by the applicant in his founding affidavit is that he has since filed an application with this court for condonation of that he calls "late noting of an appeal for review." The last issue made by the applicant is that he harbours the belief that the board of suitability has the sole objective of dismissing him from the police force.

In a rather confusing manner the applicant says he will suffer irreparable harm on account of the following reasons,

i) that he has filed an application challenging his conviction which is still pending
ii) that he is still to receive the outcome of his appeal from the Commissioner General and that the appeal suspends both the conviction and sentence
iii) that a board member of the board of suitability is an interested party and therefore biased.

It is important to note that attached to the founding affidavit is a convening order for board of suitability dated 26 November 2014 and a court application for condonation for late noting of an application for review dated 12 December 2014.

What exercised my mind are that grounds for review stated in the application for condonation for late noting of an application for review. The grounds outlined by the applicant are as follows;

a) that the applicant was convicted and sentenced of the offence charged without being asked to plead to the charge

b) that the trial officer did not record the proceedings
c) that the applicant was denied legal representation

As already stated the proposed terms of the final order sought are anchored on the outcome of the appeal to the Commissioner General of the police and also to the outcome of the application for condonation for late noting of an application for review in HC 11066/14.

The respondents opposed this application on mainly two grounds, namely that the matter is not urgent and that the relief sought by the applicant is based on falsehoods.

I did not seek to be detained by the question of urgency in this matter despite the deficiencies of the certificate of urgency I have already alluded to and the clumsy manner in which the applicant addressed the question of urgency in his founding affidavit. I simply decided to give the applicant the benefit of the doubt and proceeded on the basis that the urgency in this matter arose when the applicant was served with the notice of hearing of the board of suitability.

I dismissed this application on the basis that the interim relief sought by the applicant is predicated on misleading information and falsehoods. I have no doubt in my mind that this is simply an abuse of the court process as the application for condonation for late noting of the application for review is doomed to fail and have absolutely no prospects of success. This is so because as already said it is based on misleading information. The falsehoods peddled by the applicant are clear. The record of proceedings shows that the applicant pleaded not guilty to the charge preferred against him during the hearing contrary to what the applicant alleged. It is not true that the applicant was denied legal representation as the record of proceedings shows that the applicant was legally represented by Mr *Takaindisa*. It is also not correct that the applicant was not served with the relevant papers to the charge. In fact the record of proceedings shows that the applicant made numerous applications for postponements which were granted. It is clearly false to allege that the trial officer did not keep the record of proceedings. The record of proceedings clearly shows that due process was followed when the hearing was conducted. It is therefore not surprising that Mr *Mugiya* for the applicant conceded to all these facts although he unwittingly tried to argue that the trial officer did not properly capture all what happened during the hearing.

The applicant's founding affidavit as already said is not only badly drafted but is equally unhelpful just like the certificate of urgency. In the certificate of urgency it is falsely alleged that the applicant's appeal is still pending before the Commissioner General of the Police when the

applicant in the founding affidavit confirms that his appeal was dismissed and that he has since finished serving the sentence imposed. The certificate of urgency does not explain the basis upon which the convening of the board of suitability would cause irreparable harm to the applicant. The basis upon which the composition of the board of suitability is being challenged is not clear. The applicant can always seek the recusal of one Phuti before that board of suitability if the applicant is of the view that there is an objective basis to do so. It is therefore not true that the applicant has no other remedy.

The inescapable conclusion is that the basis upon which interim relief is being sought is not only mischievous but misleading. It is for these reasons that I dismissed this application with costs.

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