CONSTABLE KAISI 065030J
versus
THE BOARD PRESIDENT (CHIEF SUPERITENDENT NDLOVU N)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 2 0ctober 2018

Urgent chamber application

N Mugiya, for the applicant
Miss *N L Mabasa*, for the respondents

MUREMBA J: On 2 October 2018 I heard this matter and dismissed it with costs. I have been asked for the written reasons and these are they.

The facts of the matter are largely common cause. The applicant is a police officer in the Zimbabwe Republic Police. In 2016 he was charged with contravening para 35 of the Schedule to the Police Act [*Chapter* 11:10] and was convicted. A board of suitability was convened by the second respondent, the Commissioner General of Police in terms of s 50 of the Police Act. This led to the applicant's discharge from the Police Service. Dissatisfied with the discharge, the applicant approached this court with an application for review under case number HC674/17. The application was successful. This court set aside the board of suitability proceedings which were conducted on 30 January 2017. The subsequent discharge of the applicant from the police service by the second respondent was rescinded with full pay and benefits. The court order was granted on 12 April 2018. Following that order the applicant was reinstated with full pay and benefits.

However, on 16 July 2018, the applicant was served with a convening order calling him to appear before a new board of suitability on the same allegations and circumstances for which he had been previously discharged. This prompted the applicant to approach this court with an application for permanent stay of proceedings under case number HC 6984/18. That application is still pending. In the present matter the applicant averred that when he appeared before

the new board of suitability on 6 August 2018, he made an application for the proceedings to be stayed pending finalisation of his application for permanent stay of proceedings in HC 6984/18. The first respondent granted it. However, on 21 September 2018 the applicant was served with another notice to appear before the board of suitability on 27 September 2018 for continuation of the board of suitability proceedings despite the fact that the application for permanent stay of proceedings is still pending before this court. This prompted the applicant to file the present application seeking stay of the board of suitability proceedings pending determination of the application for permanent stay of proceedings in HC 6984/18. The applicant contended that what the first respondent did was wrong because he reviewed his own decision yet he was now *functus officio*. His further argument was that if the present application was not granted, he would suffer irreparable harm as his application for permanent stay will be rendered academic. He contended that on the other hand, if stay was granted the respondents would not suffer any prejudice.

For stay of proceedings to be granted pending determination of another pending matter the applicant should show good cause. See *Sergeant Khauyeza* (F0486777 J) v *The Trial Officer (Superintendent J. Mandizha) and The Commissioner General of Police* HH 311-18. The applicant should show that it is in the interests of the administration of justice for stay to be granted. To show this he should show that he enjoys a reasonable prospect of success in the pending matter. As has been stated by this court in numerous cases it is not the desire of this court to constantly interfere with administrative proceedings and make institutions ungovernable. This court would rather have those proceedings finalised and have the aggrieved party approach it on review thereafter. See the *Sergeant Khauyeza* case *supra*.

In *casu* in his founding affidavit in the application for permanent stay of the board of suitability proceedings, the applicant said that the board of suitability proceedings of 30 January 2017 were quashed because of three reasons. Firstly, he had been prematurely dragged before the board yet in terms of circular 3/2012, for a person to be brought before a board of suitability he should have been convicted three times under the Police Act. Secondly, there was no cause of action for bringing him before the board. Thirdly, the presiding board president had failed to conduct the said proceedings in terms of due process of law and in terms of the Uncoded Rules Volume 1. In that application the applicant is challenging the legality of the new board of suitability proceedings which are now being presided over by the first respondent. To the applicant these proceedings are a legal nullity because the respondents decided to repeat the same board of suitability in the same and similar fashion as was disapproved by this court

in HC 647/17. The respondents are frustrating the enforcement of the order of this court in HC 674/17 by circumventing it through illegal and contemptuous means. The respondents have not fully complied with this order which remains extant. There is no basis for repeating a failed process which process was condemned by this court. The respondents are merely demonstrating that they do not respect the courts and that they can take the law into their own hands as they please.

On the other hand Ms *Mabaya* for the respondents submitted that the Board of suitability proceedings were quashed because the applicant had been denied legal representation during the hearing. She submitted that in that regard the second respondent is perfectly entitled to convene a fresh board of suitability and do the proceedings afresh.

For three reasons I was not convinced that the applicant enjoys prospects of success in the application for permanent stay of the board of suitability proceedings. Firstly, the parties gave different reasons why this court quashed the board of suitability proceedings of 30 January 2017. It was the applicant's word against the second respondent's word. Attaching a written judgment of this court would have made it clear why the board of suitability proceedings of 30 January 2017 were quashed. Unfortunately the judgment was not attached. From the look of things there is no written judgment. In the absence of a written judgment, there is no way of knowing the reasons why this court quashed the board of suitability proceedings. In turn it is impossible to tell the applicant's prospects of success in his application for permanent stay of proceedings. The applicant had a duty to attach the written reasons of this court's judgment. His failure to do so resulted in him failing to show good cause why I should grant his present application for stay of proceedings pending determination of the application for permanent stay of the board of suitability proceedings.

Secondly, I was not persuaded by Mr *Mugiya*'s argument that by convening a new board of suitability the respondents were in contempt of this court's order of 12 April 2018 which ordered reinstatement of the applicant. As was correctly argued by Miss *Mabasa*, the order of this court only quashed the board of suitability proceedings of 30 January 2017, but it did not bar or interdict the respondents from convening another board of suitability on the same cause of action. The respondents fully complied with the order of this court because the second respondent went on to reinstate the applicant with full pay and benefits. However, thereafter the second respondent went on to convene a new board of suitability in order to enquire into the suitability or otherwise of the applicant to remain in the police force in view of the misconduct charge he was convicted of. The quashing of the board of suitability proceedings

led the parties to the same position they were before the convening of the board of suitability. If the proceedings were quashed because of procedural irregularities in the conduct of those proceedings, the second respondent was entitled to convene a fresh board of suitability which would deal with the matter properly. In *Standard Chartered Bank of Zimbabwe Limited* v *J Chikomwe and 211 Ors* S-77-2000 an improperly constituted disciplinary committee upheld the decision of hearing officers who had dismissed the respondents (workers). The respondents appealed to the Appeals Board which set aside the dismissal and reinstated them. Standard Chartered Bank appealed to the Tribunal which confirmed the decision of the Appeals Board on the same grounds. On appeal to the Supreme Court MUCHECHETERE JA agreed that the proceedings should be set aside on the same grounds but said that the respondents were not entitled to automatic reinstatement. He remitted their cases for a fresh hearing. In doing so the learned judge said,

> "It should be born in mind that the respondents in their appeal to the Appeals Board were mainly challenging the procedural irregularities in the hearings before the displinary committee. The merits of the cases were not really challenged…… A setting aside of the proceedings of the disciplinary committees should therefore lead the parties to the same position before the hearing in the disciplinary committees- appeals before a properly constituted disciplinary committee."

In *Air Zimbabwe (Private) Limited* v *Mnensa & Another* SC – 89/04 the respondents who were employees of the appellant were charged with misconduct before a disciplinary committee and were found guilty and were dismissed. They had been denied legal representation during the disciplinary hearing. They appealed to the General Manager who set aside the decision of the disciplinary committee and ordered the matter to be heard *de novo.* On this basis the respondents asked to be reinstated but the appellant refused to reinstate them. The respondents filed a court application in this court (High Court) seeking an order for reinstatement without loss of benefits. The application was granted. The appellant (Air Zimbabwe) then appealed to the Supreme Court. CHIDYAUSIKU CJ (as he then was) citing with approval the *Standard Chartered Bank* case *supra* upheld the appeal. In doing so he said that there had been no inquiry into the merits of the respondents' conduct. The disciplinary proceedings were flawed. New disciplinary proceedings should have been instituted to enquire into the conduct of the respondents as was ordered by the General Manager. He said,

> "A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent."

I*n casu* in light of the above authorities, if the board of suitability proceedings were quashed because of procedural irregularities and there was no enquiry into the merits of the

matter by this court, a fresh board of suitability proceedings can still be conducted. As a result, if there were procedural irregularities the applicant has no prospects of success in the pending application for permanent stay of proceedings. As already stated above, a written judgment of this court would have made it clear on what basis the proceedings of 30 January 2017 were quashed.

The third reason why I concluded that the applicant's application for permanent stay of proceedings had little prospects of success was that his founding affidavit in that matter HC 6984/18 does not allude to a violation of his fundamental right(s) as enshrined in the Constitution of Zimbabwe. For an application of permanent stay of proceedings to be granted, the applicant ought to allude to a violation of a constitutional right or rights. He further needs to state how he has tried to assert the right(s). He also needs to state the prejudice that he suffers as a result of the infringement of the right(s). In the absence of specific prejudice being shown permanent stay will not be granted. As a result, areas of actual prejudice need to be isolated and identified. The applicant therefore bears a heavy onus to discharge. The remedy of permanent stay of proceedings is only granted in extremely rare or exceptional circumstances. See *Petros Makaza and Aonr* v *The State & Khumbuzo Gumbo & Anor* v *The State* CCZ 16/17. I noticed that in HC 6984/18, the applicant's ground for making the application for permanent stay is that the respondents are in contempt of this court's order in HC 647/17 by convening a fresh board of suitability against him. There was no allegation of a violation of the applicant's constitutional right(s).

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

Mugiya & Macharaga, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners