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HC 1217-16
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ROBERT MADAMOMBE
versus
COMMISSIONER GENERAL OF POLICE
and
THE BOARD OF SUITABILITY
and
DEPUTY COMMISSIONER (HUMAN RESOURCES)

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 13 JUNE 2016 AND 25 AUGUST 2016

Urgent Chamber Application

Applicant in person
L Musika for respondents

TAKUVA J: Applicant filed this application seeking an order couched in the following terms:

"Pending the determination and finalization of this matter;

(1) the respondents be and are hereby interdicted from conducting a Board of Suitability against applicant.
(2) In the event the said Board of Suitability has already sat and made its recommendations the first respondent is interdicted from acting on the recommendations or discharge applicant from the Police Service pending finalization of (1) above."

Applicant is a Constable in the Zimbabwe Republic Police, currently stationed at Hwange. The first, second and third respondents are all responsible for administering discipline to members and officers in the Police Service. Following events of 3 September 2015, applicant was arraigned before a single officer for contravening paragraph 12 of the Schedule to the Police Act [Chapter 11:10] the Act. Leaving any point of guard without permission or reasonable excuse". Upon conviction he was sentenced to seven days imprisonment at the detention barracks at Fairbridge.

Dissatisfied, applicant appealed to the Commissioner General in terms of section 34(7) of the Act. The appeal was dismissed after which the sentence was executed. According to applicant he was denied his right to appeal further in terms of section 70(5) (b) of the Constitution of Zimbabwe. Subsequently, on 12 May 2016, he was served with convening orders signed by third respondent to the effect that a Board of Suitability would sit to enquire into his suitability to remain as a member, retain his salary or seniority. Applicant does not want this to happen for a number of reasons, chief among them are the following:

"(1) Chief Superintendent Wilson should not be the Board chairperson as he had conspired with the single officer and applicant's officer in charge to have him punished severely.
(2) The convening of the Board has no other purpose but to unreasonably and maliciously discharge him from the Police Service in order "to reduce the wage bill."
(3) It is surprising that the Board of Suitability is to be convened for applicant "who has not committed any offence with elements of dishonesty and for minor infraction of the Police Act."
(4) There is no other "faster alternative" remedy to stop this illegality since the Police Service Commission, the overall employer to whom in terms of section 51 of the Act, applicant is required to appeal in the event that first respondent discharges him "is in support of this massive discharge by the first respondent." To raitonalise and reduce the wage bill. It is just an extension of the first respondent.
(5) The Police Service Commission is no longer reinstating discharged members pending appeal. Pursuing such a remedy is "suicidal."
(6) The matter is urgent in that the Board is scheduled to sit on 18 May 2016 or at anytime thereafter.
(7) The applicant will be discharged from the Police Service by a person whose power to discharge was "ousted by section 223 (1) (a) of the Constitution of Zimbabwe.
(8) Section 50 of the Act violates the applicant's rights to fair administrative justice. That law must be "struck off and a law in terms of section 219 (4) of the Constitution to be enacted to align the Police Act with the Constitution."
(9) Applicant requests in terms of section 175 (4) of the constitution that the provisions of section 50 and 34(7) of the Police Act be referred to the Constitutional Court as these violate his right "to appeal to impartial courts of law."

This then in a nutshell is the applicant's case. What constitutes the requisites of an interim interdict is now a well-beaten path. MALABA JA (as he then was) in *Airfield Investments (Pvt) Ltd* v *Minister of Lands and others* 2004 (1) ZLR 511 (S) neatly put them as:

"(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) that the balance of convenience favours the granting of interim relief; and
(d) that the applicant has no other satisfactory remedy."

The onus to establish these requirements is on the applicant. As regards the first requirement, the applicant must establish the existence of a *prima facie* right. In this case, the applicant's contention is that his rights to "administrative justice" will be violated if the Board of Suitability is permitted to convene and deliberate on his suitability. The argument is that the respondents are "violating the constitution, his legitimate interests and rights including the existing Police Act [Chapter 11:10] and its regulations by conducting an inquiry to look into his suitability to remain as a member, retain his salary, rank or seniority." He maintained that respondents have no lawful mandate to act in terms of section 50 of the Act as this power was taken away by section 223 (1) (a) of the Constitution of Zimbabwe. Applicant also averred that sections 34(7) and 50 of the Act are "no longer in sync with the constitution". He seeks to obtain an interdict to stop the illegality as a reading of sections 8 of the Act and sections 223 (1) (a) and 219 of the constitution shows "clearly that the Act was invalidated by the Constitution."

In order to follow applicant's argument which surprisingly he failed to develop during the hearing despite having filed detailed heads of argument and supplementary heads of argument, it is instructive to cite *in extenso* the relevant sections relied upon.

Section 8 of the Act states;

"Power and functions of Commissioner General.

Subject to this Act and such general directions of policy as the Minister may give, the Commissioner General shall—

(a) have the command, superintendence and control of the Police force;
(b) subject to such conditions as may be prescribed, appoint fit and proper persons to be members; and
(c) subject to this Act, promote, suspend, reduce in rank or discharge any member other than an officer." (my emphasis).

On the other hand section 219 of the Constitution basically established a Police Service and its functions. Subsection (4) of section 219 states

> "(4) An Act of Parliament must provide for the organization, structure, management, regulation, discipline and subject to section 223, the conditions of service of members of the Police Service." (my emphasis)

The relevant portion of s223 states:

"Functions of Police Service Commission

(1) The Police Service Commission has the following functions—
(a) to appoint qualified and competent persons to hold posts or ranks in the Police Service;
(b) to fix and regulate conditions of service, including salaries, allowances and other benefits, of members of the Police Service.
(c) to ensure the general well-being and good administration of the Police Service and its maintenance in a high state of efficiency.
(d) to ensure that members of the Police Service comply with section 208;
(e) to foster harmony and understanding between the Police Service and civilians;
(f) to advise the President and The Minister on any matter relating to the Police Service and,
(g) to exercise any other function conferred or imposed on the Commission by this constitution or an Act of Parliament.
(2) -----
(3) -----." (my emphasis)

The Constitution is unequivocal as to whom it reposes the command of the Police Service. It states in unambiguous terms in section 221 that;

> "(1) The Police Service is under the command of a Commissioner General of Police appointed by the President after consultation with the Minister responsible for the police." (My emphasis).

In my view since there is no provision which is ambiguous there is no reason to depart from the literal rule of statutory interpretation to arrive at the intention of the legislature in crafting them. Quite clearly, the Constitution in section 223 has divested the Commissioner-General of the power to appoint persons into the Police Service. This power now rests in the Police Service Commission. What is also crystal clear is that the power to discipline members and officers has been left in the Commissioner-General's hands as confirmed by section 221 of the Constitution. The rationale in my view is not difficult to find. It lies in the nature, scope and

objectives of a uniformed force, namely that a commander must be able to discipline his forces. Any other interpretation would result in operational and institutional chaos with disastrous implications on the Police Service's responsibilities as outlined in section 219 of the Constitution.

As pointed out above while section 223 has limited the Commissioner General's powers in section 8 of the Act, it has no bearing whatsoever on section 50 of the Act. The section grants the Commissioner-General power to convene a board of inquiry when necessary, to inquire into the suitability or fitness of a regular force member to remain in the force or to retain his rank, seniority or salary. The Commissioner General is also empowered to discharge the member or mete out any other suitable punishment.

The section states;

"50. Board of Inquiry: procedure where member unsuitable or unfit to remain in Regular Force or to retain his rank, seniority or salary.

(1) A board of Inquiry consisting of not less than three officers of such rank not being below that of superintendent, as may be considered necessary by the Commissioner-General, may be convened by the Commissioner-General to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary:

Provided that no officer who is a material witness or has a personal interest in the matter shall be appointed to such a board.

(2) The senior officer appointed to a board in terms of subsection

(i) shall preside over the board, and record or cause to be recorded in writing or by mechanical means all evidence which may be given before the board.

(3) if a Regular Force member, either than an officer, is found after inquiry by a board to be –

(a) unsuitable or inefficient in the discharge of his duties; or

(b) otherwise unfit to remain in the Regular Force or to retain his rank, seniority or salary;

the Commissioner-General may—

(i) discharge the Regular Force member, or

(ii) impose any one or more of the following penalties—

a. reduction in rank or salary;
b. loss of seniority;
c. with holding of an increment of salary;

(iii) reprimand the Regular Force member

(3) -----." (my emphasis)

This section specifically deals with disciplinary issues in the Police Service. It grants the Commissioner-General power to regulate disciplinary matters in terms of the law. The Constitution, far from striping the Commissioner General of this authority, confirms it expressly in section 221. In fact it is not only section 50 of the Act that deals with the power of the Commissioner-General in disciplinary matters but the entire Part V of the Act. If the legislature wanted to grant this power to the Police Service Commission it would have done so expressly in the Constitution, like what it did with regards to the appointment of suitable officers. As the law stands, the Police Service Commission appoints qualified and competent persons, but their conduct once appointed falls within the jurisdiction of their commander who is the Commissioner-General. It cannot be said that section 50 is *ultra vires* the Constitution. In my view, it would not be ideal or practical to make the Police Service Commission a court of first instance in disciplinary matters involving thousands of members.

The unquestionable role of the Commissioner-General in discipline is restated in section 34 (7) of the Act in the following terms:

"34 Trial before court consisting of one officer

(1) -----
(2) -----
(3) -----
(4) -----
(5) -----
(6) -----
(7) A member convicted and sentenced under this section may appeal to the Commissioner-General within such time and in such manner as may be prescribed against the conviction and sentence and where an appeal is noted, the sentence shall not be executed until the decision of the Commissioner General has been given."

It should be noted that before mounting this challenge to the jurisdiction of the Commissioner-General, the applicant invoked this section by unsuccessfully appealing to the Commissioner-General. In his papers, applicant does not hide his anger at this decision and its

maker. What is critical to note is that section 223 (1) (a) of the Constitution does not remove the power granted to the Commissioner-General in section 34 of the Act.

What is clear that applicant is determined to avoid subjecting himself before this board. Perhaps part of the reason is that he is aware that despite his assertion in his papers, the truth of the matter is that he has relevant previous convictions. In this regard, I fully associate myself with MATHONSI J's remarks in *Magwala Nkululeko* v *The Commissioner General of Police and three other*s HC 11-16, that

> "It would seem that officers in the Police Service are unwilling to subject themselves to the disciplinary authority of their superiors sitting as a suitability board for whatever reasons. I think Police Officers must now be reminded that they are like any other employee and are therefore subject to disciplinary action by their superiors. This court cannot be used as a shield against impending disciplinary action and will only step in where there had been a clear violation of a Police Officers rights. It must be appreciated that the Commissioner General is empowered by law to convene a suitability board to inquire into the suitability of a member as long that is done lawfully and in accordance to the governing Act. The applicant has not shown that there are clear violations of his rights on the matter on hand. The board has been convened by his superiors who have been appointed in terms of the Constitution and their actions are sanctioned by the law. (my emphasis)

I must point out that the "Act" referred to is the Police Act in section 50. It is trite law that an applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed, and if he does not do so, the application must fail- see C. B Prest, *The Law and Practice of Interdicts* 1993 at page 53 and *Airfield Investments(Pvt) Ltd's* case *supra*

According to *Prest*, *supra* the correct meaning of a *prima facie* case is that "an applicant is required to furnish proof which, if uncontradicted and believed at the trial, would establish his right. The use of the phrase 'prima facie' established though open to some doubt', however, indicates that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required."

For these reasons, I come to the conclusion that in *casu,* the applicant has failed to establish that he has a *prima facie* right to protect at all. Consequently, I take the view that this application has no merit and must fail.

Assuming I am wrong, there is another reason why this application must fail. It is that where there is an existing remedy with the same result for the protection of the applicant, an interdict will not be granted. In *casu* the applicant has an alternative satisfactory remedy in that in the event of an unfavourable outcome, he can appeal to the Police Service Commission in terms of section 51 of the Act which states;

> "51 Appeals
> A member who is aggrieved by any order made in terms of section forty-eight or fifty may appeal to the Public 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 applicant does not challenge the constitutionality of this appellate body. It stands to reason that it is an adequate alternative remedy.

Accordingly, it is ordered that the application be and is hereby dismissed without an order of costs.

Civil Division, Attorney General's Office, respondents' legal practitioners