

EX-CONSTABLE CHENGETA F 064520 E

Versus

**THE BOARD PRESIDENT
(CHIEF SUPERINTENDENT DUBE M)**

And

THE COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 6 November 2023 & 18 January 2024

Court application for review

T. Mabika, for the applicant
S. Jukwa, for the respondents

DUBE-BANDA J:

[1] This is a court application for review. The applicant seeks an order couched in the following terms:

- i. The board of suitability convened by the respondents against the applicant be and is hereby held to be unlawful.
- ii. The proceedings for the board of suitability conducted by the 1st respondent and applicant's subsequent discharge from the Police Service be and are hereby set aside.
- iii. The respondents are ordered to pay costs of suit on client and attorney scale.

[2] The application is opposed by both the first and the second respondents.

Background facts

[3] The applicant, an ex-constable in the Zimbabwe Republic Police appeared before a single officer on 18 December 2015 facing a charge of contravening paragraph 34 of the Schedule to the Police Act [Chapter 11:10] i.e., "Omitting or neglecting to perform any duty or performing any duty in an improper manner." He was convicted and sentenced to a term of imprisonment. The applicant appealed the conviction and sentence to the Commissioner General of Police, and the appeal was dismissed in its entirety. Subsequent to the dismissal of the appeal, a Board

of Inquiry was convened to inquire into his suitability to remain in the police force. The Board recommended that he be discharged from the Police Service. Aggrieved by the decision of the Board, the applicant filed an application for review in this court. This court in HC 417/17 (Per TAKUVA J) ordered that the proceedings before the Board of Suitability proceedings be set aside; that the decision to discharge the applicant from the Police Service be set aside; and that the matter be remitted to the Commissioner General of Police to convene a different Board of Suitability which will allow applicant his constitutional right to legal representation. See *Constable F. Chengeta v The Board President (Chief Superintendent E. Wilson) & Another* HB 372/17. A new Board was convened and on 10 January 2018, the applicant appeared before the new Board. Subsequent to the inquiry, the Board recommended that the applicant be discharged from the police force and he was so discharged on 8 February 2018.

Preliminary points

[4] In his answering affidavit and heads of argument the applicant raised a point *in limine* to the effect that the second respondent's opposing papers were filed out of time allowed by the rules of court, and therefore were not properly before court. However, at the commencement of the hearing Mr *Mabika* counsel for the applicant abandoned this point *in limine*, and no further reference shall be to it.

[5] The applicant took the point that the record of proceedings does not comply with the requirements of the law. It was contended that the record is not in a question and answer format, and that some information is missing from the record. It was argued that the record is meaningless and difficult to follow and understand and that such constitutes a gross irregularity in the proceedings warranting the setting aside of the proceedings of the Board. This is an issue that must be determined in *limine*.

[6] Section 50(2) of the Police Act provides thus:

“The senior officer appointed to a board in terms of subsection (1) 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.”

[7] Section 50(2) of the Act requires that there be a record of proceedings. By statutory command the senior officer appointed to the board shall ensure that the proceedings are recorded. Where there is no mechanical recorder for the recording of the proceedings, the senior

officer must produce a full handwritten record of the proceedings. No doubt it is important to have an accurate and reliable record of proceedings. It must be clear and intelligible. The Commissioner of Police must be able to read and understand the record and the recommendations made therein. Otherwise without a proper record the Commissioner General will be unable to follow the proceedings of the Board.

[8] The respondents contend that the proceedings of the board were properly record. And a record has been placed before this court. *Per contra* the applicant contends that no proper record was produced, and that which is before court is not an accurate record. If essential evidence has been omitted the applicant must say so and show the materiality of the missing evidence. There must be some indications in the record itself or by way of an affidavit of the materiality of the missing evidence. Otherwise, a court will not be inclined to set proceedings aside on the basis of an unproved allegation that the record is not accurate or a mere speculation that the missing parts of the record contains material evidence. In *casu*, there is no evidence that the record is neither accurate nor that material evidence is missing. The applicant in both his founding and answering affidavit neither sets out the missing evidence nor its materiality. In the heads of argument it is contended that some of the information that transpired during the proceedings is missing from the record. The missing information is not spelt out. Such is inadequate and serves no useful purpose. Further, I do not agree that the record is meaningless, it is not. It is for these reasons that the attack on the record has no merit and is refused.

Merits

[9] Aggrieved by the recommendations of the Board and the decision of the Commissioner General to discharge him from the police force, the applicant filed this application for review. The application is anchored on the following grounds:

- i. The Board of Suitability proceedings presided over by the first respondent against applicant were grossly irregular as contemplated in s 27(1) c) of the High Court Act [Chapter 7:06] in that:
 - a. The convening order was issued contrary to the provisions of s 50(1) of the Police Act.
 - b. The convening order was not signed by the Deputy Commissioner General (Human Resources).

- c. There is no certificate of delegation conferring authority to convene the Board by the Commissioner General of Police to the unknown Deputy Commissioner General (Human Resources).
- d. The convenor of the Board is in contempt of court as he failed to comply with the court order pertaining the same case.
- e. The summary of carrier is inadequate and inconsistency (*sic*) with itself, and contrary to the Police Standing orders Volume 1 as read together with the Uncoded Rules volume 1 page 15 and 16.
- f. The defaulter's record presented by the board members does not reflect the true record of the defaulter's carrier.
- g. The respondent failed to determine points in limine raised by the applicant.

[10] In the founding affidavit the applicant avers that at the commencement of the hearing before the Board he took a number of points *in limine* and the Board did not give a ruling in respect of those points. The points *in limine* the applicant contends he took are in the main the same grounds of review that anchor this application. Mr *Mabika* submitted that the Board did not give a ruling regarding the points *in limine* taken by the applicant, and that the matter was not heard on the merits. Counsel argued that even assuming the points *in limine* were dismissed, there could be no final judgment without hearing the merits of the matter.

[11] In the heads of argument the respondents submitted that a Board of Inquiry convened in terms of s 50 is different from a Board convened in terms of s 30 of the Police Act, in that s 30 deals with trials, while s 50 of the Act is an inquiry. Mr *Jukwa* counsel for the respondent submitted that a Board Inquiry is conducted differently from a trial. Cut to the bone, the point made was that a Board of Inquiry is not a trial, it is an investigation. Counsel sought the dismissal of the application with costs.

[12] The convenient starting point is the empowering provision, i.e., s 50 of the Police Act which provides thus:

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, may be convened by the Commissioner 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 (1) 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, other 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 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. withholding of an increment of salary;

(iii) reprimand the Regular Force member.

[13] The applicant appeared before a Board of Inquiry. The terms of reference were spelt out in the Convening Order, and the Board was required to: “Look into the suitability or fitness of Number 064520E, Constable Chengeta F to remain in the Police Service, retain his rank, salary or seniority.”

[14] The Board of inquiry was mandated to inquire or investigate the suitability or fitness of the applicant to remain in the police force and report its findings to the Commissioner-General of the Police. I agree with Mr *Jukwa* that the Board is not a court of law. Its mandate was to investigate and report. Its proceedings are not judicial proceedings. It decides nothing; it determines nothing. It only investigates and report. But this should not lead to the minimisation of its task. It has to make a report which may have wide repercussions on the police officer subject to the inquiry as happened in this case. Seeing that the board’s report and recommendations may lead to such consequences, i.e. a discharge from the Police Force, it is incumbent that it must act fairly. But its proceedings must not be confused with trial proceedings. The terms of reference of the board were clearly set out in the Convening Order,

i.e., to look into the suitability or fitness of the applicant to remain in the Police Service, retain his rank, salary or seniority. The jurisdiction of the Board turns on the terms of reference. There is no room to take points *in limine* before the board. To me the preliminary points taken before the Board were outside its jurisdiction. It could not determine them. I say so because the Board cannot uphold a point *in limine* and decline to inquire in the suitability of the applicant in terms of the terms of reference. Put differently, it cannot report to the Commissioner General that it has upheld points *in limine* and therefore it was unable to recommend whether the applicant remain in the Police Service, retain his rank, salary or seniority. Such would amount to an absurdity and such a board would have acted outside the terms of the convening order.

[15] Mr *Mabika* submitted that even assuming the points *in limine* were dismissed, there could be no final judgment without hearing the merits of the matter. This submission emanated from a misunderstanding of an inquiry convened in terms of s 50 of the Act and what it entails. The Board does not conduct a hearing, it does not judge. It inquires or investigates and makes a report in which it makes recommendations to the Commissioner General of Police. In terms of the terms of reference it can recommend whether the applicant remains in the Police Service, retain his rank, salary or seniority. Therefore, to talk about a judgment is clearly off-side. One rider, the board must conduct the investigation in a fair manner. Fairness in this context means the board must hear the applicant within the context on whether he remains in the Police Service, retain his rank, salary or seniority. If the applicant chooses to direct his energies arguing irrelevant issues that would be his problem, but the board must remain on its proper lane as per the convening order. In *casu*, it is clear that the board conducted the inquiry in a fair manner and recommended, as per its terms of reference that the applicant be discharged from the Police Service.

[16] The Board of Inquiry convened in terms of s 50 of the Police Act is not a court of law. It does not conduct a trial. It does not judge. Its jurisdiction and competence are underpinned by the terms of reference upon which it is convened. At the conclusion of its work, it must report and make recommendations to the Commissioner General whether applicant remains in the Police Service, retain his rank, salary or seniority. It cannot report that it upheld points *in limine* and therefore failed to carry out its mandate as encapsulated in the terms of reference. Accordingly, it is essential that those who have the privilege of representing litigants before the Board of Inquiry convened in terms of s 50 of the Police Act do their duty scrupulously and

understand the legislative jurisdiction and competence of the Board. Otherwise, they will derail the work on the Board by making inconsequential submissions as happened in this case. It is for these reasons that this application is still-borne and falls to fail on this basis alone.

[17] In any event, and just for completeness the point that the board did not determine the points *in limine* taken by the applicant is clearly incorrect. The record shows that all the issues taken by the applicant were indeed determined by the board. Notwithstanding the fact that the board had no jurisdiction to entertain the preliminary points taken by the applicant because they fell outside the terms of the convening order, it determined them. The board found the preliminary point to be frivolous and vexatious and dismissed them one by one. The contention that it did not has no justification on the record. Again, on this point this application stands to fail.

[18] What remains to be considered is the question of costs. In civil litigation, the general approach is that costs orders should follow the result. The rationale behind this rule is that if a party is brought to court to defend a claim with insufficient merit, then it could hardly be fair to expect it to pay legal costs to defend an action that, objectively, ought not to have been brought in the first place. There is no reason to depart from the general rule in this matter. The applicant must bear the respondents' costs.

In the result, it is ordered as follows:

The application for review be and is hereby dismissed with costs of suit.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Attorney-General's Office Civil Division, 1st and 2nd respondents' legal practitioners