

CONSTABLE SITHOLE Q 058 7340

Versus

CHIEF SUPERINTENDENT DUBE S.
(BOARD PRESIDENT)

And

The COMMISSIONER GENERAL OF POLICE

And

THE POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 2 MAY 2023

Urgent Chamber application

Mr N. Mugiya, for the applicant

Mr T. Undenge, for the respondent

ZISENGWE J: The applicant is a serving member of the Zimbabwe Republic Police (ZRP) and holds the rank of constable. He filed this application through the urgent chamber book seeking an interim order for the stay of proceedings pending the outcome of two High Court applications he filed with this court. There cases are HC CAPP 55/23 and HC CAPP 61/23.

To put this application in perspective a brief chronology of the matter as same can be gathered from the papers filed of record on 12 April 2023, the 1st and 2nd Respondents convened a board in terms of Section 50 of the Polici.. to determine the suitability of the applicant to continue serving as a member of the.....Police Service. He had earlier been served with the notice to appear for the suitability board on 20 March 2023.

I will not endeavour to refurgitate in extension the factual background of this matter in the context of this extemporary judgment suffice it to say that in 2022, applicant was convicted in

terms of the disciplinary proceedings under the police Act. The allegations date back to 2017. Consequent to his conviction he was sentenced to term of imprisonment at a designated place.

In March 2023, applicant was served with a convening order to appear before a board of suitability in terms of the Police Act. He raised certain preliminary points which were all dismissed by the board President on 12 April 2023. He then proceeded to file this urgent chamber application on 27 April 2023 to have the proceedings heeded in abeyance pending the outcome of his separate applications namely CAPP 55/23 and CAPP 61/2023.

In CAPP 55/23 which was filed in 4 April 2023 he seeks by way of review the overturning of the conviction in the disciplinary proceedings referred to earlier. He claims that the conviction is vitiated by a litany of errors which he enumerated therein.

In CAPP 61/23, he unpugns the propriety of the dismissal of his points in limine which he raised in the suitability board inquiry. He seeks an interim order surprisingly as a ... and the suitability board enquiry pending the outcome of the CAPP 55/23 and CAPP 61/2023.

The application stands opposed by the Respondents who aver in the main most there was nothing irregular as unpruned about the dismissal of the points in limine, but more importantly they challenged the propriety of seeking a reward of uninterminated proceedings.

They however raise as a point in limine the question of urgency and it is to which that I now turn.

Urgency

The 1st respondent contends that the matter is not urgent. He claims that this application is merely a ploy by the applicant to delay and frustrate proceedings of the suitability board. The 1st respondent bases his..... on the fact that the applicant waited until the 11th hour, so to speak to ... to action....bring this application. He stated that the suitability board having sat on the 12th of April 2023 to bring this application.

In one well known case ZLR 188 AT 193 FFCr the following was said

“What constitutes urgency is not the imminent arrival of the day of a matter is urgent when at the....need to act arises the matter cannot wait. Urgency which .. from a deliberate as careless abstain from action until the deadline drawn is at the type of urgency contemplated by the rules”

In document Support ...(Pvt) Ltd v Mapuvire ‘2006 (2) ZLR 240 (H) the court had this to say.

“..... urgent applications are there when ...the courts fail to act, the applicants may well be their rights to dismissively support to the court that it should act both to act subsequently as the position would have become irreversible aid irreversible so to prejudice as the applicant.

In Kuziva Tigere v Police Service Commission HH 43a/15

“ See created urgency, that urgency which from deliberate inaction until the day of reckoning.....not the urgency contemplated by the rules of the court. A party that refrains from taking action when to do so arises only to to the court at the 11 hour as if ..the subject matter has part arisen will be stopped dead on the...became.....will not a

In Bleat Enterprise Pvt Ltd vHB95/21 Kabora J reiterated the possession that the applicant by his conduct must conduct himself in a way that ...urgency.

In Gwarada V Johnson & Others 2009 (2) ZLR 159 (+1) it was held that

“ A matter does not assume urgency because a litigant has plans, fulfilment of which requires an immediate solution urgency on this new arises when an act occurs which requires ...resolution...of which may come extreme prejudice to the applicant”

Econet Wireless (Pvt) Ltd v Trurbo Mobule (Pvt) Ltd & Anor 2013 (20 ZLR 309 (S)

In the present matter the crisp question for determination is when the need to act arose. Whereas the 1st respondent insists that same arose at the very learnt on 12 April 2023 when the suitability board was convened, the applicant on the other hand maintains that same arose on the 21th of April 2023 when the application to suspend the proceedings was dismissed. According to counsel he could not have approached this court on an earlier date without first making an application before the suitability board.

What the applicants ‘argument conveniently overlooks is the fact that as the cause of action arose as soon as he was aware that there was a convening order purportedly to determine his suitability to remain within the police service. At that stage he was aware of all the purported grounds of review which he set out in CAPP 61/23 he did not need the concurrence of the 1st respondent to halt what he perceived to irregular proceedings.

More pertinently however, the points in limine having been dismissed on the 12th, the applicant was aware that the 1st respondent intended to proceed with the inquiry despite his i.e. applicants mis... to its propriety.

The proceedings of the 27th of April which applicant relies on mere simply predicated on the present urgent chamber application having been filed. In other words the submissions made by counsel on the 27th of April were to seek a suspension of the proceedings pending the outcome of the present application P- yet differently that application was a circumstance of the urgent chamber application and not the basis of the urgent chamber application

The cause of action undoubtedly at the very least took place on the 12th of April when applicants' preliminary points were dismissed by the 1st respondent. It is... that when a litigant does not act when the need to act arises a reasonable explanation must be provided for the none timeous action to justify the matter to be treated as urgent. *Econet Wireless (Pvt) Ltd v Timaco Mobile Pvt Ltd &Anor 2013 (2) ZLR 309(S)*

In the present matter no explanation whatsoever was preferred for the failure by the applicant to file the urgent chamber application as soon as it became apparent that the prenent of the board had no intention to stop the proceedings.

For some 15 unexplained days he went into hibernation only filing CAPP61/23 in the process challenging the dismissal of the points in limine on the 14th of April 2023. There was nothing that precluded him to simultaneously file the present urgent chamber application seeking to suspend the proceedings.

The parties further haggled on the question of irreparable harm, when any that would be occasional to the applicant should the application not be heard on an urgent basis. The respondents argument in this regard is simple and straight forward. The argue that even when this application is dismissed for want of urgency rendering the application in CAPP55/23 and CAPP 61/23 potent..merely academic and further that should the applicant finds himself at the wrong end of

the stick at the conclusion of the suitability board enquiry, that is not the end of the world for the applicant as he still has theof either appealing to the Police Service Commission in terms of that decision.

The contrary argument presented on behalf of applicant is that there is effectively no other remedy available to him should the suitability board continue and that he is dismissed. It was further submitted that should he be dismissed then he may not have the financial wherewithal to content such dismissal having this lost his employment.

It was further averred that the avenue of review is not available to applicant. A con... argument was presented ostensibly to support of this argument.

Ultimately however, I do not see what irreparable harm the applicant would suffer when this application is not treated as urgent. This is because in CAPP 55/23 the applicant is merely challenging the propriety of his conviction in earlier disciplinary proceedings. He will not relinquish his right to proceed with that challenge by having this matter removed from the roll of urgent matters.

In CAPP 61/2023, he is merely contesting the dismissal of the preliminary he raised in the proceedings in the suitability board enquiry he retains the right to refer to the same either review as appeal should he persist with them.

A...however, the applicant manifestly failed to treat this matter as urgent by waiting an unexplained 15 days before launching the same. He has no claim at urgency. Accordingly the preliminary point by the respondent relating to urgency is hereby upheld and the matter is hereby removed from the roll of urgent matters with costs.