Judgment No. HB 68/07
Case No. HC 301/07

TONDERAI TITUS MADANHA

Versus

CHIEF SUPERITENDENT CHIMWANZA

And

THE COMMISSIONER OF POLICE

And

THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 28 JUNE 2007

M Ndlovu, for the applicant
C Muchenga, for the respondents

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of the final order sought

Whereupon after reading documents filed of record:

It is ordered:

That you show cause to this honourable court why final order should not be made in the following terms:

Final Order

1. It is be and hereby ordered that applicant has a right to make election to be tried by a magistrate.
2. That the 1st respondent be and is hereby permanently barred from proceeding with the trial of the applicant.
3. That 1st respondent pays costs on an attorney client scale.

Interim relief granted

Pending the confirmation or discharge of this provisional order, the applicant is granted the following relief:

1. That the 1st respondent be and is hereby interdicted from proceedings with the trial of the applicant until this matter is finalised."

The background facts of this matter are the following.

The applicant is a member of the Zimbabwe Republic Police with a rank of a constable. On 6 February 2007 he appeared before the first respondent facing two charges. The gravamen of the charges are the following:

Count 1

He was charged of contravening paragraph 35 of the Schedule of the Police Act [Chapter 10:11] as read with section 29 and 34 of the Schedule i.e. "Acting in any manner prejudicial to good order or reasonably likely to bring discredit to the Police Force." It is being alleged that the applicant "did wrongfully and unlawfully wrote an outcome of police report to Delta Beverages, Bulawayo advising them that their driver Moses Nhovha who had been involved in an accident with a Zimbabwe National Army car had not been charged as the accident was due to brake failure, whereas the accused had been charged and paid a deposit fine of $250 000,00 (old currency) on 25 June 2006. Acting on the outcome of the report, the company adjudged that their drive was not at fault only to discover later that he had paid a fine for driving without due care and attention."

Count 2

He was charged of contravening paragraph 34 [*sic*] of the Police Act, *supra* as read with section 29 and 34 of the Schedule to the Police Act i.e. "Performing duty in any improper manner". It is being alleged that the applicant "did wrongfully and unlawfully cleared twelve beasts away from the purporting owner's place and without local people witnessing the clearance of the said beasts."

When the applicant appeared he was legally represented. His legal practitioner indicated that the applicant elected to be tried by a magistrate. The 1st respondent declined the applicant's request. The proceedings then commenced and witnesses testified. Thereafter, the matter was postponed to 20 February 2007 for continuation. Before this date arrived the applicant opined that the 1st respondent was going to convict him of the charges. The basis of the opinion was that 1st respondent appeared too biased and showed hostility towards his legal practitioner. The applicant attached a provisional order granted in another matter involving a constable HC

143/06 as precedent. It is clear from the said matter that the applicant therein obtained the provisional order unopposed.

Before the resumption of the trial before a single officer, *supra*, the applicant launched this application. I propose to deal with the issues in turn.

Is the order in HC 143/06 binding on this court pursuant to the *stare decisis* rule?

The general rules are that all courts are bound by the decisions of the courts superior to them and that courts will follow their own past decisions unless they are clearly wrong – *Fellner* v *Minister of Interior* 1954(4) SA 523 (A) at 542B; *National Clemsearch (SA)* v *Borrowman & Anor* 1979(3) SA 1092(T) at 1101; *R* v *Shydom* 1 SC 60; *Jacobson* v *Nitah* 7 SC 178 and *R* v *Faithfully and Gray* 1907 TS 1081. In *R* v *Faithfull & Anor, supra*, SOLOMON J said:

"Of course, in ordinary circumstances the court will abide by its decisions; *stare decisis* is a good rule to follow. But where a court is satisfied that its previous decision was wrong, and more particularly where the point was not argued, then I think it is not only competent for the court, but it is its duty in such a case not to abide by its previous decision, but to overrule it" (emphasis added) see also *Bloemfontein Town Council* v *Richter,* 1938 AD 232 and *Harris* v *Min of Interior* 1952 (2) SA 471 (A).

As alluded to above, the order in HC 143/06 was granted by default. It was not based on the merits. The point raised was not argued. It is only the legal principle enunciated that must be followed; the facts must be decided with reference to the evidence in each individual case – *The Law Student's Companion* (2nd Ed) J Redgment at 158. The decision or judgment, in the sense of the court's order, by itself, only operates … as between the parties; It can only state how in so far as it discloses a rule" – *Fellner* v *Min of Interior, supra,* at 542D. See also *S* v *Nienaber* 1976(2) SA 147 (NC). It is the proposition of law or the *ratio decidendi* that matters and not the order itself – *Pretoria City Council* v *Levison* 1949 (3) SA 305 (A) at 317 and *S* v *Tshawe* 1979 (1) SA 700 (R). *In casu,* the order in HC 143/06 (i.e. the previous decision) is not supported by the court's considered on the law. So it can only bind the litigants in that case and not this court. As stated by GREENBERG JA in *Fellner* v *Minister of Interior, supra,* at 537: "The rule that the court is bound by a previous decision has reference only to the *ratio decidendi* and not to the concrete result of that decision." See also *R* v *Philips Davy (Pty) Ltd* 1955(4) SA 120 (T). Further in *Collet* v *Priest* 1931 AD 290 at 302 De VILLIERS CJ said:

"Whatever the reasons for a decision may be, it is the principle to be extracted from the case, the *ratio decidendi*, which is binding, and not necessarily the reasons given for it."

Accordingly, the concrete result in case number HC 143/06 does not bind this court.

Has the applicant established a case for the relief sought?

To obtain the interlocutory relief sought the applicant must establish a clear right and show:

(a) An infringement of his right by the respondents or at least a well grounded apprehension of such an infringement, and

(b) That the balance of convenience favours the granting of such interdict. Does the applicant, as a constable have a right to elect whether to be tried by a single officer, board of officers or a magistrate? This is the crux of this matter.

It is important to note that this is a labour dispute between the applicant and his employers. The Police Act provides for a dispensation of dealing with such matters of discipline in Part V. The applicant, not being an officer, [i.e." a member holding a commissioned rank" in terms of the definition of "officer" in section 2 of the Act] was brought for a trial before a court consisting of one officer in terms of section 34(1) of the Act. At the commencement of the proceedings, even before the issues cited in this application arose, he purported to "elect trial by Magistrates' Court". In terms of section 32, this election is afforded to the commissioned officers. Section 32 specifically states:

"If notice is given, in the manner and time prescribed by a member whom it is propose to try before a board of offices in terms of paragraph (c) of subsection (1) of section twenty-nine that he wishes that the charge against him be tried by a magistrates' court and not by a board of officers, the charge shall be tried by a magistrates' court." (Emphasis added)

It is clear that the right of election for trial before a magistrate is granted to officers only and not other members. The applicant is not a commissioned officer. So section 32 does not apply to his case. It is the legislature in its wisdom that excluded members other than commissioned officers from the enjoyment of the right of election of a trial before magistrates' court. According to the golden rule of interpretation, the literal meaning of the words of a statute must be adhered to, unless this leads to an absurdity or is at variance with

the supposed intention of the legislature – *S* v *Takaendesa* 1972(4) SA 72 RA at 77; *R* v *Venter* 1907 TS 910; *Principal Immigration Officer* v *Hawabu* 1936 AD 26 and 30-31 and *Rogut* v *Rogut* 1982 (3) SA 928(A). Whilst it is trite that statutes are presumed not to sanction discrimination or inequality [it was argued that section 32 discriminates against members who are not commissioned officers] the rule underlying this sub-presumption is epitomised by the word of MILLER J in *Lister* v *Incorporated Law Society, Natal* 1969(1) SA 431 (N) at 434:

"The court will not lightly construe a statute in such a way that its effect is to achieve apparently purposeless, illogical and unfair discrimination between persons who might fall within its ambit. If the language of the statute is reasonably capable of an interpretation which avoids that result, that is the interpretation which the court will give it rather than one which would attribute to the legislature a whimsical predilection for purposeless and unfair discrimination."

Section 32 deliberately excluded members who are not commissioned officers. There is no absurdity in it. Tempting as it is, there is no justification for this court to play a creative role. As stated by HOEXTER JA, in *R* v *Tebetha* 1959(2) SA 337 (A) at 346:

"Jus dicere, non dare is the function of the court and the language of an Act of Parliament must neither be extended beyond is natural sense and proper limited in order to supply omissions or defects, nor strained to meet the justice of an individual case."

Further, in *S* v *Adams* 1979(4) SA 793 (T) at 801, KING J observed:

"An Act of parliament creates law but not necessarily equity. As a Judge in a court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a Court of Equity, I would have come to the assistance of the appellant."

In this case the legislature provided for different disciplinary dispersions for commissioned and non-commissioned officers. *Prima facie,* this is discriminatory. But, the applicant has not relied on section 23 of the Constitution of Zimbabwe. Assuming he had done so, still the interpretation provided for in the interpretation clause i.e section 26 would operate. The government would be afforded an opportunity to justify the limitation on the constitutional right on the basis that the discrimination is "reasonably justifiable in a democratic society." *Zimbabwe Developers (Pvt) Ld* v *Lou's Stores (Pvt) Ltd* 1983(2) ZLR 376 and *Woods & Ors* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* 1995(1)

SA 703 (ZS). The applicant's papers do not raise discrimination as a constitutional issue. I agree with Mr *Muchenga,* for the respondents that section 34 provides for domestic remedies for non-commissioned officers facing disciplinary cases. It is also clear that a member aggrieved by the determination enjoys a right of review by the Commissioner of Police in terms of subsection (3). The matter may, *inter alia*, be referred by the Commissioner to the Attorney-General in terms of subsection (4). The Attorney-General may refer the matter to a Judge of the High Court for review in terms of subsection (5). The member also enjoys a right of appeal to the Commissioner and such noting of appeal suspends the execution of the sentence in terms of subsection (7). A member convicted by a trial in terms of section 34 "shall not be regarded as having been convicted of an offence for the purpose of any other law."

The maximum penalty is a Level Two fine or imprisonment not exceeding fourteen days or both. The applicant elects to go to a magistrates' court when he enjoys no such right in terms of section 32. he wants to approach the Magistrates' Court before exhausting domestic remedies provided for in section 34. There are no good reasons advanced for not exhausting domestic relief. The applicant applied to be tried before a Magistrates' Court even before the alleged "bias and hostility" towards his legal practitioner occurred. It appears the initial application was based on the perception that the trial conducted in terms of section 34 are not as fair as the ones before the Magistrates' Court. I do not think the suspicion is one of a reasonable person in the position of the applicant. The suspicion is not based on reasonable grounds – *Tutani* v *Min of Labour, Manpower Planning & Social Services & Ors* 1987 (2) ZLR and *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996(1) ZLR 613.

From the foregoing, the applicant failed to establish a clear right and show that:

(a) an infringement of his right by the respondents or at least a well grounded apprehension of such an infringement; and

(b) the absence of any other satisfactory remedy (section 34 provides other satisfactory remedies), and,

(c) that the balance of convenience favours the granting of the interdict.

The trial has already commenced, evidence has been led and all that remains is for the applicant to await the outcome. If he is aggrieved by the outcome, he can appeal and such appeal suspends the execution of the sentence.

Accordingly, the application is dismissed with costs.

Cheda & Partners, applicant's legal practitioners
Civil Division, Attorney-General's Office, respondents' legal practitioners