HB 148/17
HC 118/17

DETECTIVE CONSTABLE MUJABUKI

Versus

THE TRIAL OFFICER – SUPERITENDENT GUDO

And

THE COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 & 8 JUNE 2017

Opposed Application

N. Mugiya for the applicant
L. Musika for the respondents

MAKONESE J: This is an application for review in terms of Order 33 Rule 256 of the High Court Rules, 1971 in respect of trial proceedings instituted by the respondents against the applicant. The single ground for review set out in the application is in the following terms:

> "The conduct of the 1st respondent is a violation of the applicant's right to a fair trial in terms of section 69 of the Constitution as read together with section 86(3) of the Constitution and the entire proceedings should therefore be set aside."

The applicant seeks an order of this court staying the proceedings before a single officer commenced at Beitbridge District Headquarters on the 6th of December 2016 in terms of the Police Act. Applicant is facing a charge of contravening paragraph 35 of the Schedule to the Police Act (Chapter 11:10) as read with section 29 (a) (i) (d) (ii) and section 34 of the Act, "Acting in an unbecoming manner or in any manner prejudicial to the good order or discipline or reasonable likely to bring discredit to the Police Act". The undisputed facts are that the applicant being a member of the Police Service drove a motor vehicle without a licence. He was involved in a road traffic accident which claimed the lives of two pedestrians. The applicant was charged and acquitted on culpable homicide charges in the Magistrates' Court. When he was hauled before a single officer on allegations of violation of the Police Act, applicant excepted to the

charges arguing that it was not competent for him to be charged in terms of the Police Act after having been charged in terms of the ordinary law on the same allegations. Applicant alleges that the trial before a single officer would constitute double jeopardy and would be in violation of the provisions of section 70(1) (m) of the Constitution of Zimbabwe (Amendment No. 20) 2013. Respondents oppose the application for review and raise a point *in limine* in relation to the propriety of this application. It is contended on behalf of the respondents that the application is not properly before the court in that it falls foul of Rule 257 of the High Court Rules. It is observed by the respondents that the grounds upon which the applicant seeks to have the proceedings set aside are not covered by the provisions of section 27 (1) of the High Court Act (Chapter 7:06), which provides that:

> "Subject to this Act or any other law, the grounds upon which any proceedings or decision may be brought on review before the High Court shall be:-
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> (a) Absence of jurisdiction on the part of the court, tribunal or authority concerned
> (b) Interest in the cause, bias, malice or corruption on the part of the presiding officer.
> (c) Gross irregularity in the proceedings or decision.
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> In the case of *Magugu* v *Police Service Commission and Another* 2010 (2) ZLR 185 (H), GOWORA J (as she then was) stated as follows:-
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> *"The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he is subjected to."*
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> The learned judge further stated thus:
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> *"The function of the court is to ensure that the administrative body does not abuse lawful authority entrusted to it by treating the individual subjected to it under the lawful authority unfairly."*
>
> In terms of section 35 (1) of the Police Act, it is provided that:
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> "The proceedings before or at any trial by a Board of officers or an officer in terms of this Act, shall as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe."

The applicant's main contention is that he should not be tried by the single officer in terms of the Police Officer as this constitutes double jeopardy. He contends that having been

charged in the criminal court in terms of ordinary law for culpable homicide, the respondents have no jurisdiction to subject him to further disciplinary proceedings in terms of the Police Act. It is my view, that on the facts of this matter the matter falls in the purview of a review application. The point *in limine* taken by the respondents has no merit and I shall proceed to consider the matter on the merits.

In terms of section 278 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) it is provided thus:-

> "A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceeding in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority as the case may be.
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> Under section 193 of the Constitution of Zimbabwe it is provided that:
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> "Only the following courts may exercise or be given jurisdiction in criminal cases –
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> (a) the Constitutional Court, the Supreme Court, the High Court and Magistrates Court;
> (b) a court or tribunal hat deals with cases under a disciplinary law, to the extent that the jurisdiction is necessary for the enforcement of discipline in the disciplined force."

It is clear that the Constitution makes specific provision for the creation of tribunals necessary for the enforcement of discipline within the police service, prison service, security service and other disciplined forces. The argument presented by the applicant which suggests that section 278 of the Criminal Law (Codification and Reform) Act is a law of general application has no sound legal basis. There is nothing under section 278 of the Criminal Law (Codification and Reform) Act that prohibits the prosecution of members of the police force who would have violated the Police Act. There is no double jeopardy. The offence charged under the Police Act is essentially different from the charges brought in the Magistrates Court. In order that the point is made clear, in the Magistrates Court, the charge was culpable homicide. When applicant appeared before the single officer the charge was "acting in an unbecoming manner prejudicial to the good order or discipline or reasonably likely to bring discredit to the Police

Force". The manner in which the charge is framed illustrates that the applicant is being tried in accordance with the norms and standards of police discipline.

I must make the point that disciplinary trials are a creature of statute which empowers those in authority to administer discipline to their subordinates within the law. These proceedings have the overriding objective of maintaining good order and discipline within the force. This court will only interfere with such disciplinary proceedings where there is an irregularity or abuse of authority or unfair treatment on the person being tried. Where the proceedings are conducted within the law and by persons authorized to do so, this court is slow to exercise its powers of review.

See the cases of *Magwala Nkululeko* vs *Commissioner General of Police & Others* HB-11-16; *Mazungunye* vs *Comm General of Police & Ors* HB-149-16 and *Felix Sangu* v *Commissioner of Police & Ors* HB-110-16.

The common thread that runs in all these recent decisions is that far too many officers from the Police Service seek refuge in this court where there are facing disciplinary charges in terms of the Police Act. There has been an upsurge in cases of reviews and applications for stay of disciplinary proceedings arising from cases of discipline within the Police Force. This court is now acting like a buffer, or a shield, protecting members who should simply submit to the lawful disciplinary trials. Only in those cases where members of the force are being treated unfairly or where due process is not observed in terms of the Constitution, must this court intervene.

In the circumstances, the application for review has no merit whatsoever.

I accordingly, make the following order:

The application be and is hereby dismissed with costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners