DZIKAMAI MADZIVIRE
versus
THE TRIAL OFFICER
and
THE POLICE COMMISSIONER GENERAL

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 19 November & 16 December 2015

Opposed Application: Review

A Mugiya, for the applicant
L.T Muradzikwa, for the respondent

TSANGA J: This is an application for review brought in terms of Order 33 r 256 of the High Court Rules 1971. The applicant seeks an order that:

1. The decision handed down by the first respondent 12 of November 2013 be and is hereby squashed and set aside.
2. The respondents to pay costs of suit.

The Facts

The background to the matter is that the applicant was indicted for contravening para 34 to the Police Act [*Chapter 11:10*] which is "omitting or neglecting to perform duty or performing duty in an improper manner" as specified in the Schedule. On 25 September 2013, the applicant was in charge of a road-block along Kadoma-Chegutu highway. Applicant and his team was approached by a team from Police Internal Investigations led by one Superintendent Banda. A spot check was conducted and the applicant was found in excess of US$55-00 which was in the ticket book known as Z69J. His explanation was that it belonged to another vehicle that had gone for re-fuelling.

A hearing was convened and the applicant was found guilty and convicted of contravening the above mentioned provision of the Police Act. He was sentenced to 7 days in with labour at Chikurubi Detention Barracks Support Unit. Dissatisfied with the outcome of

the disciplinary proceedings, he appealed to the second respondent Commissioner of Police. On 12 July 2014, he was informed that his appeal was not successful and that he should therefore serve the sentence. On 15 July 2014, he filed the present court application for review in terms of Order 33 r of the High Court Rules, 1971.

The gravamen of his dissatisfaction with the outcome is that although he had been charged with "omitting or neglecting to perform duty" or "performing duty in an improper manner", the reasons for sentence, which were cryptic, indicated that he was convicted for "failure to do a hand over and take over". He averred in his affidavit that the issue of hand over and take over was never addressed during the course of the trial and that as such this finding was a gross irregularity on the part of the trial officer.

He also averred that the trial officer exhibited malice towards the applicant during the course of the trial. In support of this contention, the applicant averred that as soon as the state closed its case the trial officer had proceeded to announce the verdict that the applicant had been found guilty as charged. Furthermore, it was submitted that the trial officer had descended into the arena as she was hostile towards the applicant and interrupted the defence counsel during cross-examination. Applicant averred that the trial officer also failed to subpoena Superintended Banda who was a key witness to the trial.

The first and second respondents opposed this application. The first respondent was the trial officer whilst the second respondent the Commissioner General of Police. The opposing affidavit was deposed to by the first respondent. Whilst initially a point *in limine* had been taken that the review was filed out of time as it should have been at the conclusion of the first hearing, the respondents' counsel conceded in their heads that the application was not out of time as internal remedies had to be exhausted. To bolster the point that applicant was correct in exhausting internal remedies, this court was referred by the applicant's counsel to s 34 (7) of the Police Act [*Chapter 11:10*] which states that:-

> "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."

Furthermore, applicant also relied on the case of *Moyo* v *Gwindingwi and Anor* HH 168/11 in which Mathonsi J stated that:

> "In a line of cases this court has determined that it will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhausted domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the courts unless good reasons are shown for making an early approach."

In *casu*, the undisputed facts show that disciplinary proceedings ended on 11 November 2013 before the first respondent, applicant immediately appealed to the second respondent who 12 July 2014 informed that his appeal was dismissed. On 15 July 2014 applicant filed this application.

Regarding the merits of the matter, the first respondent averred that the record of proceedings reflects what actually transpired during the proceedings. She disputed that as the trial officer she had descended into the arena or that she malicious or showed bias towards the applicant and defence counsel. She averred that the applicant was legally represented throughout the trial by a senior counsel, who would not a have allowed such a transverse of justice to occur. Moreover, her standpoint was that although the court can subpoena any person, it is primarily the duty of the parties to call witnesses who will support their case. She maintained that the conviction had been proper.

Applicant's heads of argument highlighted the review powers of this court in terms of s 27 (1) (b) of the High Court Act [*Chapter 7:06*] which provides in essence the grounds for review as being interest in the cause, bias, malice or corruption the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned. The case of *Dube* v *Nandiona & Ors* HH 173/93 was relied upon for the assertion that what has to be shown is not that the determination was wrong but that it was irrational and that it defied logic. Mr *Mugiya*, who appeared on behalf of the applicant, stressed that the trial officer never gave a reason for judgement as her judgment showed that she had not analysed the evidence that was put before her. He further emphasised on behalf of applicant that failure by the trial officer to capture some of the proceedings in the record was not an omission but was deliberate and clearly showed that she was malicious towards the applicant. He highlighted that the trial officer announced a verdict soon after the state had closed its case which showed that she had already convicted the applicant before the defence had opened its case.

The respondents' points of emphasis in their heads was that the record of proceedings was a true reflection of what transpired. Mr *Muradzikwa* from the Civil Division, who appeared on behalf of the respondents, insisted that the record of proceedings did not show that the first respondent descended into the arena or reveal malice towards the applicant or defence counsel. He did however take the view both in the heads of argument and in his oral presentation, that the decision arrived at was so outrageous in its defiance of logic that no reasonable person acting logically would have arrived at. This view emanated from his assessment that the applicant had clearly given an explanation of how he came to be in

possession of the extra $55.00 yet the state witness failed to challenge this as they did not wait to investigate the applicant's defence. It was also arrived at taking into account that the evidence of the applicant's witnesses had also corroborated the applicant's story. He submitted that there was gross irregularity in the decision. His conclusion was that this was one of exceptional cases where the review procedure could (not "must") be used to consider whether a conviction was proper or not.

The test for bias as articulated for example in the case of *Nkomo* v *TM Supermarkets (Pvt) Ltd* 2013(2) ZLR 75 (H) is whether the person so challenged has associated himself with one of the two opposing views that there is a likelihood of bias or that a reasonable person would believe that he would be biased. A careful analysis of the record indeed fails to show aspects of such bias that the applicant alluded to as maintained by counsel for the respondents albeit they did not agree with the final finding. The explanation by applicant's counsel was that there was much that had occurred that was not made part of the record. Mr *Mugiya* relied on the case *Chidavaenzi* v *The State* HH 113/08 for the contention that failure to keep a comprehensive record of proceedings amounts to a misdirection the entire proceedings. Obviously whether or not there has been failure to keep a comprehensive record of proceedings must be self-evident from the record itself. In the *Chidavaenzi* case the record from the record presented for appeal it was not even clear the accused person was. Furthermore, the accused's plea had not been recorded. There were thus many procedural irregularities on the face of the record. In *casu* what the applicant says has been left out are not procedural details but rather factual omissions which this court has no way of verifying. The principle therefore does not aid the applicant in this case. This court has to go by the record and the record fails to show that the proceedings were irregular on account of bias in the manner alleged by the applicant.

There is a distinction between compromising a claim and merely conceding that some points may not be sustainable. The respondents have not compromised their claim that there was no bias. However, they one with applicant that the decision was irrational. The real issue which therefore remains for decision is whether this court is in agreement with the parties that the determination was irrational in the sense of being so outrageous in its defiance of logic". The sum total of the trial officer's reasons for judgment were captured as follows:

> **"Reason for sentence**
> There was no proper hand over and take-over of the money in the charge office diary (OB) even in the declaration book. As he said the money was for other books which were in the car. The prevalence of the cases (sic) are on the rise and you are a first offender.

> Found in excess of $55-00 and failed to account for it. The money should tally with the receipt that they receipted on that day."

The overall charge for which the above reasons were being articulated was "omitting or neglecting to perform duty" or "performing duty in an improper manner". Therefore the manifestation of "omitting or failing to perform duty" or "performing duty in an improper manner" was by failing to hand over and take over money as alluded to in the reasons for judgment. I do not agree that the trial officer was putting forward a new charge. The trial officer in this regard was simply elucidating the context for the charge of "failure to perform duty" or "performing duty in an improper manner". The failure was manifested by omitting to hand over and take over. This was the reason she gave.

It is true that the reasons are cryptic but it is not entirely true that no reasons relevant to the charge were given. It is not as if the decision was given arbitrarily. The trial officer makes it clear on record that the applicant was found in excess of $55-00 and that money should "tally with the receipt that they receipted on that day". Neither counsel for applicant nor for the respondents engaged this court full throttle on the trial officer's words that there was no hand over or take over "even **in the declaration book** ". Applicant simply captured the paragraph in question to point out the brevity of the decision in light of the evidence as a whole and to point to its inadequacy. It was important to engage with its import and framing as it points to failure to adhere to given procedures being the basis of the decision. This appears to have been the core to the decision - in other words procedural irregularities in handling the cash in question. Immediately after these words she mentions the fact that applicant said "the money was for other books which were in the car". The statement "even in the declaration book" appears to suggest that this money which was said to be for other books said to be in the car that had left the scene, should have been in the declaration book.

However, I would agree with both counsel that it was vital for the trial officer to show that she had applied her mind wholly to all the vital links in the evidence before her, in order to illustrate her arrival at the conclusion that there had been a failure to do a proper hand over and take over in line with proper performance of duty. The inference for this conclusion must appear from her engagement with the evidence which is clearly absent in this case. A full engagement with the reasons assures the affected party that the trial officer has engaged fully with the facts of their matter. Unfortunately, this court was for the greater left to speculate where she may having been coming from. This is clearly unacceptable.

It needed to be clear why she was dismissing the applicant's explanation of his evidence as to why the money was in his possession in the manner that it was. It was improper for her to write from a perspective that the parties involved are aware of the procedures. Even if that was the case, it did not absolve her from giving well-articulated reasons. Such reasons may themselves stem an appeal if the party against whom a decision is made is furnished with full reasons for that decision.

In the final analysis, given the failure *ex facie* the reasons, to fully address why the trial officer made the order that she did, and given the failure to engage with the facts, I am persuaded that on balance, the applicant has made out a case which justifies setting aside the conviction and sentence on the basis of irrationality and defiance of logic. Her conclusion was arrived at without a display of proper engagement and weighing of the facts in question. The applicant has asked for an order of costs. However, having found that there was no bias on the part of the trial officer and that neither was the decision entirely wanting, each party will bear their own costs.

However, in order to encourage the performance of duty in a proper manner among trial officer themselves, which the trial officer was so keen to see done, the application is granted as follows:

1. The decision handed down by the first respondent on 12 November 2013 be and is hereby squashed and set aside.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners