

ASSISTANT INSPECTOR BERE A 985652K
and
CONSTABLE ZHOU L 989491H
versus
COMMISSIONER ERASMUS MAKODZA
(OFFICER COMMANDING-MASHONALAND EAST)
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 28 February 2020 & 5 March 2020

Urgent Chamber Application

Mr N. Mugiya, for the applicants
Miss T. Tembo with Mr T. Nyamukapa, for the respondents

MUSITHU J: Applicants are members of the Zimbabwe Republic Police (ZRP) Marondera Traffic. On 24 February 2020 they filed this urgent chamber application seeking relief set out in the draft provisional order as follows:

“TERMS OF THE FINAL RELIEF

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The First Respondent’s transfer of the Applicants from Zimbabwe Republic Police Marondera Traffic be and is hereby declared unlawful and wrongful and accordingly set aside.
2. The 1st Respondent is ordered to pay costs of suit on a client-attorney scale.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the provisional order, an interim relief is granted on the following terms;

1. The transfer of the Applicants by the Respondents be and is hereby stayed pending the finalization of this matter and the pending disciplinary trial at Marondera District Headquarters.”

The brief facts motivating this application are as follows.

On 11 February 2020, the applicants and five other police officers were manning a roadblock at the 71 kilometre peg along the Harare-Mutare road. First applicant was in charge of the road block. According to the first applicant, first respondent and other senior officers arrived at the roadblock around midday and started harassing the applicants and their fellow officers. They accused them of being corrupt and taking bribes. They were arrested at the site and ordered to discontinue the roadblock. First respondent failed to find evidence of corruption and shifted goal posts. He accused first applicant of failing to ensure that officers under her command declared their valuables in line with the procedure for manning roadblocks. Applicants deny the allegations. First applicant asserts that the officers had declared their valuables as per procedure. She attached an extract from the declaration book to confirm the declarations made on the day. The extract is a photocopy, handwritten and unreadable. She further averred that the duty to cause officers manning a roadblock to declare assets is reposed upon the Officer in Charge and not the team leader. This is in terms of the internal Traffic Operations Contemporary Anti-Corruption Strategies Circular 01/2012. In spite of the evidence that procedure was complied with, first respondent vowed to fix the applicants and their colleagues officers. They were arrested and detained in anticipation of an internal disciplinary trial.

The applicants' account of events is contradicted by that of first respondent. It goes as follows. On the same day around 0900 hours and at the same site, a team of senior police officers from the Police General Headquarters arrived at the site. The team comprised of Commissioner Tayengwa, Assistant Commissioner Paul Nyathi, Chief Superintendent Thebe and Chief Superintendent Kureva. The senior officers observed a Toyota Hiace combi heading towards Harare being stopped at the roadblock. The conductor disembarked and ran to second applicant. He handed her ZW\$20.00, but was not issued with a receipt. As he was about to return to the combi, he and the second applicant were summoned by the senior police officers. The ZW\$20.00 was recovered from second applicant. Searches were carried out on all the officers manning the roadblock. ZW\$9.00 was recovered from second applicant's trousers pocket. ZW\$125.00 and US\$45.00 was recovered in second applicant's purse. The money was not declared in the declaration register. A further ZW\$87.00 was found abandoned under a tree at the roadblock site. Five cellphones were found in the first applicant's bag. They were also not declared. The roadblock

started at 0600 hours and only four arrests had been made. ZW\$300.00 cash as recorded in the Z69J book 06/20 had been raised from these arrests. The officers were handed over to the officer commanding Marondera District for disciplinary action.

It is not in dispute that following this incident, the applicants were transferred from the station on that very day. First applicant was initially transferred to ZRP Juru. That transfer was overturned the following day with a radio signal confirming her new station as ZRP Sadza, Chivhu. Second applicant was transferred to ZRP Masasa, also in Chivhu. The transfers were with immediate effect. The applicants contend that their transfers from urban Marondera to remote rural stations was actuated by malice and the desire to fix them, done as it was, at short notice and with no provision for relocation allowances. As if to confirm this position, first applicant was transferred twice within 72 hours. First to ZRP Juru and then ZRP Sadza. First respondent denies that the transfers were motivated by any ill will on his part. They were motivated mainly by the events of 11 February 2020, and partly as an exercise of discretion by virtue of powers conferred on him by law. The reversal of the transfer of first applicant from Juru to Sadza followed a realization that ZRP Juru ended up having more Assistant Inspectors than required. ZRP Sadza was in need of officers of that level. The transfers affected 13 other officers. It is not clear how many of these also face internal disciplinary processes as the applicants.

POINTS IN LIMINE

At the commencement of the hearing, *Miss Tembo* for the respondents raised two points in *limine*, lack of urgency and failure by applicants to exhaust internal remedies. For convenience, I invited the parties' legal practitioners to address me on the points *in limine* and the merits of the matter. The matter would be disposed of on the basis of the points in *limine* if I found them meritorious.

Urgency

Miss Tembo submitted that the need to act arose on 12 February 2020 when the radio signal communicating the transfers was published. The applicants filed an urgent chamber application on 19 February 2020. It was set down for hearing on 24 February 2020 at 1200hours. The applicants defaulted and the matter was struck off the roll. Even then, the delay of seven days was not explained. The applicants filed the present application on 24 February 2020. The delay was

inordinate. The transfers published on 12 February 2020 were imminent, and immediate action was called for. The failure to attend court on 24 February 2020 exacerbated the delay in taking immediate action. The certificate of urgency and the founding affidavit did not explain the reason for the seven day delay in filing the first application. If the first application was not urgent, then the present was hopeless. The applicants had been sluggish in their approach to the matter.

Mr *Mugiya* argued that the matter was urgent. The delay of seven days was not unreasonable by any measure. In any case it was explainable. Applicants became aware of the decision to transfer them on 12 February 2020. The radio signals communicating the transfers were served on 13 February 2020. The lawyers took instructions on 14 February 2020. 15 February 2020 was a weekend. The lawyers managed to file the application on 19 February 2020. The application could not be filed earlier because the swipe machine at the High Court was not working. They could not pay the filing fee on submission of the application. When the applicants got to know of their transfer, they requested the official communication from their command, but they were only given circular number 1 of 2012 and the charge sheets. The command refused to give them the radio signals leaving them with no choice but to launch the application without key documents. This explains the delay in lodging the first application. The first application was set down before MANGOTA J on 24 February 2020 at 1200hours. Applicants and their counsel state that they were delayed on their way to court because of a road traffic accident which was holding up traffic. They arrived at the judge's chambers at 1208hours and were advised the matter had been struck off with costs. They immediately launched the present application.

I find the explanation for the delay conceivable. It is not unusual for litigants and their lawyers to require time to put information together before filing an application of this nature. In the present matter, it was not denied that the requested information was in the hands of the first respondent or other senior officers of ZRP. What was denied was that their request for information was declined. Whether or not a matter is urgent is an issue for exercise of discretion by the judge. The remarks by GARWE JA in *Econet Wireless (Pvt) Limited v Trustco Mobile (Proprietary) Limited & Another*¹, are apposite. He said:

“It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of a discretion....”

¹ SC-43/13 at page 14 of the judgment.

In the exercise of my discretion, I find that the delay in filing the application was not inordinate. Following the striking off of the first application on 24 February 2020, the applicants filed another application on the same day. They evinced a desire to prosecute the matter on an urgent basis. The matter is urgent. The point *in limine* is dismissed.

Failure to exhaust domestic remedies

Ms *Tembo* submitted that applicants should have subjected themselves to the local remedies at their disposal before approaching this court. The applicants were transferred on the strength of powers delegated to first respondent in terms of section 10 of the *Police Act*², (the Act) as read with Article 2.1 of the ZRP Transfer Policy (the policy). Section 10 of the Act provides that:

“10 Delegation of Commissioner-General’s functions

Subject to this Act, the Commissioner-General may from time to time delegate to any officer of or above the rank of superintendent any right, function, power or duty conferred upon him by this Act or any other enactment, other than the power of further delegating the right, function, power or duty so delegated.”

Article 2.1 of the policy states as follows:

“The transfer of non-commissioned officers (Assistant Inspector and below) shall be authorized by the Chief Staff Officer [Human Resources Administration] and any other senior officer delegated to act in the same function by the Commissioner General of Police”

The same policy, it was submitted, allows first respondent as officer commanding province, to transfer members of the police within his province. It also provides procedures to be followed by officers not contented with their transfer. Article 3.0 provides that:

“All appeals against transfers shall be made in writing by the concerned officers/members and submitted to Police General Headquarters for consideration through the usual channels” (underlining for emphasis)

Ms *Tembo* submitted that the phrase “*through the usual channels*” is well known in the force. An aggrieved officer must submit a report to their officer in charge who in turn must refer it to the officer commanding district. From the officer commanding district it goes to the office of the second respondent. The internal grievance procedure allows first and second respondents to

² [Chapter 11:10]

look into the grievance and take appropriate remedial action, if need be. The applicants had not followed the internal grievance procedure, without good reason. The matter was not yet ripe for referral to this court. The court was urged not to usurp the administrative powers of second respondent. Such powers are set out in section 8 of the Act as read with section 221 of the constitution of Zimbabwe.

Mr *Mugiya* argued that the internal remedies alluded to by the respondents only applied where applicants were challenging their transfer. In the present matter, they were not. They were merely seeking a temporary reprieve pending the holding of their internal disciplinary trials. He further submitted that applicants engaged their commanders in terms of paragraph 30 of the Standing Orders volume 1 for consideration of their request. The request was made through the officer in charge on the day of their arrest. To date, no response had been received from the officer in charge. In any event, the applicants were not even aware of the existence of the transfer policy. It had not been officially brought to their attention or published. Counsel submitted that in terms of part 2 of Standing Orders volume 1 any policy became effective after publication to members of the force. On their part they were required to acknowledge receipt by endorsing their signatures. The signed acknowledgement of receipt is kept in the officer's personal file for future reference in case of any future misconduct or enquiry. I read part 2 of the Standing Orders volume 1 and I did not find the part that speaks to the operationalization of the policy as alluded to by Mr *Mugiya*.

Mr *Mugiya* submitted that the internal disciplinary trial that applicants will be subjected to is before a single officer in terms of section 34(1) of the Act. The decision of a single officer is subject to review by second respondent, where the trial results in a conviction and sentencing of the officer. An officer can also challenge the conviction and sentence on appeal to the second respondent. If applicants had been transferred, but not charged, then they could have subjected themselves to the internal remedies alluded to. The relief sought was not available internally. A notice of objection would not take less than 30days, by which time the process that triggered the approach to this court would be long completed. The internal remedies did not provide applicants effective redress. That prompted an approach to this honourable court. Counsel referred to the case of *Makarudze and Another v Bungu and Two Others*³.

³ HH 08/15

At the conclusion of the oral submissions, I asked parties to avail copies of the transfer policy and the Standing Orders volume 1 as both documents had been referred to extensively. *Clause 2.17* of the transfer policy provides as follows:

“Appeals against transfer

No appeals against a transfer shall be entertained unless:-

- Officer/Member has complied with the transfer order.
All appeals against transfers shall be made in writing by the concerned officers/members and submitted to Police General Headquarters for consideration through the usual channels” (underlying for emphasis)

The preliminary objection needs to be understood in the context of the relief sought by the applicants. Applicants are not challenging their transfer. That relief is for the return day. Before me, applicants seek the temporary stay of their transfer pending the return day and the holding of the internal disciplinary trial. I have perused the transfer policy and the Standing Orders volume 1 to verify if there is provision for this kind of relief internally. I found none. The transfer policy sets out the different forms of transfer and the induction process for transferred officers. *Clause 2.17*, of the policy cited above, provides for appeals against transfer. It does not provide for the transfer procedure in detail. If the detailed procedure is resident in some other transfer procedure manual, then such was not brought to my attention. Just as is the case with the transfer policy, the Standing Orders volume 1 provides for the different forms of transfer of officers. It goes further to provide for the removal of the member’s furniture and its storage⁴. *Articles 31 to 45* deal with the arrest of officers, suspension, prosecution, legal representation, trials and enquiries, punishment, appeals and criminal charges against officers. There is no procedure for stay of transfer pending the internal trial of an officer.

The submission by Ms *Tembo* that the phrase “*through the usual channels*” in *clause 2.17* of the policy is well known in ZRP is not persuasive. I say so for two reasons. Firstly the phrase “*through the usual channels*” is not defined. The meaning ascribed to it has been disputed by the applicants. In the absence of agreement as to the meaning, then oral evidence would be required for the court to appreciate its significance and application. Secondly, the clause in which the phrase is used specifically deals with appeals against transfer. The applicants *in casu* are not appealing

⁴ 2nd Edition Part 5 Articles 1.0 to 8.0

against transfer. It is on the return day that they seek an order declaring their transfer from ZRP Marondera Traffic unlawful and wrongful. Before me they merely seek a temporary reprieve.

In *Makarudze and Another v Bungu and Two Others*⁵, MAFUSIRE J says the following of domestic remedies:

“The general view is that it is discouraged for a litigant to rush to this court before he or she has exhausted such domestic procedures or remedies as may be available to his or her situation in any given case. He or she is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so: see *Nokuthula Moyo v Norman Gwindingwi NO & Anor*⁶. However, it is also the general view that the domestic remedies must be able to provide effective redress to the complaint. Furthermore, the alleged unlawfulness complained of must not be such as would have undermined the domestic remedies themselves: see *Tutani v Minister of Labour & Ors*⁷; *Moyo v Forestry Commission*⁸ and *Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee*⁹. The court will not insist on an applicant first exhausting domestic remedies where they do not confer better and cheaper benefits: *Moyo’s case, supra*, at p 192.”

The remarks by MAFUSIRE J are apposite to this case. I am persuaded by Mr *Mugiya’s* submission that *clause 2.17* of the policy would be applicable if the applicants were challenging their transfer before me. They are not. All they seek is a temporary injunction, allowing them to remain at the station for the duration of the internal disciplinary trial. I found nothing in both the transfer policy and the standing orders by way of remedies which provide applicants the redress they seek before me. The objection is accordingly dismissed.

MERITS

Mr *Mugiya* submitted that all the applicants seek is a temporary suspension of their transfers pending the conclusion of the internal disciplinary trial. They are not challenging their transfers at this point. He argues that the transfers were executed in a manner that is punitive, unjust and unlawful seeing as the applicants had already been charged and were awaiting the commencement of the internal disciplinary trial. It was further submitted that the respondents’ conduct was an affront to section 68, as read with section 87(3)(e) of the Constitution. The

⁵ At pages 9-10 of the judgment

⁶ HB168/11; See also *Musandu v Cresta Lodge Disciplinary and Grievance Committee* HH 115/94; *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H); *Tuso v City of Harare* 2004 (1) ZLR 1 (H); *Chawara v Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H) and *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88 (H)

⁷ 1987 (2) ZLR 88 (H) at p 95D

⁸ 1996 (1) ZLR 173 (HC), at p 191

⁹ HH 115/94

applicants were already being victimized before the internal disciplinary trial decided their fate. In any event, both the Act and the Standing Orders volume 1 have safeguards to allay any fears respondents may harbour regarding the applicants' continued stay at the station during their internal disciplinary trial. They can be suspended or stripped of some of their powers during the course of the trial.

Miss *Tembo* cautioned against interference with the administrative powers reposed in the second respondent by the Constitution and the Act. The powers can only be interfered with if exercised unlawfully or irrationally. In *casu*, respondents acted in terms of Act and the transfer policy and no malice or arbitrariness can be imputed to them. In any case, the applicants as is the case with all officers, are expected to know the transfer policy. It is part of police literature kept at every police station which every officer is familiar with. That the applicants are not challenging their transfer shows they were content with the manner they had been transferred. *Ms Tembo* further submitted that the applicants could also make use of routine orders at their disposal. These were in the form of rules and regulations governing the conduct of officers at the station. She did not explain where these are found, and neither did she make specific reference to clauses that are pertinent to this case. They were not placed before me. Miss *Tembo* further submitted that keeping the applicants at the station would send wrong perceptions at the workplace and the community. The allegations against the applicants were related to corruption, and their arrest had been witnessed by people within the community. Administratively, the applicants could not be kept at the station a day longer because of the sensitive nature of the allegations against them. There was also fear of interference with witnesses who were going to testify against the applicants. In any case, the applicants were not the only officers affected by the transfers.

Mr *Mugiya* argued that the routine orders referred to by respondents were not applicable to this case. They did not have the force of law. He also challenged the validity and authenticity of the transfer policy.

The validity or authenticity of the transfer policy is not an issue for determination at this stage. Suffice it to state that there seems to be two different versions of the transfer policy. During oral submissions, *Ms Tembo* submitted that appeals against transfers are handled in terms of clause 3 of the policy. That same clause is referred to in paragraph 4.2 of first respondent's opposing

affidavit. However the transfer policy availed to me after the conclusion of the oral submissions deals with appeals against transfers in clause 2.17.

All the applicants seek at this stage is a temporary suspension of their transfers pending the conclusion of their internal disciplinary trials. They are not opposed to their transfers. In support of their cause, they cited the inconvenience of shuttling back and forth between Marondera and their new stations in order to attend the disciplinary trial. Marondera is convenient for them as their witnesses are resident in that town. It is closer to the offices of the lawyer of their choice. In any case the trials had already commenced in Marondera, but had been postponed at the instance of the respondents. For the respondent it was submitted that arrangements can be made for the internal trials to be conducted at the applicants' new stations or some other place conveniently located. I do not find the request by the applicants untenable.

The reasons advanced by respondents in opposition to the interim relief sought are far from convincing. It is not in dispute that applicants face allegations which are related to corruption. They remain allegations at this stage. They have not been convicted yet. Court decisions are not influenced by public perceptions as Ms *Tembo* seemed to be suggesting. I agree with Mr *Mugiya*'s submission that the Standing Orders volume 1 and the Act provide respondent with sufficient safeguards in the interim. The safeguards deal with any administrative inconveniences that may be occasioned by the applicants' stay at the station for the duration of the internal disciplinary trial. I am satisfied that the applicants have made a *prima facie* case for the relief sought.

Accordingly it is ordered that:

Pending the confirmation or discharge of the provisional order, an interim order is granted in the following terms:

1. The transfer of first and second applicants at the instance of first and second respondents be and is hereby suspended pending the return day and the conclusion of the internal disciplinary trial at ZRP Marondera District Headquarters.
2. The costs of this application shall be in the cause.

Mugiya and Muvhami Law Chambers, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners