HB 135-15
HCR 48-11
XREF HCA 85-11 & 579-11

BRIAN MOYO
versus
THE COMMISSIONER GENERAL Z.R.P
and
CHIEF SUPERINTENDENT KUNENE
and
CHIEF SUPERINTENDENT MAFUNDA
and
SUPERINTENDENT MAPIYE
and
SUPERINTENDENT HUNGWE
and
CO-MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 26 JUNE AND 2 JULY 2015

Court Application for Review

Applicant in person
Mr *Dodo* for the respondents

MAKONESE J: The applicant was an Assistant Inspector in the Zimbabwe Republic Police. He appeared before a single officer for contravening paragraph 35 of the schedule to the Police Act [Chapter 11:10], as read with section 29 (a) (d) and section 34 (i) of the said Act as amended by part LXXI of the Criminal Penalties Act number 22/2001, that is to say "acting in an unbecoming or in any manner prejudicial to the good order or discipline or reasonably likely to bring discredit to the Police Force." Applicant who conducted his own defence pleaded not guilty but was convicted and sentenced to 8 days imprisonment at Fairbridge detention barracks. Applicant was not satisfied with the outcome of the trial and subsequently appealed against his conviction and sentence in terms of section 11 (1) of the Police (Trials and Boards of Inquiry) Regulations, 1965, to the Commissioner General of Police.

The allegations against the applicant are that on 7 May 2009 he instructed one Sergeant Mungani to release a suspect Dumisani Ngwenya without following the laid down procedure.

Sergeant Mungani purported to release the suspect upon payment of a fine. Sergeant Mungani quoted a Z69 "j" number 757122 which turned out to relate to a different suspect Thulani Ncube who had been arrested for patronizing a shebeen. In his response to the applicant's appeal, the trial officer stated in paragraph 7 as follows:

> *"Dumisani Ngwenya and his wife gave evidence that only implicated you and you were given the chance to cross examine them on the aspect you are raising now but you failed to do so. It is the evidence of Sithandazile Ncube that she gave you 100 rands and that shortly thereafter Dumisani Ngwenya was released."*

The trial officer also led evidence of Sergeant Mungani who corroborated the evidence of the complainants. In dismissing the appeal against both conviction and sentence the Commissioner General of Police held that the grounds of appeal were meaningless and that applicant was trying to buy time and to delay the day reckoning. On 16 April 2010, the applicant filed an appeal against the decision of the Commission General with the Police Service Commission in terms of section 51 of the Police Act. In his lengthy Notice of Appeal the applicant complained about the conduct of proceedings held before the Trial officer. He repeated his allegations of bias and alleged that he was not given adequate time to prepare for his defence. Applicant alleged, further that the *audi alteram partem* was violated in that he was not given a fair trial. I found the Notice of Appeal to be rumbling statement of complainant against all persons who had anything to do with the case. On 8 September 2010, the Police Service Commission dismissed the applicant's appeal in the following terms:

> "The above matter refers.
>
> Please be advised that at its meeting held on 22 September 2010, the Police Service Commission turned down your appeal against discharge and upheld the Commissioner General of Police's decision to discharge you from the Police Force."

The applicant refused to come to terms with the ruling of the Police Service Commission and hence on 3 May 2013 he lodged an application for review. The applicant was granted leave to file the application for review outside the prescribed time limits. Although the matter was initially enrolled as an unopposed matter I declined to grant the order sought and ordered the applicant to file detailed heads of argument. It is my view that the matter is not properly before

the court for failure to observe the requirements of order 33 rule 256 and 257 of the High Court Rules, 1971. Rule 257 provides that the court application for review shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. The applicant's Draft order is couched in the following terms:

"1. The conviction by the Trial Officer be and is hereby squashed (sic) and set aside.

2. The results from the Board of Suitability are hereby annulled.

3. The applicant be re-instated in the Police Force with effect from the date of discharge.

4. There are no order as to costs.'

In his oral submissions in court, the applicant repeated his allegation of bias against the trial officer. He alleged that his co-accused Sergeant Mungani was acquitted and yet they were being tried together. What the applicant failed to realize was that evidence was led from the suspect's wife who testified that she handed the sum of 100 rands to him and soon thereafter, Dumisani Ngwenya, the suspect, secured his freedom. There can be no doubt therefore that the allegation of bias was without merit. The other complaint against the trial officer was that he was answering telephone calls on the landline during the course of the hearing, which gave rise to the suspicion (by applicant) that the trial officer was being "remotely controlled" by someone else. If it was found to be true that the trial officer was responding to telephone calls during the course of the proceedings this would be an undesirable situation, but I do not consider that such a factor would strike at the heart of the propriety of the trial.

On the merits, the application for review is based on bold generalisations not substantiated by any facts. In effect the grounds of review raised in the applicant's papers, are grounds of appeal. The only ground that has any semblence of a ground for review is that the trial officer was biased. On this basis alone, the application for review would be defective and in the exercise of its discretion, the court must find that the application is improperly before the court. See the case of *Murowa* v *Delta Operations Ltd and Another* 2002 (2) ZLR 30 (S).

In *Mugugu* v *Police Service Commissioner and Another* 2010 (2) ZLR 185 (H), GOWORA J, dealt with a case similar to the present one. In that matter the applicant was a police

officer. He was convicted of a disciplinary offence and his appeal to the Commissioner was rejected. After his conviction, a board of inquiry was convened to determine his suitability to remain in the police force; the board recommended a reduction in rank and a transfer from his existing posting. The Commissioner of Police accepted the recommendation. The applicant unsuccessfully appealed to the Police Service Commission. He then sought to bring the board's decision on review. The ground he relied on was that the punishment recommended by the board was excessive. The applicant also alleged that there was bias on the part of the Police Service Commission, in that the decision was arrived at without having regard to the record of proceedings of the board and without affording the applicant's or his legal practitioners a hearing on the appeal lodged. The applicant also contended that Police Service Commission's bias was evident from the record, where he was castigated for not being grateful for not having been fired as a result of his transgressions. The primary issue was whether this was a ground of review or appeal. The learned judge stated the position at page 189 as follows:

> "The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is, however not within the ambit of the reviewing courts power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful authority entrusted to it by treating the individual subjected to it under that lawful authority unfairly."

In casu, there is no evidence that the applicant was treated in an unfair manner by the officer in the first instance. There was sufficient proof that the applicant had corruptly caused the release of suspect. This court sitting as a reviewing court can only intervene if there is evidence that that there was gross irregularity in the conduct of proceedings being reviewed.

In the circumstances, I am satisfied, not only that the matter is improperly before the court for want of compliance with the provisions of order 33 rule 257, but on the merits there are no proper grounds for review.

I, accordingly dismiss the application, with no order as to costs.

National Prosecuting Authority's office, respondents' legal practitioners